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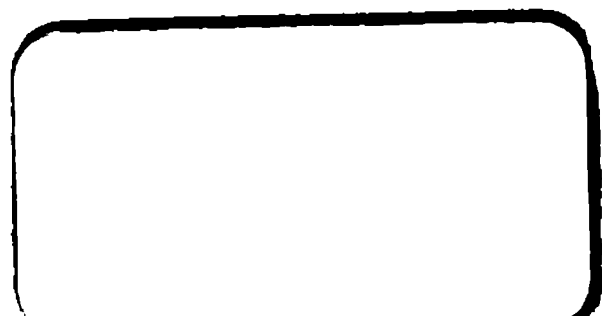
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A  
**Digest**  
OF  
**THE LAWS OF ENGLAND.**

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**VOL. IV.**

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# THE LIVES OF KING

BY THE REV. J. H. WILSON, D.D.,  
OF THE UNIVERSITY OF CHURCHILL, OXFORD.  
IN TWO VOLUMES. VOL. I.

LONDON:  
PRINTED BY J. H. WILSON, AT THE  
UNIVERSITY PRESS, CHURCHILL, OXFORD.  
1841.

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**Digest**  
OF  
**THE LAWS OF ENGLAND.**

BY  
THE RIGHT HONOURABLE  
SIR JOHN COMYNS, KNIGHT,  
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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**The Fifth Edition, Corrected,**  
(WITH CONSIDERABLE ADDITIONS TO THE TEXT)  
AND CONTINUED  
FROM THE ORIGINAL EDITION TO THE PRESENT TIME;  
TO WHICH IS ADDED,  
A DIGEST OF THE CASES AT NISI PRIUS,  
**By ANTHONY HAMMOND, Esq.**  
OF THE INNER TEMPLE.

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**VOL. IV.**  
**ESTATES—LIBERTIES.**

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A  
**D I G E S T**  
OF THE  
**L A W S   O F   E N G L A N D .**

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**(A) Estate in Fee Simple.****(A 1.) Of what Things a Man may have it.**

An estate imports the interest which a man has in lands. Co. L. 345. a.

Every one, who has an estate in land, has the inheritance, the freehold, or a chattel interest.

Every estate of inheritance is a fee simple, or a fee tail.

An estate in fee (*b*) simple is, (*c*) where a man has an estate in lands or tenements to him and his heirs for ever. Lit. S. 1.

A man may have an estate in fee simple of all lands, or tenements, or other things real. Co. L. 1. b.

Of lordships, advowsons, commons, estovers, and all hereditaments. Co. L. 4. a.

So a man may have an estate in fee simple descendible to him and his heirs in the Isle of Man; though it be not parcel of the realm, but a distinct territory: for it is grantable by the king under the great seal, and therefore the estate in it shall be descendible according to the rules of the common law. Co. L. 9. a.

So he may have a fee simple in things mixt; as, in franchises, liberties, &c. Co. L. 2. a.

So, if a man grants to another and his heirs all woods, underwoods, timber-trees or others in such a part of a forest, saving the soil; the grantee has a fee to take *in alieno solo*. R. 8 Co. 137. b.

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(*b*) The word *fee* is explained to signify, that the land or other subject of property belongs to its owner, and is transmissible in case of an *individual*, to those whom the law appoints to succeed him under the appellation of *heirs*; and in case of *corporate bodies*, to those who are to take upon themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors. Litt. s. 1. 1 Inst. 1 b. 271. b. Wright's Ten. 147. 150. Spelm. Feu. c. 1. Fleta. lib. 5. c. 5. s. 27. 2 Blk. Com. 104. 106. Hale's Anal. 74. Bracton, lib. 4. 263. b. 1 Prest. Est. 420.

(*c*) An estate which *may* continue for ever. 1 Prest. Est. 419.

So, in things personal; as, in an annuity. (d) Co. L. 2. a. (e)

In a dignity granted to him and his heirs. Co. L. 2. a. (f)

In a swan-mark. 7 Co. 17.

In a part or share of the New-River-water. Ca. Parl. 207. (g)

So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a fee to him and his heirs, qualified in a particular manner: As, if a queen consort institutes an hospital, and reserves the patronage *sibi et Reginae Angliæ succedentibus*. R. Ca. Ch. 214.

But in estates *in esse* before such desultory inheritance it cannot be: As, the duchy of Cornwall limited to the prince *et filiis Regis Angliæ primogenitis*, shall not be good, except when limited by act of parliament. R. 8 Co. 16. Vide Roy, (G).

So a limitation of an advowson to the queen, and the queens her successors, shall not be good without an act of parliament: for (h) there is no person against whom a demand may be made. R. Ca. Ch. 214.

If a man gives land to A. and his heirs of the part of his mother; the words, of the part of his mother, are void; for none can create a new inheritance, or descent, not allowed by law. Co. L. 13. a.

### (A 2.) By what words.

A man cannot have a fee simple by feoffment, or grant, (i) without the words, (k) to him and his (l) heirs. (m) Co. L. 1.

And

(d) 1. But the heirs of the grantor must be bound expressly, and in that character, to the payment or render of the annuity. 1 Prest. Est. 509. — 2. And since an annuity may be the subject of a fee, it follows, that permanency of interest, not immobility, is the essential quality of a fee. Ibid. 507. — 3. And in equity, where money is convertible, by its application in purchases, into land, it is impressed, in the interim, in regard to succession, with the inheritable qualities of land. Id. 507.

(e) 1. An annuity of inheritance is held to be forfeitable for treason as an *hereditament*. 7 Rep. 34. b. — 2. Yet, being only personal, it is not an hereditament within the statute of Mortmain of 7 Edw. 1. st. 2. — 3. Nor is entailable within the statute *de donis*. Co. Litt. 2. a. n (1)

(f) 1. Which is an hereditament *either* mixed both of the realty and personalty. — 2. For when the king creates an earl of such a county or other place, to hold that dignity to him and his heirs, this dignity is personal, and also concerneth land and tenements. Co. Litt. 2. a. — 3. And is entailable within the statute *de donis*. Co. Litt. 20. a. 2 Eden. 373. — 4. And being within the protection of the statute, is not forfeited by an attainder of felony. 2 Eden. 373. (See 54 G. 3. c. 145. as to what attainder of the ancestor shall now disinherit the heir.) — 5. Yet neither can the donee nor his issue bar the entail, by fine, recovery, or any other means, as may be done in the case of other entailable things. Show. Parl. Ca. 1. Collins's Claims of Bar. 293. — 6. Or it is an hereditament altogether personal; as where a title is created, and no place mentioned. — 7. For naming a place is not essential to the creation of a dignity. 1 Ld. Raym. 13. — 8. But in this case the grantee of a dignity to him and the heirs male of his body, will have a fee conditional, and not an estate tail. 12 Rep. 81. Co. Litt. 20. a. n. (3.)

(g) Dick. 545

(h) 'then the freehold might be in abeyance, and then.'

(i) 1. Limitations of trust are to be construed in like manner and by the like rules, as limitations of a legal estate. 3 Ves. 127. — 2. And therefore in deeds the fee cannot pass by grant or transfer, *inter vivos*, without appropriate words of inheritance. 1 Prest. Est. 64. — 3. But in contracts to convey, and in trusts declared in a conveyance, the fee may pass notwithstanding the omission of a limitation to the heirs. Ibid. — 4. Therefore articles to convey to A. B. in fee, or a conveyance to A. B. and his heirs in trust to convey to C. D. in fee simple, would confer a right in equity, to call

And therefore if he purchases to him *in perpetuum*, he has only for life. Lit. S. 1. (n)

Or;

for a conveyance of the inheritance. Ibid.—5. So a conveyance to A. and his heirs in trust, *totidem verbis*, for B. in fee, would pass a fee. Ibid.—6. So there may be a right in equity to call for a conveyance of the fee, because there is evidence of an intention to convey the fee, although that intention be not expressed by a limitation to the heirs. Ibid. 64. 65.—7. And the result of the general rule is, that a bargain and sale by an equitable owner to A. simply, would pass no more than an estate for life; while if it should appear from a recital that there was an intention to sell the fee, the court would consider the fee to pass. Ibid.—8. And to pass the fee of copyhold lands, it is not always requisite, that the word heirs should be used. 4 Rep. 29. b. Kitch. 102. b. Supra, Copyhold, (F. 8.)—9. Though the general rule seems to render it necessary that this word should be inserted, unless some other term, sanctioned by usage, and grown into custom, has been substituted in its place. Watk. Cop. 108. Rol. Abr. 839. l. 504. 2 Prest. Est. 67.—10. By custom a grant of a copyhold to a man and his (*sibi et suis*), or to him and his assigns (*sibi et assignatis*), or to him, without any other word, may give the inheritance. Watk. Cop. 109. 1 Rol. Abr. 48. 2 Prest. Est. 68.—11. So a fine *sur cognizance de droit cum ceo*, or *sur cognizance de droit tantum*, passes an estate in fee simple without the word heirs. Co. Read. 6. 1 Inst. 9. b. 12.—For when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgment to claim any estate in the lands in remainder or reversion. Besides, in every judgment a fee simple was recovered; and the cognizance or acknowledgment of the concord, coming in place of a judgment must have the same effect.—13. But if the concord be qualified by the express words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only pass an estate for life or in tail; for it would be absurd, that a greater estate should pass than that which the parties themselves have limited; and the preceding donation or feoffment which is acknowledged in the fine, may as well be supposed to have been for life, or in tail, as in fee. 1 Salk. 340.

(k) 1. The limitation must be either by express words, or by words of direct and immediate reference. Shep. Touch. 101.—2. The word heirs (or successors, in case of a corporation) need not be in the identical deed of grant, or other mode of assurance by which the estate is granted or conveyed.—3. Thus where one to whom lands have been granted in fee, after reciting the grant, or without any recital, grants the lands to another as fully as they were granted to him. Shep. Touch. 101. infra.—4. Or where a man grants two acres to A. and B., to hold one acre to A. and his heirs, and the other acre to B. “in form aforesaid.” Shep. Touch. 101. 1 Inst. 9. b.—5. Or where a man seised of lands in fee, enfeoffs another in fee, and continues in possession of the lands, claiming to hold them at the will of the feoffee; and the feoffee enfeoffs the person by whom he was enfeoffed in these terms: “You have given me these lands (naming them); as fully as you have given them to me, I assure them to you.” 39 Ass. 12. 2 Leon. 26. 1 Inst. 9. b. infra. 2 Prest. Est. 1. 2.

(l) 1. And so often as the limitation is to two persons, it must express, whether the heirs are to be of both these persons, or of one of them. Hob. 94. Shep. Touch. 101. 1 Inst. 8. b.—2. And when of one of them only, then also of which of them in particular; as of one in certain, or of the survivor of them, &c.—3. A grant to two men and heirs, without any specification that the heirs shall be of both persons, or of one of them, is void as to the heirs for uncertainty. 1 Inst. 8. b. 19 Hen. 6. 23. 20 Hen. 6. 34. Latch. 42. 5 Rep. 112. Shep. Touch. 19. 37 Hen. 6. 5. 2 Prest. Est. 10.

(m) 1. It is not, however, necessary that the grant should, by one entire or continuous expression, be to the grantee and his heirs: It may be by divided clauses; as to A. for life with a remainder to his right heirs. Shep. Touch. 101.—2. It will be sufficient that it should, from the context, appear that B. and his heirs are to have the benefit of the grant.—3. Thus where a grant was of a rent to A., and afterwards that he and his heirs should distrain for it; this limitation of distress to him and his heirs enlarged the estate, and made it a fee simple. 3 Bulst. 128. 2 Prest. Est. 7. 8.

(n) 1. So to a man and his heirs during the life of C., or during the lives of several persons. Bract. lib. 2. c. 9. Vaugh. 201. 1 Rep. 140. 10 Rep. 98.—2. And since it is an essential quality of a fee that it may continue for ever, an interest granted to  
a man



Or, to him and his assigns for ever. (o) Lit. S. 1.

So, if he purchases to him and his heir in the singular number. Co. L. 8. b. Cont. (p) per 2 J. 1 Rol. 832. K.

To him or his heirs, in the disjunctive. Co. L. 8. b.

So, if it be to A. *et* B. *et hæredibus*, without saying, *suis*, it shall be void for the incertainty. Co. L. 8. b. 1 Rol. 833. l. 20.

Though a warranty be added to them *et hæredibus suis*: for this cannot enlarge it. 1 Rol. 833. l. 25.

So, if by deed, reciting an agreement to convey to A. and his heirs, a man grants estovers for easement of him and his heirs by assignment, and if no assignment that he and his heir shall cut; A. has only for life. R. 1 Leo. 2.

So, if a natural person purchases to him and his successors, he has only for life. Co. L. 8. b.

So, if a body politick takes in its natural capacity: As, a lease to a dean, &c. for 100 years, and afterwards a release to him and his successors, it gives to him only for life: for he takes the lease in his natural capacity. Co. L. 9. a.

So, if a corporation sole, as a bishop, parson, &c. purchases, he has not a fee without the word, successors. (q) 1 Rol. 832. l. 50.

But a feoffment to B. *et hæredibus*, without saying, *suis*, gives him a fee simple. Co. L. 8. b. (r)

So, to a son and the heirs of his father. Semb. Co. L. 220. b.

So, to B. *et liberis suis* and their heirs; if he has issue, it gives them a joint-estate in fee. Co. L. 9. a.

So, to B. *hæredibus et successoribus suis*, gives a fee. Co. L. 9. a. (s)

So a feoffment or grant to a body politic and their successors, gives them a fee simple. Co. L. 8. b.

a man and his heirs, but so qualified, that the continuance of the same under the limitation is bounded by the life of one person, or the lives of several persons, is not an estate in fee, for it cannot continue for ever.—3. Hence a limitation to A. and his heirs, during the life of B. is a mere freehold, not an inheritance. 1 Rep. 140. b.—4. So till an event shall arise which must happen and necessarily must take place within the period of a life, or the period of one of several lives; as an estate to A. and his heirs during the widow-hood of C., is an estate of mere freehold. 1 Inst. 42. 1 Prest. Est. 479. 480.

(o) As to the operation of these words, see 2 Prest. Est. 3. 4.

(p) 1. Extrajudicially.—2. And in the annotations on 1 Inst. it is said that, according to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner, as *heirs* in the plural number. 2 Rol. Abr. 253. Ambl. 453. Godbolt. 155. T. Jones. 111. Cro. Eliz. 313. Robinson's Gavelkind, 95. 96. 1 Burr. 58. Vin. Abr. 10 vol. 233. k. pl. 1. 8 vol. 233.—3. But the contrary is asserted by Mr. Preston. 2 Prest. Est. 9. 10.

(q) A limitation to a person in his politic capacity, and his heirs, gives him an estate for life only. 1 Inst. 8. b. 4 Hen. 5. 9.

(r) 1. It is not universally true, that a limitation to a man and his heirs conveys an estate in fee.—2. Either from words of qualification, or from the nature and extent of the interest which is granted, an estate for life, or a mere chattel interest, or an estate at will, may pass 2 Prest. Est. 11.

(s) 1. The mere possibility, that an interest limited to a man and his heirs may determine within the period of a life, or the period of several lives, as to A. and his heirs till his marriage, or till his return from Rome, or till B. shall attain twenty-one, will not qualify the interest into an estate of mere freehold. 1 Prest. Est. 482.—2. For, admit it to be possible that the interest may continue for ever, and it will follow that the interest is a fee. Ibid.—3. A limitation to a man and his heirs so long as another person shall have heirs of his body, conveys a fee. Ibid. cit. Plowd.

So a grant to the king *in perpetuum* gives him a fee, without the words, his heirs or successors: for he never dies. Co. L. 9. b.

So a feoffment to a corporation aggregate *in perpetuum* gives a fee: for it never dies. Co. L. 9. b. 1 Rol. 832. l. 55.

Or, to a corporation sole, to be held in *frankalmoigne*. Co. L. 9. b. 1 Rol. 833. l. 5.

So, if A. re-enfeoffs B. *adeo plene* as B. enfeoffed him, he has a fee without the word, heirs. Co. L. 9. b. Q. 1 Rol. 833. l. 12.

So a grant to the church of B. gives a fee without the word, heirs, or, successors. 1 Rol. 833. l. 3.

And a limitation to the right heirs of B. gives a fee, without the words, and their heirs. 1 Rol. 833. l. 16.

So, by devise (*t*), a fee may be given without the words, his heirs. Co. L. 9. b. Vide Devise, (N 4.)

Or, by fine *sur conuzance de droit come ceo*, &c. Co. L. 9. b.

Or, by a common recovery. Co. L. 9. b.

So a fee passes without the words, his heirs, where a man gives land with his daughter, &c. in Frankmarriage. Co. L. 9. b.

If a parcener, or joint-tenant releases to his companion. Co. L. 9. b.

If the lord, &c. releases to the terre-tenant; which enures by way of extinguishment. Co. L. 9. b.

If a man releases a mere right; as, where a disseisee releases to the disseisor all his right. Co. L. 9. b.

So, if a rent be granted upon partition, for owelty of partition. Co. L. 9. 10. (*u*)

So, if a peer be summoned to parliament by writ, he has a fee in his dignity, without the word, heirs. Co. L. 9. b. Vide Dignity, (C 3.)

So, by the forest-law, if the king at a justice-seat, grants to another an assart *in perpetuum*, without more, he has a fee. Co. L. 10. a.

So, by custom a grant of a copyhold, *sibi et suis*, or, *sibi et assignatis*, may give the inheritance. 4 Co. 29. b. Vide Copyhold, (C 7.)

### (A 3.) By what means.

A man takes a fee by descent, or by purchase.

When he takes by descent, and how it shall descend, Vide in Discent, (A — C 1., &c.)

A man may purchase a fee simple by feoffment.

Or, by fine, or common recovery; which are of the nature of a feoffment upon record.

So, by grant, or by exchange, release, or confirmation, which are in the nature of a grant.

So, by bargain and sale. Vide Bargain and Sale, (B 1., &c.)

So, by covenant to stand seised. Vide Covenant, (G 1., &c.)

So, by devise. Vide Devise, (N 4.)

So a man may gain a fee by wrong: As, by disseisin, abatement, or intrusion.

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(*t*) 1. There is a case in which it is reported to have been adjudged, that an estate in fee in a rent created by *deed*, passed without the word, *heirs*. 26 Ass. 126. b. pl. 38. 18 Vin. 472.—2. But this is denied by Mr. Preston. 2 Est. 5.

(*u*) Shep. Touch. 101.

(A 4.) When there may be a fee upon a fee.

A man cannot have a more ample, or greater estate of inheritance than a fee simple. Lit. S. 11. (x)

And therefore, where a man is said to be seised in fee, generally, it shall be understood in fee simple. Lit. S. 293.

And estates tail, and all other particular estates, are derived out of a fee simple. Co. L. 18. a.

And therefore, after a limitation in fee simple, absolutely, there cannot be another estate in fee limited: for if land be conveyed to A. and his heirs, remainder to B. and his heirs, the remainder is void. Co. L. 18. a. Vau. 269. 2 Cro. 591.

So, if two fee simples come to one person, they are united into one estate: As, if tenant in tail, the reversion to the king, be attainted for treason, whereby the estate tail is forfeited to the king; yet the king has only one estate in fee: for the estate forfeited is united to the reversion. Co. L. 18. a. (y)

So, if tenant in tail grants his estate to the king. Co. L. 18. a.

So, if an estate tail be made to a villein, by which the lord enters, and grants his estate to the donor; the donor has but one fee. Co. L. 18.

So, by a grant executed by the party, a fee cannot depend upon a fee though the first fee be not absolute: As, if land be conveyed to A. so long as B. has heirs of his body, the remainder to C., the remainder is void. Co. L. 18. a. Dub. Vau. 269. Acc. Pl. Com. 29. b.

But two fee simples of the same land may, by act of law, be in several persons: As, if a man gives land in tail to a villein, the donor has the reversion in fee, and if the lord enters, he has a fee determinable upon the death of the villein without issue. Co. L. 18. a.

So a fee may be limited to another upon a contingency: As, if land be to the use of A. and his heirs, and if he dies without heir in the life of B. then to C. and his heirs; the estate to C. is good. R. 2 Cro. 591.

So, if a devise be to A. so long as B. has issue of his body, and for want of such issue to D. and his heirs; the devise to D. shall be good, by way of an executory devise. Per Vau. 270.

So, if a copyhold be granted to A. and his heirs, and if he dies within

(x) 1. Dyer, 4. a. 33. a. 330. 1 Rep. 85. a. Cro. Jac. 591. 3 Atk. 774. Amb. 204. Fearn, 342—349. Cro. Car. 57. Cro. Jac. 695. 1 Ld. Raym. 326. 1 Inst. 18. 2 Ves. 180. 10 Rep. 97. b.—2. And Lord Coke, in commenting on this text, lays it down, that the doctrine extends as well to fees simple conditional and qualified, as to fees simple pure and absolute.—3. And he gives this example of its application; if land be given to H. and his heirs so long as B. hath heirs of his body, remainder in fee, the remainder is void. 1 Prest. Est. 484. doubted by Vaughan C. J., Vaugh. 269. et vide the comment in Prest. from 484. to 487.—3. Who states that the consent of authorities has clearly stated the law to be, that a fee may not, by the grant of the party, be limited with effect to depend on, and to take place after, a fee not being an estate tail, so as to be a remainder under a conveyance at common law. 1 Blk. 177.—4. And that the same observation applies to limitations, or declarations of use and of trust.—5. But that still it is clear, that at common law, there may be two concurrent fees; the latter to take place, in case the former should fail of effect, and never vest in interest. 1 L. Raym. 205. 6 T. R. 30.

(y) 1. The same person may have in the same lands a fee, and eventually and by descent an interest by executory devise, which may divest the fee, and vest it in the former owner. 15 Ves. 174.—2. But by the rule of the common law, the same person cannot have the fee, and a power over the fee. 1 B. & P. 192. 3 Prest. Con. 265. 494. 1 Est. 505.

age, and not married, to B: it shall be good. 2 Rol. 791. l. 40. Vide Copyhold, (C 11.)

If A. devises to his eldest son and his heirs, and other land to his youngest son and his heirs, charged with legacies, and if either son dies before entry or legacy paid, it shall be to the survivor; it shall be good to the survivor. Dub. Jon. 17.

(A 5.) When it may be variable.

So a fee ought to be fixt.

And therefore, a grant to the eldest son of the king, and the eldest sons of him and his heirs, kings of England, is not good without an act of parliament: for the law does not allow an inheritance to merge and revive, as often as the king has or has not an eldest son. R. 8 Co. 17. b. Vide Roy, (G)

So a feoffment cannot be to the use of A. every Monday, of B. every Tuesday, &c. 1 Co. 87. a.

But an estate, certain in quantity, may be variant as to place: As, if A. has 12 acres to him and his heirs to be annually allotted in a meadow of 80 acres. Co. L. 4. a.

So it may vary as to the person: As, there may be a partition, that A. shall have the manor of D. for a year, and B. the manor of S., and the next year A. the manor of S. and B. the manor of D. and so *alternis vicibus* for ever. Co. L. 4. a.

That A. shall have from Lammas to Easter, B. from Easter to Lammas. Co. L. 4. a.

(A 6.) What shall be a fee simple qualified or conditional.

A fee simple estate is absolute, or qualified (z), or conditional. (a) Co. L. 1. b.

As, if land be given to A. and his heirs, tenants of such a manor. Co. L. 27. a. (b)

To the king and his heirs, kings of England. Co. L. 27. a. (c)

To B. and his heirs, lords of the manor of D. Co. L. 27. a. (d)

So,

(z) 1. A qualified fee is an interest, given on its first limitation to a man and to certain of his heirs, and not extended to all of them generally, nor confined to the issue of his body. Fleta, lib. 3. c. 3. — 2. Of which species of estate, a limitation to a man and his heirs on the part of his father, affords an example. Litt. 1. 354. 1 Inst. 27. a. 220. 1 Prest. Est. 449. — 3. It is a quality of this estate, that it will not descend under the original grant to all the heirs of the persons to whom it is granted: it will determine after a failure of those heirs who are within the prescribed degree. 1 Prest. Est. 460.

(a) 1. A conditional fee, in the more general acceptation of the term is, when, to the limitation of an estate, a condition is annexed, which renders the estate liable to be defeated. In which application of the term, either a determinable or qualified fee may, at the same time, be a conditional fee. 1 Prest. Est. 475. — 2. Also an estate limited to a man and his heirs, to commence on the performance of a condition, is frequently described by this appellation; though it may with greater accuracy and precision be distinguished by the appellation of a limitation on condition, or rather contingency. Id. 476. — 3. And the estate at this day most frequently expressed by this term, arises from a gift to a man or a woman, and the heirs of the body of the donee; or from a gift to two persons, and the heirs of their two bodies, of an *hereditament*, which is not a tenement, and therefore not within the statute *de donis*. Id. 477.

(b) 2 Blk. Com. 109.

(c) Kings of Scotland. 1 Cruise. Dig. 24.

(d) 1. During the time while a particular tree, a tree in any wood, or any tree in a certain

So, by common law, if a man conveys land to another and the heirs male of his body; this will be a fee simple conditional. Cc. L. 19. a.

Or, to husband and wife, and the heirs of their bodies. 2 Inst. 333.

But a man cannot create a new estate of inheritance (e): And therefore, if a man conveys lands to A. and his heirs male, the word, male, shall be rejected, and he shall have it to him and his heirs. Lit. S. 31.

Or, to A. and his heirs female. Lit. S. 31. (f)

If he conveys lands in gavelkind to A. and his eldest heirs, the custom shall not be defeated; for the word, eldest, shall be rejected. Co. L. 27. (g)

Or, lands at the common law to A. and his eldest heirs female of his body; all the daughters ought to inherit. Co. L. 27. b.

The grant of the dukedom of Cornwall by the king to his son, *et ipsius et heredum suorum regum Angliæ filiis primogenitis in regno Angliæ successoris*, would not have been good, if not confirmed by parliament. (h) R. 8 Co. 16. The Prince's case. Co. L. 27. a.

### (A 7.) What would be a performance of the condition.

If an estate, at common law, was given to a man and the heirs of his body; by having issue, the condition was performed, and the donee might alien. Co. L. 19. a. 1 Rol. 840. l. 15.

So, if an estate was given to a man and the heirs male of his body,

certain wood, &c. shall stand. Kitch. 301. 27 Hen. 6. 29. 11 Rep. 49. 1 Ld. Raym. 326. — 2. Whilst a man (or woman not being the donee,) shall have heirs of his body, or issue of his body. Plowd. 557. 1 Inst. 18. 10 Rep. 97. b. Shep. Touch. 46. 103. 402. 3 Leon. 117. — 3. Till the marriage of a person shall take place. Cro. Jac. 593. 10 Vin. Abr. 253. — 4. Till a person at Rome shall return from Rome. Fearn, 8. — 5. Or till a person shall go to Rome. Shep. Touch. 122. — 6. Till debts shall be paid. Fearn, 187. — 7. Till default shall be made in payment of his debts. Leon. 33. 2 Woodd. 733. — 8. As long as A. [and his heirs] shall pay 20l. annually to B. Plowd. 557. 11 Rep. 49. a. — 9. So long as St. Paul's shall stand. Plowd. 349. 557. — 10. Until a sum (uncertain) shall be paid by a particular person. Moor, 15. — 11. Until an act shall be done. Dyer, 300. b. Vide 2 Vern. 525. 578. Carter, 75. 107. — 12. Until a minor shall attain his age of twenty-one. 5 Atk. 74. Amb. 204. Fearn, 342. 9 Mod. 28. 10 Vin. Abr. 203. — 13. Until legacies shall be paid. 3 Atk. 560. 562. — 14. Until they shall have made a lease. Dyer, 290. a. — 15. Until he otherwise should dispose of the same. Carter, 96. 1 Prest. Est. 451, 453.

(e) 1 Inst. 11. 9 Hen. 6. 25. 11 Hen. 6. 13. 1 Inst. 27. b. 18 Ass. pl. 5. 18 Ed. 5. 45. b. 46. a. Moor, 424. 8 Rep. 14. 1 Prest. Est. 461.

(f) Which, however, does not apply to descendible freeholds; there the occupancy or title may be conducted wholly through the line of males or females. 1 Prest. Est. 461.

(g) 1. But by purchase any class of customary heirs may become purchasers, under the customary denomination or character. Hob. 31. 1 Vent. 72. 2 Mer. 171. — 2. And if customary or copyhold lands, descendible contrary to the rules of the common law, be limited to right heirs as purchasers, the law will prefer the common law heir, and deem him to be the purchaser. 1 Atk. 607. Watk. Desc. 223. n. d. Co. Litt. 10. a. a. (4.) — 3. Unless the donor has expressly designated the customary heir as the purchaser. Rob. Gavelk. lib. 1. c. 6. 117. — 4. But when the customary heir is in express terms the object of the gift, as the right heirs in gavelkind, right heirs in borough-english, &c. the customary heirs may take under this express designation. Hob. 31. 1 Prest. Est. 462, 463.

(h) 1. For an act of parliament may limit an inheritance of lands or tenements, otherwise than by common law is allowable. Co. Lit. 27. a. — 2. And in the case on the title to the earldom of Oxford, decided in parliament, 1 Cha. 1., the judges held, that a limitation of the earldom to Aubrey de Vere and his heirs male, *being by act of parliament*, was sufficient to raise a fee simple, descendible to males only. See W. Jones, 100. Co. Lit. 27. a. n. (5.)

the



the having issue a son was a performance of the condition. Vide Co. L. 19. a.

But if an estate was given to a man and the heirs male of his body, who had issue a daughter; the condition was not performed. Co. L. 19. a.

### (A 8.) The effect of the condition performed.

If the condition was performed, he who had the fee simple conditional, by the common law, might alien his land. Co. L. 19. a.

Or might charge it with a rent, common, &c. Co. L. 19. a.

Or might forfeit it. Co. L. 19. a.

But though the condition was performed by having issue, and the issue inherits, the land does not descend to the heir general: for, if the donee, or his issue, afterwards dies without issue, the estate reverts to the donor. Co. L. 19. a.

So, if he dies without issue male, where the gift was to him and the heirs male of his body. Co. L. 19. a.

Vide post, (B. 1, &c.)

### (B) Estate tail.

#### (B 1.) The commencement of it.

An estate is said to be entailed, when it is ascertained, what issue shall inherit it. Lit. S. 18.

By the common law, all estates of inheritance were fee simple absolute, or (i) conditional. Co. L. 19. a.

But by the st. (k) W. 2. 13 Ed. 1. 1. The will of the giver according to the form in the deed of gift manifestly expressed shall from henceforth be

(i) 1. *Item sicut ampliari possunt hæredes, sicut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quid modus et conventio, vincunt legem. Ut si dicatur — Do tali tantam terram cum pertinentiis in N. habendum et tenendum sibi et hæredibus suis, quos de carne sua et uxore sibi desponsatâ procreatos habuerit. Vel sic — Do tali, et tali uxori suæ, vel cum tali filiâ meâ, &c. habendum et tenendum sibi et hæredibus suis, de carne talis uxoris, vel filię exeuntibus, vel procreatis vel procreandis: quo casu cum certi hæredes exprimuntur in donatione, videri poterit quod tantum sit descensus ad ipsos hæredes communes per modum in donatione appositum; omnibus aliis hæredibus suis a successione penitus exclusis, quia hoc voluit donator.* Bract. lib. 2. c. 6. Vide Fleta, lib. 5. c. 9. Britton, c. 36. — 2. These limited donations were evidently derived from the *feudum talliatum*. — 3. They were probably introduced into England about the end of the reign of King Henry II., or that of one of his sons; for Glanville, who gives a very accurate account of the different estates that were known in his time, makes no mention whatever of limited donations; whereas Bracton, as we have seen, who wrote in the reign of King Henry III. has given a full description of them. 1 Cruise, 81.

(k) 1. The evident object of limited donations was to restrain the donees from disposing of the estates thus given; but the general propensity which prevailed about the reign of Edward I. to favour a liberty of alienation, induced the judges to construe limitations of this kind in a very liberal manner. Instead of declaring that the estates must descend to those heirs who were particularly described in the grant, according to the evident intention of the donors, and the strict principles of the feudal law; and that the donees should not in any case be enabled by their alienation to defeat the succession of those who were mentioned in the gift, or the donors' right of reverter; they had recourse to an ingenious device, taken from the nature of a condition. Now it is a maxim of the common law, that when a condition is once performed, it is thenceforth entirely gone, and the thing to which it was before annexed, becomes



be observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but it shall remain to the issue or revert to the giver, if issue fail.

(B 2.) What tenements may be entailed.

And therefore, all lands and inheritances corporeal may be entailed Co. L. 19. b. Vide Copyhold, (C 8, 9.)

So all inheritances issuing out of them, or which concern or are annexed to lands and tenements, or exerciseable in land, though they cannot be holden. Co. L. 20. a.

As, rents, commons, estovers, &c. Co. L. 20. a.

The nomination to a church. Co. L. 20. a.

becomes absolute and wholly unconditional. And the judges, reasoning upon this ground, determined that these estates were conditional fees; that is, were granted to a man and the heirs of his body, upon condition that he had such heirs; therefore, as soon as the donee of an estate of this kind had issue born, his estate became absolute, by the performance of the condition, at least for these three purposes: — 1°. to enable him to alien the land, and thereby to bar, not only his own issue, but also the donor himself of his right of reverter; 2°. to subject him to forfeit the estate for treason or felony; which, till issue born, he could not do, for any longer term than that of his own life; lest the right of inheritance of the issue, and that of reverter of the donor, might be thereby defeated; 3°. to enable him to charge the lands with rents and other incumbrances, so as to bind his issue. 1 Cruise, 81. 83. Plowd. 255. 241. 1 Inst. 19. a. 2 Inst. 355. 7 Rep. 34. b. — 2. The donee of a conditional fee might also alien the lands before issue had; nor could the donor have entered in such a case, because that would have been contrary to his own donation, which limited the lands to the donor and his issue. And if the donee had issue born, after the alienation, the donor was excluded during the existence of such issue. The issue were also bound by the alienation of their ancestor, though previous to their birth; because they could only claim in the character of his representatives, and were therefore bound by his acts. But where the donee of a conditional fee aliened before he had issue, such alienation did not bar the donor's right of reverter, whenever there happened a failure of issue; because the subsequent birth of issue was not a sufficient performance of the condition to render the precedent alienation valid. 1 Cruise, 83. Plowd. 241. — 3. Where the person to whom a conditional fee was limited, had issue, and suffered it to descend to such issue, they might alien it; because, having succeeded by descent to this estate of their ancestor, who had acquired a power of alienation by having issue, they took the estate in the same manner, discharged from any restraint whatever. But if the issue did not alien, the donor would still be entitled to his right of reverter; as the estate would have continued subject to the limitations contained in the original donation. 1 Cruise, 83. 7 Rep. 34. b. 1 Inst. 19. a. — 4. From this mode of construing conditional fees, the purposes for which they were intended were completely frustrated; and therefore the nobility, whose object was to perpetuate their possessions in their own families, procured the above statute to be passed. 1 Cruise, 84. — 5. Which statute, as observed by Lord Mansfield, only repeated what the law of tenures had said before, that the tenor of the grant should be observed. 1 Burr. 115. — 6. And therefore the judges, in the construction of it determined, that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee; but divided the estate by creating a particular estate in the donee, called an estate tail, subject to which the reversion in fee remained in the donor. 1 Cruise, 84. 2 Inst. 355. Plowd. 248. — 7. In consequence of which construction, estates limited in this manner are not conditional; nor is the right of entry of the donor, on failure of issue of the donee, considered as arising from a breach of the condition, but as a right of reverter accruing to the donor on the natural expiration of the estate granted. The statute rejects the erroneous opinion which had been held by the judges, that a donation of this kind created a conditional fee; and declares that it vests an estate of inheritance in the donee, and some particular heirs of his, to whom it must descend; and that the estate of the donor is a reversion, expectant on the determination of that estate. 1 Cruise, 85. Plowd. 242.

So

So offices may be entailed, Co. L. 20. a. which concern lands and tenements. 1 Rol. 838. l. 4.

As, the office of marshal of England. Co. L. 20. a. 7 Co. 33. b.

The office of serjeant of C. B., or chamberlain of the exchequer. Co. L. 20. a. Jon. 111.

The office of fostership, or the custody of a church. Co. L. 20. a. 1 Rol. 838. l. 5.

The office of steward, receiver, or bailiff of a manor. 1 Rol. 638. l. 10. 7 Co. 33. b.

So, a dignity; for a baron, &c. is named of some county, town, or place. Co. L. 20. a. R. 7 Co. 33. b. 1 Rol. 837. l. 55. Jon. 100.

Uses. Co. L. 20. a. R. 7 Co. 33. b.

So, the dignity of baronet; if he be created baronet of such a place. R. 12 Co. 81.

So a villein in gross may be entailed: for he is a thing real. 1 Rol. 812. l. 20.

So, charters. Co. L. 20. a.

But personal inheritances, or which concern chattels merely, cannot be entailed (*l*): As, an annuity. Co. L. 20. a. 1 Rol. 837. l. 50. (*m*)

Or, the office of master of the horse, hounds, &c. for they are merely personal. Co. L. 20. a.

Nor things, which do not concern lands or tenements, nor are exerciseable in lands or tenements. 1 Rol. 837. l. 50.

And therefore, if a baronet be created to him and the heirs male of his body, without mentioning of any place, he shall have a fee conditional in his dignity, which will be forfeited for felony. R. 12 Co. 81.

So a lease *pur auter vie* cannot be entailed; and if it be limited to one and the heirs of his body, remainder over, the remainder may be barred by a surrender, without a recovery. Cont. 2 Ver. 184. R. acc. 2 Ver. 226.

### (B 3.) By what words an estate tail shall be created.

An estate tail ought, regularly, to be limited to a man and the heirs of his body begotten. (*n*)

And

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(*l*) Money directed to be laid out in the purchase of land, is considered in equity as land; and in such a case, if the land to be purchased is directed to be conveyed to a person in tail, he will be considered, in equity, as tenant in tail of the money till the purchase is made.

(*m*) 1. Lord Hardwicke held, that an annuity in fee simple, granted by the crown out of the four-and-a-half per cent duties, payable for imports and exports at the island of Barbadoes, was merely a personal inheritance, not entailable within the statute *de donis*. Therefore, that being settled upon A. and the heirs of his body, it was a conditional fee at common law; so that A. having issue might alien it, and thereby bar the possibility of reverter. 2 Ves. 170. — 2. And Lord Thurlow held, that an annuity granted by act of parliament, out of the revenues of the post-office, redeemable upon payment of a sum of money, to be laid out in land, was a personal inheritance only, not entailed within the statute *de donis*; for that, notwithstanding the power reserved to the crown of laying it out in land, the parties had a right to treat it as an annuity; and the court of chancery would not keep the objection, of its being land, in contemplation from century to century, because of the possibility of substituting the money in the place of the annuity. 1 B. C. C. P. 377. — 3. And a limitation of personal property, after a description that would raise an entail express or implied in real estate, is void; and the person who would be tenant in tail, takes the absolute interest. 3 Ves. 99. 3 Mer. 183.

(*n*) 1. This word *begotten*, says Lord Coke, may in many cases be omitted, or expressed

And therefore, if it be limited to a man and his issues, he has it only for life; for the word, heirs, is as necessary as to an estate in fee simple: for all estates tail were fee simple conditional at the common law. Co. L. 20 a. 2 Inst. 334. 1 Rol. 837. l. 30.

So a gift to a man *et semini suo*, does not make an estate tail. Co. L. 20. b.

Or, to a man *et exituis*, or, *prolibus de corpore suo*. Co. L. 20. b. (o)

Or, to the issues male of his body. 1 Co. 103. b.

Or, to the survivor having issue male, and to the issue male of such issue male. R. 1 Rol. 837. l. 35.

So a gift to a man and his heirs male, or, heirs female, does not make a tail, but shall be a fee simple: for it does not limit of what body the heirs ought to issue. Co. L. 27. a. Lit. S. 31. Vide infra.

Or, to a man and his heirs male lawfully begotten. R. Cro. El. 478.

Or, to him and his heirs of the body of his sister lawfully begotten: for he cannot marry his sister. R. 1 And. 310. (p)

Though limited by way of use. 1 Rol. 837. l. 30. R. Mo. 424. Cro. El. 478. (q)

So

pressed by the like, and yet the estate in tail is good; as *hæredibus de carne, hæredibus de æ, hæred' quos sibi contigerit*, &c. as is aforesaid; and where the word of Littleton is 'engendered,' or 'begotten,' *procreatis*, yet if the word be *procreandis*, or *quos procreaverit*, the estate in tail is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before. — 2. And the annotator subjoins, 10 E. 3. 19., adjudged accordingly. Hal. MSS. — 3. But it is held, that where the words were in *posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*. Adj. M. 26 Eliz. B. R. 3. Leon. 87.

(e) 1. To this passage the annotator has annexed the following: But *devise* to one *et hæredibus legitime procreatis* is tail. H. 43 Eliz. C. B. rol. 1408. L. Moor's case, 711.; but *contra* by *act executed*. 7 Rep. 41. b. Dormer's case. — 2. If lands be limited by deed to the use of J. S. *et hæredum masculorum suorum legitime procreatorum*, remainder over, it is a fee simple; but if it be *hæredum masculorum de æ*, or in English, the heirs of him lawfully begotten, especially where there is a remainder over, it is tail. 7 Rep. 41. Bedell's case, Dormer's case. H. 38 Eliz. B. R. rol. 739. Hal. MSS.

(p) 1. If, says Lord Coke, tenements be given to a man and to a woman being not his wife, and to the heirs male of their two bodies; they have an estate tail, although they be not married at that time. Co. Litt. 25. b. — 2. To which the annotator from Hal. MSS. subjoins, if husband and wife are divorced *a vinculo*, they are only tenants for life; for the law does not presume that they will marry again. 7 H. 4. 16. 3 H. 6. 43. — 3. But, continues Lord Coke, if lands be given to a man and two women, and the heirs of their bodies begotten, in this case they have a joint estate for life and every of them a several inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility, viz. that he shall marry the one first and then the other. — 4. To which the annotator subjoins from Hal. MSS., here it cannot be tail, for the uncertainty which of them he will marry first. But if a gift was to A. and B. a feme sole, and to the heirs of their bodies, remainder to A., and C. a feme sole, and to the heirs of their bodies, it is tail. — 5. Lord Coke adds, and the same law it is, when land is given to two men and one woman, and to the heirs of their bodies begotten.

(q) 1. It is affirmed by Lord Coke, in 1 Inst. 19. b., that by the statute of uses, the land is, as it were, appropriated to the tenant in tail, and to the heirs of his body; and therefore that if an estate be made, either before or since the statute, to a man and the heirs of his body, either to the use of another and his heirs, or to the use of himself and his heirs, this limitation of use is utterly void. For before the statute he could not have executed the estate to the use. And so was it adjudged in an *ejectione firmæ* between John Cowper, plaintiff, and Thomas Franklin, &c. defendant. — 2. To which the annotator subjoins, but in Godbolt's report of Franklin and Cowper, it is said to

So the use of a fine to A. and his eldest son and the heirs male of the son, does not make an entail in A. R. 1 Leo. 212. Cro. El. 220.

So, if he has an express estate for life, he shall not take a tail by implication: as, if a copyhold be surrendered to A. and B. for life, and for want of issue of B., to D. and his heirs: B. has not a tail: for he had an estate expressly limited for life. R. Jon. 342.

But if a man gives an estate tail to A. remainder to B. *in formâ prædictâ*; B. has an estate tail. Co. L. 20. b. 1 Rol. 838. l. 35.

If he had given an estate to A. and the heirs male of his body, with a power of revocation, and afterwards revokes, and gives the same estate to A. and his heirs male, paying 500*l.*, &c. omitting, of his body; it shall be an estate tail. R. 3 Lev. 214.

So a gift to A. and B. and one heir (*r*) of their bodies, and one heir of such heir only, makes an estate tail. Co. L. 22. a. 39 Ass. 20. Qu. Perk. Sect. 171. Semb. cont. Pl. Com. 29. b. Semb. acc. Reg. Jud. 6.

So, a gift to A. and his heirs, *habendum* to him and his heirs, and if the donee dies without issue, that the land shall revert. 1 Rol. 838. l. 45. (*s*)

Or,

to have been resolved that tenant in tail might stand seised to an use expressed, but that an use could not be averred. — 3. Lord Bacon also gives it as his opinion, that an estate tail may be to uses *since* the statute for executing uses, and controverts the reasons for doubting it *before*. Bac. Law Tracts, 8vo. ed. 347. — 4. See a great number of authorities upon this subject, in Vin. Abr. Uses, C.

(*r*) A limitation to A. and such heir of her body as should be living at her death, with a remainder over, is an estate tail. 2 Vern. 325.

(*s*) 1. If, says Lord Coke, 1 Inst. 21. a. a man in the premises give lands to another and the heirs of his body, *habendum* to him and his heirs for ever, it hath been holden, that in this case he hath an estate tail, and a fee expectant. — 2. And so, it is said, *vice versa*, if lands be given to a man and to his heirs in the premises, *habendum* to him and the heirs of his body, that he hath an estate tail, and a fee simple expectant. But vide lib. viii. fo. 154. b., otherwise resolved, *ut patet ibi*. — 3. To which the annotator subjoins, the resolution in 8 Co. 54. b. is, that here the words, heirs of the body in the *habendum*, qualify the word heirs in the premises, and therefore that there shall be an estate tail without any fee expectant. See acc. Mo. 26. — 4. In Cro. Jac. 476., and 2 Rol. Rep. 19. 23, such words were adjudged to pass tail and fee expectant. But the case was attended with circumstances particularly shewing an intention to pass *both*; for there was a reservation of tenure to the lord paramount, which could not be if only an estate tail passed to the donee, and the reversion had remained in the donor, for then the tenure must have been of the donor. Also there was a warranty to the grantee and his heirs. However the court intimated, that their opinion would have been the same, if these special circumstances had not occurred. — 5. Where, says Lord Coke, 1 Inst. 26. b., a man by deed gave lands to Emma late wife of John Master, *habendum et tenendum prædict. Emme et hæredibus Johannes Master de corpore ejusdem Emme procreat*; in that case the son and heir of John Master begotten on the body of Emma took no estate with Emma in the lands, because he was named after the *habendum*. — 6. To which the annotator subjoins, from Hal. MSS., *where one named after the habendum shall take*. H. 15 Jac. Brookes and Brookes. In customary grant by copy, one not named in the premises being named in the *habendum*, may take a present estate. *Venit J. S. et cepit de domino, habendum*, to him and his wife is good. — 7. In frank-marriage, a wife shall take though named only in the *habendum*. Litt. S. 17. 4 E. 3. 4. 5 E. 3. 17. Brief, 703. — 8. So it seems in render by fine to B., *habendum* to B. and C. his wife. 8 E. 5. 51. 24 E. 5. 58. — 9. So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take. Litt. S. 283. 8 E. 5. 50. — 10. But otherwise, regularly, one shall not take a present interest jointly with another, unless he be party to the deed and named

Or, with warranty, to A. and his heirs, and if he dies without heir of his body, remainder to B. R. 1 Rol. 839. l. 5.

Or, to A. and his heirs, and if he dies without issue of his body, to B. R. 5 Mod. 268. R. 3 Leo. 5.

So the words, of his body, are not necessary, if there are words tantamount: as, if a gift be to A. *et hæredibus de carne suâ*. Co. L. 20. b.

Or, to A. *et hæredibus de se*. Co. L. 20. b.

Or, to A. and the heirs male of the said A., lawfully begotten. R. 7 Co. 41.

Or, the heirs which A. *de primâ uxore procrearet*. Co. L. 20. b. 1 Rol. 837. l. 20.

Heirs which *sibi contigerit*. Co. L. 20. b.

The heirs by A. *procreatis* or *procreandis*. Co. L. 20. b.

And *procreandis* extends to issues born before, as well as *procreatis* to issues afterwards. Co. L. 20. b.

To A. for life, and afterwards to the heirs of A. *procreatis* or *procreandis*, and for want of such issue, to B. shall be an estate tail to A. R. 1 Ch. R. 213.

So a gift to A. and his heirs, and if he dies without heir of his body, that it revert to the donor. Co. L. 21. a. (t)

So a feoffment to the use of B. and his heirs in *perpetuum*, and in default of issue of the body of B. to the right heirs of the feoffor; B. has only an estate tail: for the use shall be construed according to the intent. R. Carth. 343. 5 Mod. 267.

So sometimes a limitation to the heirs of the body of another, makes an estate tail: as, to A. and the heirs of the body of his father, though his father be dead. Lit. S. 30. Co. L. 27. a.

in the premises. 8 B. 2. Feoffments, Litt. S. 721. 3 H. 6. 18. 27. 16 E. 2. Ass. 391. Trin. 16 Jac. rot. 1089. Greenwood and Tyler, Hob. 314. — 11. But if by deed indented or poll A. grants the manor of S. *habendum* to B. *et hæredibus*, it is good though he was not named in the premises. Hal. MSS. — 12. The annotator adds, see the case of Brookes and Brookes, cited by Lord Hale, in Cro. Jac. 434., and 2 Ro. Abr. 66 67., and Vin. Abr. Grant, K. a. in which two last books there are many other cases relative to the same subject. — 13. See further Co. Litt. 7. a. where Lord Coke writes, that if A. gives land to hold to B. and his heirs, it is good, though he is not named in the premises; to which Lord Hale adds, but gift in the premises to A. *habendum* to A. and B. is void as to B. M. 25 Eliz. Ow. vid. Co. Litt. 6. a. Plowd. Comm. 156. Throgmorton's case. Hal. MSS. — 14. He continues, see also ante, where Lord Coke describes the office of the *habendum*, on which Lord Hale gives the following annotation. It is not necessary to repeat the thing granted, it being sufficient that it is named in the premises. H. 44 Eliz. B. R. Hill and Giles adjudged one not named in the premises shall not take by the *habendum*, unless, first, in case of Frankmarriage, Litt. S. 17.; secondly, In case of grant by copy. T. 15 Jac. B. R. Brooke's case. Cro. Jac. 434; thirdly, in case of a remainder. — 15. Lease to husband and wife, *habendum* to the husband for ten years; the wife takes nothing. T. 31 Eliz. Mo. — 16. So lease of the site of a rectory and all tithes appertaining to it, *habendum* the site *cum pertin.* for twenty years, the tithes pass only at will. H. 28 Eliz. Mo. 222 Carye's case. — 17. Grant to A. and B., *habendum* to A. for years, remainder to B. for years, is good; but lease of two acres to A. and B. *habendum* one acre to A. for years, the other to B. for years, is bad. T. 4 Eliz. Vide Hob. 172. Hal. MSS. — 18. He concludes by, see contra to this last case. Mo. 26. by Brown, *arguendo*. — 19. For other instances of difference between the *premises* and *habendum*, particularly where the former has been *joint* the latter *several*. See Mo. 43. 247. 280. Vide infra, Faint.

(t) In a note in P. Wms. 57., Lord Keeper Wright puts the case of a gift by deed to one and his heirs, and if he die without issue, remainder over, and holds, that the latter words restrain the former, and convert the fee into a tail.



To the grandfather, and the heirs of the body of his son. Co. L. 20. b.

But, to the son and his heirs of the body of his father, or grandfather, is repugnant and void. Co. L. 27. a. (u)

So a gift to A. and the heirs of her body by B. her husband (then dead) begotten; though A. has it only for life, yet there shall be an estate tail to the heirs of A. by B. and it shall vest in the son of A. by B. and upon his death without issue, shall descend to his sister, as heir of the body of A. by B. Co. L. 26. b.

So an estate for life, remainder to the heirs male of the body of his grandfather; the heirs male of the grandfather all take an estate by way of remainder in tail. Per 3 J. 4. cont. Dy. 156. Dub. Cro. El. 109. 2 Leo. 25. 27. Acc. Co. L. 220. a. R. acc. Cro. Car. 24. Acc. 1 Mod. 226. 237. 2 Mod. 207.

But if A. has a son and a daughter, a gift to the daughter and the heirs female of the body of her father, is void: because she is not heir. Co. L. 26. Vide post, (B 8.)

So, by devise, an estate tail shall be created by words, which are not sufficient for it in a grant. Vide Devise, (N 5, 6.)

Or, by act of parliament. Jon. 105.

#### (B 4.) Tail general, what shall be.

Tenant in tail is in two manners: in tail general or special. Co. L. 19. b.

Tenant in tail general is, where lands are given to a man and the heirs of his body, generally, without restriction. Lit. S. 14.

Or, to a man and the heirs male or female of his body. Co. L. 25. b.

#### (B 5.) Tail special, what shall be.

Tenant in tail special is, where the gift is specially restrained to some heirs of his body, and does not go to all the heirs of his body in general: as, if land be given to husband and wife, and the heirs of their two bodies. Lit. S. 16.

Or, to A. and B. (not married) and to the heirs of their two bodies, is a good tail, for the possibility of a marriage between them. Co. L. 20. b. 25. b. Vide supra, (B 3.) in notis.

Or, to the husband of A. and the wife of B. and the heirs of their two bodies. Co. L. 20. b. 1 Co. 120. Co. L. 25. b.

So, if a gift be to A. and the heirs male of his body, it is a special tail. Lit. S. 21.

Or, to A. and the heirs female of his body. Lit. S. 22.

Or, to husband and wife and the heirs males of their bodies. Lit. S. 25.

To A. and his heirs upon such a wife begotten. Lit. S. 29. (x) R. 1 And. 310.

If

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(u) 1. And he takes a fee, *ibid.* — 2. Yet gift to and his heirs of the body of B. his wife, who is dead, is tail. 12 H. 4. 1. *Rationem diversitatis quære*, for the second son is his heir of the body of the father. Hal. MSS. *Ibid.* in notis.

(x) 1. It has been said, says Lord Coke, Co. Litt. *ibid.*, that if a man give land to another and to his heirs of the body of such a woman lawfully begotten, that this is no estate



If a gift be to husband and wife with a limitation to the heirs of their bodies equally, both have an estate tail. Co. L. 26. a.

Or, to husband and wife, and the heirs which the husband shall beget upon the body of his wife. Lit. S. 28. (y) Lane, 17.

Or, heirs upon the body of the wife by the husband begotten. R. Yel. 131. Vide infra.

Or, to the heirs of the body of the wife and of the body of the husband. R. Yel. 131.

But if it be to husband and wife, and the heirs of the body of the husband; he only has a tail, and the wife for life. Lit. S. 26, 27. (z)

Or,

estate tail for the uncertainty by whom the heirs shall be begotten, for that the brother of the donee, or other cousin, may have issue by the woman, which may be heir to the donee, and estates in tail must be certain. Therefore, that Littleton to make it plain, in all his cases added to these words 'his heirs,' 'which he shall engender.' But that opinion is, since Littleton wrote, over-ruled, and that estate adjudged to be an estate tail, and begotten shall be necessarily intended begotten by the donee. — 2. So, subjoins the annotator, from Hal. MSS., gift to A. and the heirs which her husband shall beget of her body, is tail in the wife; and yet it is not said *her* heirs, nor heirs of *her* body. 41 E. 3. 24. Hal. MSS.

(y) And they have in such case the same estate, as where lands were given to them and the heirs of their two bodies begotten. Ibid. in notis.

(z) 1. But, says Littleton, s. 28., if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife, in this case both of them have an estate tail, because this word heirs is not limited to the one more than to the other. — 2. Upon which Ld. Coke observes, this word heirs is *nomen operativum*. To which of the donees it is limited, it createth the estate tail, but if it incline no more to the one than to the other, then both do take, as here Littleton putteth the case. And therewith accordeth the case of 3 E. 3. [32] where it appeareth *quod Robertus de S. dedit Johanni de Ripariis et Matildæ uxori ejus, et heredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c.*, and this adjudged to be an estate in especial tail in them both, because the estate is equally tailed to the heirs of the baron as to the heirs of the wife. — 3. To which the annotator, from Hal. MSS., subjoins, Vide Hob. c. 113. p. 84. Gift to husband and wife for their lives, and after their decease to the heirs of the body of the husband *procreand' super corpus* of the wife, is tail only in the husband, and the wife hath only for life; and it is the same with *heredibus* of the husband *de corpore* of the husband on the wife *procreand'* Skete and Oxenbridge. — 4. So Tr. 6 Jac. B. R. Repps and Bonham, land limited to husband and wife for their lives, and after their decease *heredibus* of the body of the wife by the husband to be begotten; it is tail only in the wife. But it was agreed that if it had been to the heirs which the husband should beget on the body of the wife, or to the heirs of the body of the wife and of the body of the husband to be begotten; it had been tail in both. — 5. 8 R. 2. Tail. 52. Gift to the husband and wife, and to the heirs of their bodies issuing, and if the wife *obierit sine heredibus*, yet tail in both. — 6. 12 E. 3. Variance, 77. 9 E. 3. 64. Ibid. 93. Land given to husband and wife, and to the heirs of the body of the husband, and if husband and wife, *obierit sine heredibus*, into *eos procreatis* remainder over; yet it is tail general in the husband only. — 7. Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband. Hic sect. 29. Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife. His heirs appropriate in the first case, of the body in the second case. Hal. MSS. — 8. But where, adds the annotator, the gift is to the wife only and to the heirs of the body of the husband, then the tail is not in either, of which Ld. Hale gives the following case as an instance. — 9. Nott. p. 1651 Sir Leventhorpe Franck's case. Land given to the wife for life, remainder to the heirs of the body of the husband on the body of the wife to be begotten. Ruled that is not tail executed *omnino* in the wife, but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void. Hal. MSS. — 10. The same case, he adds, is reported by the name of Gossage and Taylor, in Styl. 325., but there the remainder is differently expressed; for it is not to the heirs of the bodies of both in direct terms, but it is to the use of the heirs to be begotten upon

Or, to husband and wife, and the heirs of the body of the wife; she has an estate tail, and the husband for life. R. 2 Cro. 475. (a)

Or, to the heirs of the body of the wife by the husband begotten. Lit. S. 28. Dub. Lane, 17. Vide supra.

Or, the heirs of the body of the wife by the husband and B. begotten. Yel. 131.

Or, to husband and wife for life, and afterwards to the heirs of the body of the wife by the husband begotten. R. Yel. 131. Vide supra.

Or, to the heirs of the body of the husband upon the body of the wife begotten; the husband only has the tail. R. Hob. 84.

So, if it be, to the heirs of the husband *de corpore suo super corpus* of the wife. Hob. 84.

So a gift to husband and wife and the heirs of the body of the survivor, gives a tail only to the survivor. Co. L. 26. a.

A gift to two husbands and their wives and the heirs of their bodies, makes a joint estate for life with several inheritances, viz. of a moiety to one husband and wife and their issue, the other moiety to the other husband and wife and their issue. Co. L. 25. b.

So a gift to B. and two women, or *vice versá*, makes a joint estate for life, with several inheritances to each. Co. L. 25. b.

### (B 6.) Gift in frankmarriage.

A gift in frankmarriage is, when a man gives lands or tenements to a man with his daughter, or other of his blood, in frankmarriage. Lit. S. 17.

So, if a gift be to A. *habendum in liberum maritagium cum filiâ suâ*; so that the woman is only named after the *habendum*. Co. L. 21. a. (b)

the body of Susannah by Leventhorpe her husband; which most probably were the words of the remainder; for Glynn's argument in favour of the wife having an estate tail, appears to have been founded upon the remainder's not pointing expressly to the heirs of either. — 11. After Sir Leventhorpe Franck's case, Ld. Hale puts a quære, and then adds, v. 3 E. 3. Formedon, 8. Land given to J. S. *ex uxori suâ quam postea desponsaverit et hæredibus de corporibus eorum*; the wife takes nothing, because not known at the time; but it is a tail in the husband. Yet *nota, hæredibus de corporibus*; if the wife had taken an estate, it had been a tail in both. Hal. MSS. — 12. According to this case, he continues, the tail is in the husband, though the wife takes no estate, and the tail is expressly to the heirs of the bodies of both. But this is more than was contended for by the counsel for the wife's estate tail in Gossage and Taylor, who admitted the contrary to have been settled by the case in Dy. 99. pl. 64., and by Lane and Pannell, which is in 1 Ro. Rep. 238. 317. and 438. — 13. See also contra, Lit. s. 352., and the case of Frogmorton, on the demise of Robinson, against Whaney, in 2 Wils. 125 and 144., where on a surrender of copyhold lands to A. whom the surrenderer intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life, with a contingent remainder to the heirs of the bodies of her and her husband.

(a) 1. Lit. s. 28. — 2. In pleading seisin of such an estate in husband and wife, it shall be alleged, that they were seised together and to the heirs of the body of the wife in her right, and not that they were seised of the freehold or fee tail. Per Fitzherbert, 27 H. 3. 21. b.

(b) 1. To which the annotator subjoins from Hal. MSS. this case. *Dedi et concessi Johanni White in liberum maritagium Johannæ filiæ meæ habendum dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi*; and warranty to him and his heirs. Ruled, that it is neither tail nor frankmarriage, but fee simple only in the husband, and nothing in the wife. M. 23 & 24 El. C. B. Webb and Porter. Vide contra 52 E. 1. Tail 25., but 45 E. 3. 20 agrees. — 2. And, he adds, see acc. this same case in Ow. 26., Godb. 18. The same case is cited in Mo. 643. pl. 886.

So,

So, if a gift be to A. *in liberum maritagium* B. *filice*, without saying, *cum filiâ*. R. Ow. 26. Godb. 18.

So a gift to a woman with a son in frankmarriage is good. Co. L. 21. b.

So a gift after marriage, as well as before. Co. L. 21. b. R. Godb. 19. (c)

And a gift to a man with a widow, as well as with a virgin. Co. L. 21. b.

So the gift shall be good, though a remainder be limited to a stranger in tail, if the reversion be to the donor. Godb. 20.

Every inheritance which lies in tenure may be given in frankmarriage: As, lands and tenements, in reversion, as well as in possession. Co. L. 21. b.

A rent-service, charge, or seck. Co. L. 21. b. (d)

If a gift in frankmarriage takes effect, it shall not be destroyed, though the donor afterwards assigns the reversion. Godb. 20.

By a gift in frankmarriage, the donees have an estate in special-tail to them and the heirs of their bodies begotten, without other words. Lit. S. 17. Godb. 19.

And the donees hold freely of the donor till after the fourth degree. Godb. 19. Lit. S. 19. Vide Co. L. 21. b.

And therefore, if a rent be reserved upon the gift, it does not take effect till the fourth degree past. Co. L. 21. b. 1 Rol. 840. l. 45. (e)

But a gift without the word, frankmarriage, is not supplied by any words tantamount: As, if it be given *in connubio ab omni servitio soluto*. Co. L. 21. b.

So, if, *liberum*, only be omitted. Per Dy. Godb. 19.

So a gift in frankmarriage is not good, if it be not with some of the blood of the donor. Co. L. 21. b. Godb. 19.

Or, if it be of a thing which lies not in tenure. Co. L. 21. b.

Or, if the tenure be not of the donor: and therefore, a gift in frankmarriage, the reversion to a stranger, passes only an estate for life. Co. L. 21. b. Godb. 20. (f)

So, if the reversion was limited to themselves. Co. L. 21. b. 1 Rol. 840. l. 50.

So, before the st. 27 H. 8. *cestuy que use* could not make a gift in frankmarriage; because the reversion was in the feoffees. Co. L. 21. b.

(c) Dy. 147. Co. Lit. 176. a.

(d) 1. A common. Ibid. — 2. 14 E. 2. Aiel. 1. Reversion granted by two in frankmarriage. Vide 4 E. 3, 4. 26 E. 3. Tail 27. Hal. MSS. Ibid in notis.

(e) 13 Hen 4. Mesne, 74. 30 Edw 3. 24. Gift in frankmarriage *salvo forinseco servitio quod*; the donee shall hold in chivalry. Hal. MSS. The Annotator's notes. Ibid.

(f) 1. The passage in Ld. Coke runs thus: If lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate tail, because there is no tenure of the donor. — 2. To which the Annotator subjoins, from Hal. MSS., but see the contrary of this, Pasch. 40 Eliz. C. B. Lord Barclaye's case, n. 11. — 3. And all the books here cited prove, that it is at least an estate tail, although no tenure; and it is accordingly adjudged, 17 Edw. 5. 65. Vide H. 43 El. B. R. rot. 140., between Lord Barclaye and the Countess of Warwick. — 4. He adds, see S. C. in Mo. 645. Cro. Eliz. 655, and 1 Rol. Abr. 750.; but the point of frankmarriage is not reported in the two latter books.

So a gift in frankmarriage cannot be by devise: for there is no tenure created. Co. L. 21. b.

(B 7.) Issue in tail; how he takes.

The issue in tail does not take by descent only; but by the st. *de donis*, as well as by descent, and is in *per formam doni*.

(B 8.) He takes *per formam doni*, though he be not heir.

So, if land be given to B. and the heirs female of his body, (g) who has a son and a daughter, the daughter shall inherit *per formam doni*, though the son be heir. Co. L. 24. b.

But, regularly, such special heir shall not take by purchase, where he is not also heir general: As, if there be a lease for life, remainder to the heirs female of the body of B. who has issue a son and a daughter, the daughter shall not take: for she ought to be heir, as well as heir female. Co. L. 24. b. Hob. 31. (h)

So, if a remainder be to the heirs male of the body of B. who has two sons, and the eldest has issue a daughter, and dies; the youngest son cannot have the remainder. 1 Co. 95. b. 103.

So a devise in tail, remainder to the right heirs of males of him and of his name; his brother shall not take, if there be a daughter who was heir general. R. Hob. 31. 2 Rol. 416. l. 30.

Yet sometimes, where there is a particular description, or designation, of the person to whom the remainder is limited, such special heir shall take, though there be another heir general: as, where a man takes notice by his will, that he has daughters, yet devises land to his heir male; the son of his brother shall take. Cited 1 Vent. 381.

So a devise to his eldest son and the heirs male of his body, remain-

(g) The Annotator in n. (1) to Inst. 25. a. says, that it is very usual to create an estate in tail female, and that he has seen an argument in which it was attempted to be proved, that the law of England will not allow of a descent through females only, even in the case of estates tail; but that other authors as well as Littleton and Coke, mention such descents, nor, adds he, did I ever hear any authority cited to support the contrary doctrine. Vide Plowd. Quær. 87. 133.

(h) 1. Upon this passage, the Annotator cites, in the first instance, the following case: A. hath issue a son and a daughter; the daughter marries B., and has issue two daughters; A. devises to his son, but if he die without issue my land shall go to my right heirs of my name and posterity, and dies; the son dies without issue; and ruled that the land shall not go the uncle, for though of his name he is not heir, for the daughter of the daughter is heir. H. 11 Jac. C. B. Counder v. Clerke, Mo. 863., and Hob. 39. Hal. MSS. See the same case in 1 Brownl. 129. — 2. He then observes, that this case of Counder and Clerke is apparently cited by Lord Hale in confirmation of Lord Coke's position, as to the necessity of being heir as well as female, in order to take by purchase under a limitation to the heir female; and it is observable, that there is not one word in Lord Hale's note intimating the least disapprobation of the doctrine. However it so happens, that in more modern times the propriety of this doctrine has been questioned by very respectable persons, who have treated it as equally unsupported by reason and authorities of law. But, perhaps, this censure of Lord Coke may have been too hasty; and it may be doubted whether there is a passage in all his works, more capable of standing the severest test of modern criticism. He then employs the remainder of his note in defence of Lord Coke's doctrine, and in explaining the qualifications with which it ought to be understood; and for this purpose he examines it, first as a reasonable rule of construction, and, secondly, by the authorities and determined cases.

der

der to the heir male of the devisor, and his heirs of his body : a son of the devisor by a second venter shall take the remainder. R. Cro. Car. 24.

A devise to the heir male of the body of his great-grandfather; the person who is his issue male shall take, though there be a daughter who is heir general. Per Cowper, 11 Feb. 3 Geo. in Chanc. inter Newcomen and Berkham. But this was in execution of a trust. Eq. Ca. 117. (Vide 2 Ver. 729.)

So, where a purchase is by deed : as, if B. covenants to stand seised to the use of his heirs male upon the body of A. his wife begotten; a son by A. his second wife shall take the remainder, though there be an heir by the first venter. R. per Hale and Wyld, 1 Vent. 981., Pibus and Mitford.

### (B 9.) Must convey his descent wholly through males, &c.

But an estate tail to a man and the heirs male of his body shall descend to him, who can convey his descent wholly through heirs male : As, if he has issue a daughter, who has issue a Son; the son shall not inherit by force of the entail. Lit. S. 24.

So, if tenant in tail to him and the heirs female of his body, has issue a son who has issue a daughter; the daughter shall not inherit. Co. L. 25. a. 2 Ver. 409.

So, if B. has an estate to him and the heirs male of his body, remainder to him and the heirs female of his body, and he has issue a son who has issue a daughter, who has issue a son; the son of the daughter shall not inherit to either entail. Co. L. 25. b.

So, if an estate tail be by devise; for that does not alter the nature of the descent. Co. L. 25. a.

### (B 10.) What shall be a Reversion.

In every gift in tail, the reversion of the fee simple, without saying more, is in the donor. Lit. S. 19. (i) Vide Copyhold, (C 12.)

The reversion is the residue of the estate continuing in him, who made the particular estate. Co. L. 22. b.

Upon a gift in tail, by operation of the st. W. 2. 1. *de donis*, the possibility of reverter is turned to a reversion in the donor. Co. L. 22. a. 2 Inst. 335.

So, upon a lease for life or years, the lessor has the reversion continuing in him. Co. L. 22. b.

So, upon an extent by statute-merchant, staple, recognizance, or *legit*, a reversion is left in the conusor. Co. L. 22. b. Vide Statute Staple, (C.)

So, since the st. 27 H. 8. 10. If a man makes a feoffment to the use of B. for life or in tail, and afterwards to the right heirs of the feoffor; the reversion is in him : for the use was continuing in him,

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(i) 1. And if tenant in tail die without issue, the donor or his heirs may enter as in their reversion. Lit. s. 18. — 2. The following case is quoted, *ibid.* in note, from Hal. MSS. : the issue in tail attainted in *vita patris*; after the death of the father the donor cannot enter, but the issue if pardoned may enter, and hold as special occupant, subject to the charges of the father. 29 Ass. 61.



and the statute executes the possession to the use. Co. L. 22. b. Vide Discent, (A). (*k*)

Or, to the use of himself for life or years, and afterwards to B. for life, and afterwards to his right heirs: the feoffor has the reversion in him. Co. L. 22. b. R. 3 Lev. 406. R. Sal. 591.

So, if husband and wife levy a fine to the use of the husband for life, remainder to A. for life, remainder to the right heirs of the husband; the husband and A. die in the life of the wife; she shall have it, and not the heir of the husband: for it was a reversion, and not a remainder. Cont. per 3 J. hut Ch. J. Dy. and Ch. B. acc. Dy. 237. b.

But if a man leases land for years, there is not any reversion till the lessee enters, or the lessor waives the possession. Co. L. 46. b.

So, if a feoffment be to the use of the feoffor in tail, and afterwards to the feoffee and his heirs; the feoffee has not a reversion, but a remainder. Co. L. 22. b.

So, if a grant be of a prebend, donative, hospital, &c. no reversion remains: for the prebendary, &c. has the whole estate, though upon his death it remains in the patron. R. Ca. Ch. 214.

### (B 11.) Of what Account.

A reversion upon an estate tail is of no great account, for it may be docked by a common recovery.

### (B 12.) By what words it passes.

If a man grants the reversion of his land, that is sufficient to pass his reversion.

So, if he grants the land itself, the reversion passes; for when he grants the land, it cannot be intended that he would not grant his reversion. R. 10 Co. 107. a. D. Vau. 83. Pl. Com. 433. b.

By a grant of a reversion, fealty passes as incident; for it cannot be severed. Co. L. 143. a.

So a rent passes; if it be not excepted, for it may be severed. Co. L. 143. a. Vide Rent, (C 5.)

But if A. reciting a lease by his father (which is void as to him) grants his reversion of the same land after the end of the former lease to another for years, his grant is void; for he had not the reversion. R. Jon. 355.

(*k*) 1. To which the Annotator subjoins from Hal. MSS. vide 3 & 4 P. & M. Dy. 134. contra. And adds, but see the case cited by lord Hale in the next note, and also ante, 12 b. and note 2. there. — 2. That case is subjoined to the next position in the text, and is as follows. Casus Com. Bedford, M. 34, 35 Eliz. Poph. n. 8. Feoffment to the use of the feoffor for forty years, remainder to B. in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor. Hal. MSS.— 3. See the earl of Bedford's case, in Poph. 3. Vide 27 E. 3. 8. 4 H. 6. 20. 42 Ass. 2. 9 E. 3. 14. 10 E. 3. 48. Lands granted by A. by fine for the life of A., remainder to A.'s right heirs. It is a reversion in A. and he may grant it. Hal. MSS. — 4. Dy. 237. Fine to husband as that which he and his wife have of his gift, with remainder to the conusor for life, remainder to the right heir of the husband. It is a void remainder, and the wife survivor shall have it for life. Hal. MSS.

So, by the grant of a reversion, land in possession does not pass. R. 10 Co. 107. b. R. Cro. Car. 400. D. Vau. 83.

Nor, by the grant of a reversion and other the premises; for that cannot be understood of the same premises, of which the reversion was mentioned before. R. Cro. Car. 400.

Nor, by the grant of a reversion, *habendum* the land; for the *habendum* does not enlarge it. Pl. Com. 150. Cro. Car. 400.

### (B 13.) A Remainder, — what shall be a good one.

So, by construction upon the st. W. 2. 1. *de donis*, a remainder (l) may be limited upon an estate tail. Vide Copyhold, (C 11.)

A remainder is the remnant (m) of an estate in land, (n) depending upon a particular estate, and created with it. (o) Co. L. 49. a. 143. a. (p)

As

(l) Lord C. B. Gilbert says, that the word remainder is no term of art; nor is it required to the creation of a remainder, since any words sufficient to show the intent of the party will create it; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word remainder to make them such. And therefore that if a man gives lands to A. for life; and that after his death the land shall revert and descend to B. for life, &c. this is a good remainder. Bac. Abr. Remainder, B.

(m) 1. When a general power of alienation was allowed, it was understood that the tenant might alien either the whole fee, or a partial estate or interest carved out of it. An estate or interest thus carved out of the fee, if it did not amount to an estate of inheritance, was called a *particular estate*. Butler's Fearn, 3. n. — 2. At the common law, two particular estates only could be created by the act of the party, an estate for life, and an estate for years. The statute *de donis* authorised him to create an estate tail. And so the law has continued. Ibid. — 3. The statute of uses introduced conditional limitations, which were unknown to the common law; but those limitations are not remainders, and the previous estates upon which those limitations depend, are not in respect to them, particular estates, in the sense in which those words are used in reference to remainders. Ibid.

(n) 1. Lord Coke's expression is "lands or tenements." — 2. It may exist in lands held for an estate of inheritance, and in lands held for an estate of freehold only. Therefore if A. be seised of land in fee simple, and convey it to B. for life, and after his decease to C. and his heirs; C. has a legal estate in fee simple in remainder expectant, and to take effect in possession upon the decease of B. And if A. be seised of land for the lives of three persons, and the lives and life of the survivors and survivor of them and convey the land to B. during the joint lives of B. and all the three *cestui que vies*, and if B. die in the lifetime of all the three *cestui que vies* then to C. and his heirs during the lives of the three *cestui que vies*, and the lives and life of the survivors and survivor of them, C. has a legal estate of freehold descendible to him and his heirs, in remainder expectant on the contingency of the decease of B. in the life time of all the three *cestui que vies*. Butler's Fearn, 4. n. — 3. As to chattels real and chattels personal; a remainder, in the legal sense of that word, cannot be limited in them after a disposition of them to one for life, or otherwise. It was once considered that they were incapable of any limitation over, after a previous limitation of a partial interest; but now it is established that they are susceptible of such limitations over. Ibid.

(o) 1. 'Created together with the same at one time.' — 2. This imports that the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. Thus where an estate is conveyed to A. for life, remainder to B. in fee; B.'s remainder in fee passes from the grantor at the same time as A.'s life estate in possession. Butler's Fearn, 4.

(p) 1. And therefore, wherever the whole fee is first limited, there can be no remainder

As, if a man makes a gift in tail, remainder to another in tail, or in fee.

Or makes a lease for life, or years, remainder to another for life, in tail, or in fee.

And such remainder shall be good without deed; for it passes by the livery made for the particular estate; for the remainder and the particular estate make but one estate to many intents. Co. L. 143. a.

So he may give an estate to A. for life, remainder to B. in tail, and if B. dies without issue, to another for years, &c. this estate for years shall be good after the death without issue. R. 1 Sid. 102.

So there may be a remainder for years after a prior term for years. Ray. 142.

So there may be a remainder of a rent created *de novo*. Cont. per Montagu, Pl. Com. 35. a. Adm. acc. Dy. 311. a. 4 Mod. 280. Mod. Ca. 112. R. 1 Sid. 285. R. Sal. 577. R. Mo. 30.

And it is sufficient, that the remainder vests during the particular estate, or *eo instante* that the particular estate determines: As, if there be a lease for life, remainder to the right heirs of B. or the first son of B. &c. if B. dies or has a son in the life of the lessee, the remainder will be good. Pl. Com. 29.

So, if a rent be granted to B. for the life of C. remainder to the right heirs of C. it shall be good; for it vests *eo instante* that the estate of B. determines. Co. L. 298. a.

So, if an estate be granted to A. for life, and if such a condition be performed, that B. shall have it; if the condition be performed in the life of A. the remainder will be good. Pl. Com. 27. 29.

So, if a remainder be limited to a person incapable, as a monk, &c. if he becomes capable before the particular estate determines, it is sufficient. Pl. Com. 27. b.

So if the particular estate be to a *non compos*, who makes a surrender; for his surrender is void. R. Sal. 577. (Vide Comyns's Rep. 45.)

So it is sufficient, if the remainder vests during the continuance of the particular estate, though there be an alteration of the estate if it be not totally merged or destroyed: As, if lessee for life grants over his estate before the remainder happens; for the estate of the grantee supports the contingent remainder. Per Windh. Ray. 30. Pol. 90.

So, if lessee for life, remainder to A. for life, remainder to the first issue of A. Remainder to B. in tail, leases for years to A. who joins with B. in a fine and feoffment; the contingent remainder to the first issue stands good: for the estate of the lessee for life supports it. 2 Rol. 794. l. 5.

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remainder in the strict sense of that word; for the whole being first disposed of, no remnant exists to limit over. Thus if lands are limited to a person and his heirs, and if he dies without heirs, that they shall remain over to another, the last limitation is void. Eq. Abr. 186. — 2. And where a person devised lands in London to the prior and convent of St. Bartholomew and their successors, so as they paid annually sixteen marks to the dean and chapter of St. Paul; if they should fail of payment, that their estate should cease, and the dean and chapter should have it; it was held that the remainder was void, because the first devise carrying a fee, nothing remained to be disposed of. Dyer, 33. a. — 3. And in the case of a qualified or base fee, no remainder can be limited upon it. Thus Lord Coke says, if lands be given to A. and his heirs, so long as B. has heirs of his body, remainder over in fee, the remainder is void. 1 Inst. 18. a. 10 Rep. 97. b. Vaugh. 269. contra. Plowd. 235.



So, if a particular estate be to two for life, and one joint-tenant releases to the other. R. per 3 J. Dolb. cont. Ray. 413. 1 Vent. 345. 2 Jon. 136.

Or, to A. for life, remainder to his first son in tail, remainder to A. in fee; though the fee be executed, the remainder is not destroyed. Pol. 90.

So, if lessee for life, &c. be disseised: for a present right of entry is sufficient to support a contingent remainder. D. 1 Vent. 189. Per Holt, M. 9 W. 3. inter Thompson and Leach. Salk. 577. 1 Co. 66. b. 135. b. Semb. Pol. 98. (Vide Comyns's Rep. 45.)

So, if tenant for life, remainder to his wife for life, remainder to B. remainder to the eldest son of B. makes a feoffment; the remainder to the eldest son is not destroyed: for by the feoffment the estate of the husband and wife shall be lost, by which B. has a present right of entry. R. 2 Rol. 796. l. 35. 794. l. 5. 797. l. 5. Semb. Pol. 376. 381.

And though the lessee, who has a present right, does not enter during his life, yet the first feoffees may enter after his death to revive the contingent estate. R. 2 Rol. 797. l. 20. Or rather the issue himself. Pol. 395.

Otherwise, if the feoffees, after the contingency happened, release their right, or by feoffment or otherwise bar their entry. R. 2 Rol. 797. l. 40. Semb. cont. Pol. 383.

So, if there be tenant for life, remainder to his first son in tail, remainder to B. for life, remainder to his first son in tail, &c. and if B. grants by fine to the tenant for life, who has a son born, and then makes a feoffment; for the right of the son born is sufficient. R. 1 Vent. 189. 2 Lev. 35.

So it is sufficient, though the particular estate be once merged or destroyed, if it be revived before the remainder happens: as, if lessee for life, upon which a contingent remainder is limited, makes a feoffment upon condition, and enters for the condition broken, before the contingency happens. Per Holt, M. 9 W. 3. inter Thompson and Leach. Semb. cont. per Hale, 2 Sand. 387. (Vide Salk. 577. Comyns's Rep. 45.)

If lessee for life, remainder to his wife for life, remainder to another upon a contingency, makes a feoffment, and dies, and his wife enters before the contingency happens: for this brings back the estate of the wife for life, and the contingent use also. Semb. 2 Rol. 796. l. 50. Acc. 2 Rol. 797. l. 15. 30.

So, if the lessee for life be attainted for treason, whereby his estate is vested in the King; the first son born before or after the attainder shall have it: for the estate of the wife was sufficient to support the contingent remainder to the son. R. Sal. 576.

So, if B. after a son born, with him in fee, conveys to A. who makes a feoffment, and then B. has another son, and the first son dies; the right of entry in the first son is sufficient. R. 2 Lev. 35.

So it is sufficient if the remainder vests, though the particular estate be afterwards defeated; as, if the lessor disseises the lessee for life, and afterwards makes a feoffment to the use of B. during the life of the lessee, remainder to A. and the lessee enters upon B. whereby his estate is defeated; yet the remainder to A. stands good. Co. L. 298. a.

So,

So, if a lease be to an infant for life, remainder to B. and the infant at full age disagrees; yet the remainder is good. Co. L. 298. a. D. 1 Sid. 360. .

So, where a remainder is limited to a person certain and known, though it takes effect only upon a contingency, yet it stands good, though the particular estate be destroyed: As, a devise to an eldest son for life, and if he does not pay annuities, &c. to the youngest son; if the eldest son makes a feoffment, and afterwards fails in payment of the annuities, &c. the youngest son may enter. R. 2 Rol. 793. l. 45. for it is not like an use in remainder. Ibid.

A devise to A. for life, remainder to the eldest son of A. and the heirs of his body; if A. dies, his wife *privement enseint* with a son, the son shall have it after his birth. R. cont. but the judgment was reversed in parliament. 4 Mod. 285.

(B. 14.) What not. If it be not supported by a particular estate.

But a remainder cannot be created without a particular estate: as if an heir endows his mother, remainder to A. in Fee. Pl. Com. 25. b.

Though it be by way of an use: As, if husband and wife, seised in right of the wife, levy a fine, and declare the uses to the heirs of the body of the husband upon his wife to be begotten. R. 4 Mod. 155. Ca. Parl. 105. Skin. 351. Vide Uses, (B 2.—K 7.)

So, if a particular estate is void in its creation, the remainder limited upon it is also void: as, if a lord grants his seigniority to the terre-tenant for life, remainder over; the remainder is void: for the seigniority granted to the terre-tenant was extinct. Dy. 140. b.

So, if a rent-charge be granted to a terre-tenant for years, remainder over; the remainder is void: for, by the grant to the terre-tenant, the rent is suspended at the commencement. 2 Rol. 415. l. 20.

If a lessor confirms the estate of the lessee for life, remainder in fee. Pl. Com. 25. b.

Or disseises him, and afterwards makes a new lease to him for life, remainder in fee: for the lessee is remitted. Pl. Com. 25. b.

So a grant to a person incapable, as to a monk, &c. remainder over, is void. 2 Rol. 415. l. 25. Pl. Com. 35. a.

Or, to a person not *in rerum naturâ*, for life. 2 Rol. 415. l. 27.

Otherwise, if a devise be to a monk, a person not *in rerum naturâ*, &c. for life: for the remainder over shall be good. 2 Rol. 415. l. 30. Vide Devise, (N 19.)

So, if the particular estate be only for years, remainder to the right heirs of B. it is void: for a freehold cannot be in abeyance. R. 1 Co. 130. a. 134. b. 135. a. Mo. 720. 3 Co. 20. Ray. 83. Poph. 4.

So a devise to A. for 50 years, remainder to the heirs males of the body of A. will be a void remainder. R. 4 Mod. 259. 1 Sal. 226. Skin. 408.

Or, to A. for 50 years if he so long live, remainder to his first and

and other sons, remainder to B. R. Mo. 488. R. Sal. 229. Semb. 2 Ver. 131. 372.

Or, to B. for years, remainder to the right heirs of B. Per 2 J. 4 Leo. 21.

Yet a remainder for years, after a term for years, will be good: for it may be in abeyance. Ray. 142.

So a devise for fifteen years, remainder to the first son of B. shall be good: for the law aids him *qui est inops consilii*. Ray. 83. Vide Devise, (N 16.)

(B 15.) Or the particular estate be destroyed before the remainder be vested.

So, if the particular estate be merged or destroyed before the remainder vests, it never can vest: (g) as, if tenant for life, remainder to the right heirs of B. or upon another contingency, remainder to D. in fee; if D. dies, and his estate descends to the tenant for life, whereby his estate is merged before the contingency happens; the remainder never vests. 1 Co. 135. b.

So, in any case, where the reversion descends upon the particular estate, and destroys it before the contingency happens. R. by all the judges

(g) 1. Mr. Fearn in the fifth chapter of his essay, considers how contingent remainders are destroyed, or prevented taking effect. — 2. And in the first section shews, that every such determination of the preceding estate before the contingency happens, as leaves no right of entry, must effectually destroy the contingent remainder depending upon it. — 3. And instances, in the second section, the case of forfeiture or surrender of the tenant for life of a freehold estate. — 4. In the third he shews, that the surrender of a copyhold will not destroy a contingent remainder. — 5. But, in the fourth, that if copyhold land be surrendered to the use of a person during his life, remainder in contingency, and the tenant for life die before the contingency happens, the remainder fails. — 6. In the fifth he shews, that *certain que trusts* for life, cannot by a feoffment or other conveyance, destroy a contingent remainder. — 7. And in the sixth, that if there be tenant for life, with a contingent remainder thereon depending, a bargain and sale or lease and release by him will not destroy the contingent remainder. — 8. In the seventh he proves, that some acts by tenant for life, though they give a remainder man title to enter for a forfeiture, yet do not destroy a contingent remainder, unless advantage is taken of the forfeiture by any subsequent vested remainder man. — 9. And in the eighth, that whether a contingent remainder is created by a conveyance at common law, or limited by way of use, the same rule holds in respect to its capacity of being destroyed. — 10. In the ninth section he shews, that the legal subjection of contingent remainders to the power of the preceding tenant of the freehold, has introduced the estate and trust usually inserted in deeds and wills for preserving contingent remainders. — 11. In the tenth, that if trustees for preserving contingent remainders join in a conveyance to destroy them, a court of equity will consider it a breach of trust. — 12. But, in the eleventh, that it is no breach of trust in a tenant for life himself to destroy them. — 13. And in the twelfth shews, that, under particular circumstances, courts of equity have directed trustees to concur in the destruction of contingent remainders. — 14. Yet, in the thirteenth, that equity views the destruction of contingent remainders by tenant for life in the light of a wrong, or tort, which it is anxious to prevent. — 15. In the fourteenth section he shews, that the alteration in the particular estate which will destroy a contingent remainder, must amount to an alteration in its quantity. — 16. In the fifteenth, that where the union or coalition of the particular estate, and the inheritance (except the circumstance of its being created by, or arising under, the same instrument or deed as the particular estate) happens by the conveyance or act of the parties, the intermediate contingent remainders depending on such particular estate are destroyed. — 17. In the sixteenth, that where the descent of the inheritance is immediate

judges except Flemyng. 2 Cro. 260. 1 Bul. 61. Per Holt, 2 Sand. 386. Arg.

So, though the reversion descends upon a particular estate, with a contingent remainder, created by devise; except when it may take effect as an executory devise. R. 2 Cro. 260. R. 2 Lev. 202.

So, if the particular estate be merged in the reversion by the surrender of the tenant.

Or determined by the death of the tenant. R. 1 Sal. 238.

Or, by the death of tenant in tail without issue. 2 Leo. 70.

Though the estate was created by devise. R. 2 Leo. 70. Mo. 371.

So, if the particular estate be destroyed before the contingency happens, by the act or wrong of the tenant: as, if tenant for life, remainder to his right heir in tail, remainder in fee to tenant for life, makes a feoffment, or levies a fine, whereby his estate for life is gone. R. 1 Co. 66. b. R. Cro. El. 630. 1 Co. 135. b. R. Mo. 545.

So, if tenant for life be attainted for treason, or felony. R. Mo. 815. Semb. Sal. 576.

So, if there be tenant for life, remainder upon a contingency, remainder in tail, and tenant for life joins with the remainder-man in tail in a fine; though each passes only that which he lawfully may, the remainder is lost. Per Hale, 2 Sand. 386.

So, if tenant in tail, remainder to the right heirs of B. makes a feoffment in the life of B. the remainder never can vest. 1 Co. 135. b.

So, though the act which destroys the particular estate be voidable; as, if a *feme covert* be tenant for life, and the reversion is granted to her and her husband; though she may afterwards waive it, the contingent remainder depending thereon is gone. R. 2 Sand. 387. 2 Lev. 39.

So, if tenant for life be *non compos*, and makes a surrender to him in reversion: if his surrender is not void, but only voidable. R. M. 9 W. 3. inter Thompson and Leach. Sal. 576. (Vide Comyns's Rep. 46.)

So, if an estate be to husband and wife for life, remainder to the heirs of the survivor, and the husband alone makes a feoffment, and dies; the remainder is gone, though the wife might avoid the feoffment *eo instante* that the contingency happens. R. Cro. Car. 102. Vide 2 Rol. 796. l. 45. But Holt said that it was a nice case. M. 9 W. 3. inter Thompson and Leach. (Vide Comyns's Rep. 46.)

So, if tenant for life makes a feoffment upon condition. Per Holt, M. 9 W. 3. (Vide Comyns's Rep. 46.)

Though the condition be broken before the contingent remainder happens: for a bare title of entry is not, though a present right of entry

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diate from the person by whose will the particular estate and contingent remainders are limited, the descent of the inheritance does not merge the contingent remainders; but that where those estates are not created by the will of the ancestor, from whom the inheritance descends on the particular estate, the descent merges the contingent remainders.—18. In the seventeenth, that where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance, the contingent remainder is, generally speaking, not destroyed; where the accession of the inheritance is by a conveyance, accident, or circumstance, distinct from that conveyance which created the particular estate, the contingent remainder is, generally speaking, destroyed.—19. In the eighteenth section he considers the effect of a feoffment upon condition, by a tenant for life, in destroying contingent remainders.

is sufficient to support a contingent remainder. Per Holt, M. 9 W. 3. (Vide Comyns's Rep. 46.)

Though the particular estate be revived after the remainder first attached: as, by entry for a condition broken, &c. Per Hale, 2 Sand. 387. Per Holt, M. 9 W. 3. Sal. 577. (Vide Comyns's Rep. 46.)

So, if a remainder to a person *in esse* be contingent, because it commences after a contingent fee to another not *in esse*; if by fine, &c. the particular estate be destroyed before the other comes *in esse*, the remainder *in esse* cannot take effect. R. 1 Sal. 224.

So a future right of entry is not sufficient to support a contingent remainder. Dub. 1 Vent. 189. Per Holt acc. M. 9 W. 3. inter Thompson and Leach, (Vide Comyns's Rep. 46. Sal. 577.)

As, if an estate be limited to A. for life, and afterwards to his wife for life, remainder to the first son of B. &c. If A. makes a feoffment before B. has issue, the contingent remainder is destroyed: for the feoffment by A. passes his estate and the remainder to the wife during the coverture; and so no right of entry was in him during the coverture. Semb. 2 Rol. 796. l. 45.

If A. be disseised, and a descent cast, and five years passed, by which the entry is tolled. Sal. 577.

So, if the freehold be gone, or defeated before the remainder upon it vests, though a particular estate for years remains: as, if a feoffment be to the use of A. for years, remainder to B. in tail, remainder to the right heirs of A. If B. dies without issue in the life of A. the remainder to his right heirs is void. R. 2 Rol. 791. l. 50.

So, if a particular estate by devise, &c. be destroyed by the wrongful act of the tenant before any remainder vests, the wrongful estate never can be made void but by the right heirs of the devisor. 1 Sal. 224. 5.

(B 16.) What remainder shall be contingent. Vide Devise,  
(N 16. 17.)

If (r) a remainder be limited to commence upon a contingency (s),  
which

(r) 1. An estate is *vested*, when there is an immediate fixed right of present or future enjoyment. Fearn 2. — 2. An estate is *vested in possession*, when there exists a right of present enjoyment. Ibid. — 3. An estate is *vested in interest*, when there exists a present fixed right of future enjoyment. Ibid. — 4. An estate is *contingent*, when a right of enjoyment is to accrue, on an event which is dubious and uncertain. Ibid. — 5. For example, If A. convey or devise land to B. and his heirs, B.'s estate (in the first case, on the execution of the conveyance, in the second, on the decease of the testator,) is vested in him in possession. Butler's note, *ibid.* — 6. Again, if A. convey or devise land to C. for life, and after C.'s decease to B. and his heirs, B.'s estate is vested in him in interest. Ibid. — 7. If A. convey or devise land to C. for life, and if D. die in the life-time of C. then, after C.'s decease, to B. and his heirs, the interest limited to B. is contingent. But while the contingency exists, B., properly speaking, has not an estate in the land; he rather has a right to have an estate in the land, if the contingency takes place. Ibid.

(s) 1. Mr. Fearn in his second chapter considers the nature of the contingency upon which a remainder may be limited. — 2. And in the first section, treats of the objection to the legal validity of a remainder from its being limited on a contingency depending on an illegal event. — 3. In the second, from the remote possibility on which it is limited. — 4. In the third, from the condition on which it is limited being repugnant to some rule of law, or contrariant in itself, or inconsistent with the quality,



which perhaps will not be (*t*) before the particular estate (*u*) determines, the remainder will be contingent, and does not vest immediately (*x*):  
as,

lity or nature of the preceding estate. — 5. In the fourth section, he observes on the rule of law, that certain incidents and qualities are so annexed to and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition, or limitation, such as the right of a tenant in tail to levy a fine or suffer a recovery. — 6. In the fifth section, he treats on the distinction between those cases, where upon the happening of an event, an estate previously limited is before its natural expiration made to cease, and those when, upon the happening of an event, a remainder is to vest in the party, but not to be executed in possession till the expiration of the estate first limited. — 7. In the sixth section, he considers the effect of a limitation to the grantee or devisee of a particular estate, which enlarges it, on a given event, to a greater estate. — 8. In the seventh section, he treats of the distinction between those cases, where a subsequent estate at common law is limited to take effect upon a condition which is to defeat the preceding estate, and those cases, where the preceding estate is limited, subject to a condition, but the remainder is limited without any relation to or dependance upon that condition. — 9. In the eighth section, he treats on the limitation of shifting or secondary uses in surrenders of copyhold estates. — 10. And in the ninth, observes on limitations of a particular estate to a person, with a condition, that on a given event he shall have a greater estate.

(*t*) A contingent remainder is, a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. For if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the remainder will never take effect. Fearné 4.

(*u*) 1. Mr. Fearné, in his third chapter, treats of the estate necessary to support a contingent remainder. — 2. And in the first section, gives the general rule, that whenever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. — 3. And in the second, shews that the rule holds, whether the estates arise on limitations of uses, or are executed in possession at common law. — 4. But shews in the third, that there does not appear to be any necessity for a preceding freehold to support a contingent remainder for years. — 5. In the fourth section he proves, that it is sufficient for the preservation of a contingent remainder, that there subsists a right to the preceding estate at the time the remainder should vest, provided such right be a right of entry, and not a right of action. — 6. But shews in the fifth, that it must be a present right, and actually existing when the contingency happens. — 7. He shews in the sixth, that when the estates are limited by way of use, and are afterwards divested and turned to a right, it has been held requisite to the execution of the subsequent contingent uses, that either the *cestui que* use under some preceding vested use, or that the feoffees or their heirs, should enter in order to revest the estates; but that this doctrine should not be hastily admitted. — 8. In the seventh section he shews, that the estate supporting, and the remainder supported, should both be created by the same deed or instrument. — 9. But in the eighth, that when the legal fee is devised to or vested in trustees in trust, there is no necessity for any preceding particular estate of freehold to support contingent limitations. — 10. And in the ninth, that if rent were granted to A. for the life of another, with remainder over, though the grantee die during the life of the *cestui que vie*, yet inasmuch as the tenant during the time holds the land discharged, it has been held sufficient to support the remainder.

(*x*) 1. Mr. Fearné distinguishes four sorts of contingent remainders. — 2. *First*, where the remainder depends entirely on a contingent determination of the preceding estate itself. — 3. *Secondly*, where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate. — 4. *Thirdly*, Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. — 5. *Fourthly*, where the person, to whom the remainder is limited, is not yet ascertained or not yet in being. — 6. He then remarks, that contingent remainders appear to have been generally distributed into three kinds only; namely, the three last, specified in the above division of them; but that he thinks it obvious that the first sort above noticed cannot be brought within any one of the other three descriptions, from the connection of the contingent event with the determination of the preceding estate itself. But, perhaps, he continues, the instances adduced of this first kind of contingent remainders,

as, if a lease be to A. for life, remainder to the right heirs of B.; for perhaps A. may die before B. and then (y) the remainder will never take effect. 3 Co. 20 a. Pol. 56.

ders, may at the first glance appear to be cases of conditional or contingent limitations not strictly falling within the definition of a remainder, and that therefore it may be proper to obviate any doubt of this nature; which in the third section of his first chapter, he proceeds to do. — 7. In the fourth section he shews, that from the third sort of contingent remainders, those must be excepted, where land is limited to a person for a term of years, if he shall so long live, and after his decease to another, and the term of years is of so long duration, that by common possibility the party cannot survive it. — 8. And in the fifth section he proves that, from the fourth class of contingent remainders those cases must be excepted, where land is limited to a person for his life, and after his decease to his heirs, or to the heirs of his body; in which cases by a rule of law of great antiquity, commonly called the rule in Shelley's case, the inheritance is held to be immediately executed in the ancestor, and therefore not to be in contingency or suspense, as to which see (B. 17.) — 9. In the sixth section he shews, that from the fourth class of contingent remainders, those likewise must be excepted, where a devise to the heir special of a person living has been held a sufficient designation of the person for the remainder to vest, notwithstanding the general rule, *nemo est hæres viventis*. — 10. And observes upon the supposed necessity, that under a limitation to the heirs male of a person operating as words of purchase, the person taking under that description must be general heir, as well as male heir. — 11. In the seventh section he proves, that the uncertainty which makes a remainder contingent, is not the uncertainty of its ever taking effect in possession, but its being originally limited on a dubious event, or to a dubious person, and the event, or the persons being yet in suspense. — 12. And he applies this doctrine to the usual limitation to trustees for preserving contingent remainders. — 13. In the eighth section he considers the effect of contingent remainders intervening between the particular estate and the remainders over, in making them contingent or not; first, where such contingent remainders are in fee simple; secondly, where they are not in fee simple. — 14. In the ninth section he shews, that where estates are subjected to a general power of appointment; the power does not suspend the effect of the limitations subject to it, but the limitations vest subject to be divested by a subsequent execution of the power. — 15. In the tenth section he considers those cases, where a condition annexed to a preceding estate, is, or is not, to be considered as a condition precedent to give effect to the ulterior limitations, in the following order. — 16. First, limitations after a preceding estate, which is made to depend on a contingency that never takes effect. — 17. Secondly, limitations over upon a conditional contingent determination of a preceding estate where such preceding estate never takes effect. — 18. Thirdly, limitations over upon the determination of a preceding estate by a contingency, which though such preceding estate takes effect, never happens. — 19. Wherein he instances in cases in which a remainder is limited in words which apparently, but not in reality import a contingency; either because they mean no more than would be implied without them, or because they do not amount to a condition precedent, but only denote the time when they are to vest in possession — 20. And also in cases where the contingency upon which an estate is limited, has been considered as a condition subsequent, not precedent; and the estate has therefore been held to be immediately vested, subject to be divested by the condition when it happens.

y) 1. Mr. Fearn in his fourth chapter treats of the time when a contingent remainder should vest. — 2. And in the first section shews, that it is necessary that some preceding freehold estate should subsist and endure until the time when the contingent remainder vests. — 3. But, in the second, that the remainder may be so limited as not to vest till the very instant at which the preceding estate determines. — 4. In the third he shews, that wherever a preceding estate is in several persons in common or in severalty, a remainder limited upon it in contingency may fail as to one part, and take effect as to another, as the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. — 5. And in the fourth, that where a contingent remainder is limited to the use of several, who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet shall it divest as to the proportions of the persons afterwards becoming capable, before the determination of the preceding estate.

A lease to A. till his full age, remainder to B. It will be a contingent remainder. R. 3 Co. 20. a.

A lease to A. for life, remainder to B. for life, and if B. dies before A. remainder to C. 3 Co. 20. a.

A feoffment to A. to the use of B. for the life of C. and if B. and C. die, remainder to D. The remainder is contingent. Lane, 22.

A devise to A. for life, and if he shall have issue male to such issue; if he shall not have them to B. Semb. 3 Lev. 434. R. 1 Sid. 47. Ray. 28.

A lease to A. for life, and if B. pays so much, remainder to the right heirs of B. For perhaps B. will not pay during the life of A. Pol. 57.

Or, after the death of A. and C. to B. For perhaps A. may die before C. and the remainder cannot commence till the death of both. R. Pol. 57.

A lease for forty years if A. so long lives, remainder, after the death of A. to another, is contingent. Ray. 144. Pol. 67. 2 Ver. 131.

To husband and wife for life, and afterwards to the heirs of the survivor. Co. L. 26. a.

So, if a remainder commences upon an act, which determines the particular estate: as, if a lease be to A. till his return from Rome, and after his return, to B. The remainder to B. is contingent. R. 3 Co. 20. a.

So, if a remainder commences after a contingent fee, it cannot be vested, but contingent: as, a devise to A. for life, and if he has issue male, to him in fee; if he has not, to B. in fee: the remainder to B. is contingent. R. 1 Sal. 224.

But there cannot be a remainder for years in contingency: for every lease for years enures by way of contract. Ray. 151. (z)

(z) 1. Mr. Fearn, in the sixth chapter of his essay, treats of certain miscellaneous properties of contingent remainders. — 2. And in the first section shews, that where a remainder of inheritance is limited in contingency by way of use or by devise, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator until the contingency happens to take it out of them. — 3. In the second, he considers the effect of a devise of lands to trustees and the survivor of them, and the heirs of the survivor in trust to sell. — 4. In the third he shews, that the inheritance continues in the grantor, when a contingent remainder of inheritance is created in conveyances at common law. — 5. In the fourth, that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, except the existence of the devisee of the contingent interest at some particular time, may by implication enter and make a part of the contingency itself, upon which such interest is intended to take effect. — 6. In the fifth, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to limit the interest which shall afterwards accrue by the contingency. — 7. In the sixth, that contingent remainders appear formerly to have been held not devisable by the person entitled thereto; but that recent determinations seem to have established the power of testamentary disposition of contingent and executory estates and possibilities, accompanied with an interest, and of such as would be descendable to the heir of the object of them dying before the contingency or event on which the vesting or acquisition of the estate depended. — 8. And in the eighth, that a fee cannot at common law be mounted upon a fee; yet that two or more several contingent fees may be limited as substitutes or alternatives one for the other.



## (B 17.) What shall be vested. Vide Devise, (N 18.)

But if a remainder be to commence upon a thing casual, but certain in the event, though it be expressed that it shall not commence till the casualty happens, the remainder shall be vested, and is not contingent: as, if a lease be for years if B. so long lives, remainder, when B. dies, to D. For it is certain that B. must die, and the words, when B. dies, denote the time when the remainder shall take effect in possession. Pl. Com. 33. a. (a)

So,

(a) 1. This is the rule mentioned above as the exception to the third sort of contingent remainders.—2. To which may be added what also was mentioned before, that where land is limited to a person for his life, and after his decease to his heirs or to the heirs of his body; in such cases by a rule of law of great antiquity, commonly called the rule in Shelley's case, the inheritance is held to be immediately executed in the ancestor, and therefore not to be in contingency or suspense.—3. The effect of which rule is considered by Mr. Fearn, in the fifth section of his first chapter, in relation to the following cases.—4. Where the estate of freehold limited to the ancestor is determinable on an event which may happen in his life time.—5. Where the limitation to the heirs, or heirs of the body of the ancestor, is contingent.—6. Where the ancestor's estate of freehold is limited to him in trust for some other person, or to answer some particular purpose.—7. Where there is a joint limitation of the freehold to several, followed by a joint limitation to them of the inheritance.—8. Where the limitation of the freehold is to two persons, or more, successively, remainder to the heirs of their bodies.—9. Where contingent limitations intervene between the preceding freehold and the subsequent limitation to the heirs.—10. Where a limitation to the wife for life, is followed by a remainder to the heirs of the body of husband and wife.—11. Where the freehold results to the ancestor, by implication.—12. Where the estate limited to the ancestor is equitable, and the limitation to his heirs carries the legal estate.—13. Where the estate limited to the ancestor is legal, and the estate limited to the heirs is equitable.—14. Where the land, of which such limitations are made is copyhold.—15. Where limitations of copyhold land to the heirs of the surrenderor are preceded by no limitation to the surrenderor himself.—16. Where there is a limitation to a person's heirs by one deed, and he acquires the freehold by another.—17. Where there is a limitation to a person for life by one deed, and the estate is afterwards limited to the heirs of his body, under an execution of a power of appointment contained in that deed.—18. He then gives an explanation of the expression "words of purchase" as distinguished from that of "words of limitation," in the cases to which the rule in Shelley's case is considered to apply.—19. He then shows the effect of the words "heirs male of the body, &c." When they operate as words of purchase.—20. He then treats on the supposed origin of the rule in Shelley's case.—21. Then on the effect of the rule in Shelley's case on equitable limitations, where they are contained in marriage articles.—22. And then gives a particular examination of such of these limitations as seem to fall under the 11 H. 8. c. 20.—23. And when they are contained in other instruments than marriage articles; considering the supposed difference between trusts executory and trusts executed.—24. He then shews that before the judgment of K. B. in *Perrin v. Blake*, in 1769, there was no decided case where a perfect legal limitation in a deed or will to the heirs or the heirs of the body, in the plural number, unqualified by any concomitant limitation to sons, daughters or children, preceded by a limitation of the legal estate for life to the ancestor, in the same deed or will, had been held not to attach in that ancestor, but to go to the heir by purchase.—25. He discusses the propriety of the determination of the K. B. in that case.—26. And then, the cases anterior to that case, on limitations literally falling under the rule in Shelley's case.—27. And then the arguments generally used in support of the determination of the K. B. in that case.—28. And then the cases subsequent to that case, on limitations literally falling within the rule in Shelley's case.—29. He then considers the effect of the rule in Shelley's case, where there is a limitation to the ancestor for his life, and a subsequent limitation to the heir of his body, in the singular number, without words of limitation superadded.—30. He then shews the effect of the

So, a lease for life or years, remainder after the death of the lessee, or end of the term to B. 3 Co. 21. a. Cro. El. 450. 585.

A gift to A. and the heirs of his body, and if it happens that he dies without issue, remainder to B. the remainder vests immediately. Hob. 30, 31.

A devise to A. in tail, and after his death, without issue, to B. and if B. dies without issue, A. not being alive, to C. in fee; the remainder to C. is vested: for the words, A. not being alive, import nothing but what was implied. R. 1 Sal. 233.

So, if a fine or feoffment be to A. till he comes back to England, and attains his full age, or dies, and after his return and full age, or death, remainder to B.; the remainder vests immediately: for it is of necessity that he will do the one thing or the other; for he will come back or die. Semb. 1 Leo. 244. Cro. El. 269.

So, if a lease be for 99 years if A. lives so long, and after the death of A. to B. in fee; the remainder will be vested; for it shall not be intended that A. may survive the term. R. Pol. 67.

So, if a remainder commences upon a contingency, which does not denote a condition precedent, but the time of the commencement of the estate: as, a devise to A. and afterwards to his first, second, third, and fourth sons in tail, and if the fourth son dies without issue, to B. he shall take though A. has no son. R. Mo. 487.

So, a devise to A. for life, if she does not marry: and if she marries, to B. in tail, &c. the remainder to B. is vested, and not contingent: for the devise to A. was during her widowhood, and the limitation to B. if she marries, was tantamount as upon determination of her estate. R. Ray. 428.

So, a devise to A. for life till he aliens, and then to B. &c. R. Mo. 487.

Or, till he discontinues, &c. R. 2 Cro. 697. Jon. 57.

So, if a remainder be limited to a person *in esse*, after a contingent estate for life, or in tail, it shall be vested. 1 Sal. 224.

### (B 18.) When an estate shall be executed, and not remain.

If an estate be granted to husband and wife for their joint lives, remainder to the heirs of the body of the wife by the husband begotten; it shall be an estate tail executed in the wife, though the jointure is not severed. R. Ray. 126.

So, if there be a contingent *mesne* remainder between an estate for life, or years, and the limitation of the inheritance, it shall be executed till the contingency happens: As, if a feoffment be to the use of B. for

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the rule in Shelley's case, where after a limitation to the ancestor for life, and a subsequent limitation to the heirs of his body, in the plural number, words of limitation are superadded. — 31. He then considers the present extent and prevalence of the rule in Shelley's case, in the construction of limitations contained in deeds and marriage articles. — 32. And then its present extent and influence, in the construction of limitations contained in wills; exhibiting the sentiments on this point of Blackstone J. the Annotator, Butler, Thurlow C., and of the author. — 33. See farther in Preston on Estates his "Succinct view of the rule in Shelley's case, exhibiting, by negative and affirmative propositions, the instances in which several limitations, one to the ancestor, the other to the heirs, the heirs of the body, or issue of the body of that person, do and do not give the inheritance to the ancestor."

life

life, remainder to the first son which B. shall have, in tail, remainder to B. and his heirs; the estate is executed in B. till the son be born. Vide 2 Sand. 383.

So, to B. for life, remainder to the first son which B. shall have, in tail, remainder to the heirs of the body of B. begotten, &c. an estate tail is executed in B. Cont. per 2 J. Cro. El. 316. But acc. clearly, 2 Sand. 383, 386.

So, if it be to B. for life, remainder to his first son who shall have issue male and his heirs for ever, and for want of such issue, remainder to B. and his heirs. R. Cro. Car. 364.

So a devise to A. for life, and after his death to the heirs of his body, is an estate tail executed. R. Cart. 171. Vide Demise, (N 5.)

So a covenant to stand seized to himself for life, remainder to A. for life, remainder to the first, second, third and every other son of his body, and the heirs male of the bodies of such first, second, and other son issuing severally and successively; provided that if A. dies without issue male, the covenantor shall stand seized to the intent to raise 100*l.* for a daughter, shall be an estate tail executed in A. R. 2 Jon. 114.

So a feoffment to the use of husband and wife for life, remainder to their first son in tail, remainder to the husband and wife and the heirs of their bodies, is an estate tail executed in them. Co. L. 28. a. R. 11 Co. 80.

But if an estate be to A. for life, remainder to the next heir male of A. and the heirs male of his body; it is not an estate tail executed in A. because the remainder is to his next heir male in the singular number, with words of limitation to his heirs. R. 1 Co. 66. b. Archer.

Or, to A. for life, remainder *seniori puero* of his body, in tail. R. Mo. 104.

Though the remainder to the next heir be upon a contingency, and in abeyance. Semb. Pol. 83, &c.

So, if there be a *mesne* remainder *in esse*, the estate shall not be executed: as, if it be to A. for years, remainder to B. for life, remainder to the right heirs of A. it shall not be an estate executed in A. R. 3 Lev. 407.

Or, to A. for life, remainder to his wife, remainder to the right heirs which A. shall beget upon the body of his wife; it is not executed in A. because of the remainder to the wife. R. Ray. 36. 1 Sid. 83. R. 2 Lev. 407.

Or, to A. for life, and afterwards to the wife for life, remainder to the heirs of both their bodies. Ray. 36. R. 1 Lev. 37.

So a possibility may prevent the execution of an estate: as, if a devise be to A. his son and heir, and if he dies without issue living B. to B. and his heirs; if he has issue living at his death, to the issue and his heirs; this *mesne* possibility prevents the merger of the estate for life in A. by the descent of the fee. 3 Lev. 407.

So, if an estate comes by several conveyances, it shall not be executed; as, if by indenture an estate is settled to A. for life, and afterwards by devise it is given to the issues of the body of A. Per Holt, Skin. 559.

## (B 19.) A remainder; by what words created.

If any words are used by which an estate is raised depending upon a particular estate, it is sufficient: as, if a man makes a lease to A. for life, and that after the death of A. the lands *redibunt* to B. and C. and their heirs; it will be a good remainder to them. Pl. Com. 29. a.

If a lease be to A. for life, remainder to W. and if W. dies living A. that then it shall remain to B. it will be a good remainder to B. for it does not import that B. shall have it in the life of A. if W. dies, but that he shall have it in remainder, as W. had it. Pl. Com. 29. b. 32. a.

If a devise be to A. for life, and if he has issue male, to his issue male and his heirs, a remainder vests in the first son: for the issue male shall be taken as a single person. R. 1 Sal. 224.

## (B 20.) When it shall take effect.

If a demise be to A. for 10 years, and of other land to B. for 20 years, remainder after the determination of those several leases, to C. when the 10 years expire, the remainder begins in the land demised to A. for it shall be construed distributively. R. 5 Co. 7.

So a devise of land to A. for life, of a house to his wife for a year after his death, and that after a year and the death of A. all his lands and tenements shall go to B.; he shall have the house at the end of the year, though A. be then living. R. 1 Lev. 212.

If a limitation be to the use of A. for life, and of other land to the use of B. for life, and after the death of A. and B. that the whole shall go to D.; he shall have, after the death of each, the land limited to him. R. Pol. 65. 67.

If a devise be to his two sons and the heirs of their bodies, and that his executor shall have it till his sons attain their several ages of twenty-one years; if the eldest attains twenty-one years, he shall have his part, though they are joint-tenants. R. 2 Cro. 259.

But where there are cross-remainders, or by express words he in remainder shall not take part till he takes the whole, there the remainder shall not take effect by parcels: as, if a devise be to A. and B. and their heirs equally to be divided, and if they die without issue, I give all the lands to D.; if A. dies without issue, a moiety does not go to D.; for the intent is expressed, that he shall take the whole only when both are dead without issue. R. Ray. 452. Pol. 425. 434. Vide Devise, (N 14. 15.)

## (B 21.) A gift in tail, with a fee expectant.

If a feoffment be to the use of A. and a woman whom he intends to marry, and their heirs, *habendum* to them and the heirs of their bodies, they have an estate tail, with a fee expectant. R. 2 Rol. 19. 23. Cont. 8 Co. 154. b. Co. L. 21. a. Vide Fait, (E 9.)

Or if a feoffment be to A. and the heirs of his body, *habendum* to him and his heirs. Co. L. 21. a.

(B 22.)

**(B 22.) Alienation by tenant in tail:— What does not bar the issue.**

By the st. W. 2. 1. *de donis*, it was enacted, *quod non habeant illi quibus tenementum fuit sic datum* (viz. the tenant in tail) (b), *potestatem alienandi, &c.*

And therefore, by common law since this statute, tenant in tail could not by fine, feoffment, grant, release, or confirmation, &c. bar the estate tail. 2 Inst. 335.

Nor tenant in tail by descent, though the statute says, *illi quibus tenementum fuit datum*. 2 Inst. 336.

So he cannot charge the estate tail. 1 Rol. 841. l. 52.

So, if he accepts a fine *sur conuzance de-droit come ceo, &c.* from another; that does not change his estate. R. 1 Vent. 257.

So a fine by him, without proclamations, does not bar the entail, though it makes a discontinuance. Semb. Jon. 354. Vide Fine, (G 1.)

**(B 23.) What shall be void.**

If tenant in tail makes a grant of a thing not *in esse*, as of a rent *de novo* out of land, the grant after his death is void as to the issue. Co. L. 327. b. 3 Co. 85. b. Pl. Com. 437. 1 Lev. 168.

So, if he grants the next avoidance. R. 1 Rol. 858. l. 5. 1 Bul. 32. 35.

Or be bound in a statute-staple, &c. Pl. Com. 437. a.

So, if tenant in tail in remainder after an estate for life, grants his estate to another, it determines by his death.

So, if tenant in tail makes a lease to commence after his death by express words, it will be void. 1 Sid. 261.

**(B 24.) What only voidable.**

But if tenant in tail makes a discontinuance by feoffment, &c. this is only voidable by action of the issue or him in remainder or reversion. Co. L. 327. b. 3 Co. 85. b. (c)

So, if by bargain and sale, covenant to stand seised, lease and release, &c. he conveys to a stranger, a base fee passes, which is not avoided till entry of the issue. Vide Post, (B 33.)

So, if tenant in tail makes a lease rendering rent, not warranted by the st. 32 H. 8. it is only voidable.

Though the lease be to commence at a future day, and he dies before the commencement. 1 Rol. 842. l. 50. 843. l. 15. R. Pl. Com. 437.

Or without rendering rent. R. 1. Sid. 261.

So, if tenant in tail grants an advowson, common, tithes, rent *in esse*, or other thing which lies in grant to another in fee; the issue in tail may make the grant void, or only voidable, at his election: for he may

(b) But still the prohibition was extended by the judges to the issue *in infinitum*. And Broke says, the omission of the heirs of the donee in the statute was a misprision of the clerk. 1 Cruise, 95. Plowd. 13. T. Jones, 239. Bro. Abr. Parliam. 91. 2 Inst. 336.

(c) Lord Raym. 779.

by entry or claim make it void, or avoid it by a *formedon*. Co. L. 327. b. R. 3 Co. 84. 5.

So, if tenant in tail grants a reversion or remainder. 3 Co. 85. a. 86. a.

Though the grant was by fine before the st. 32 H. 8. R. 2 And. 110.

So, if tenant in tail makes a feoffment, though he cannot retain the estate or profits, yet the right to the entail remains in him, which may be barred by fine or recovery, or, if it be not barred or forfeited, shall descend to his issue. R. Hob. 336.

(B 25.) What bars the issue : — A fine with proclamations.  
Vide post, (B 31.)

So, by the st. 4 H. 7. 24. a fine in C. B. of lands, tenements and hereditaments after ingrossing shall be proclaimed the same term and three following terms at four several days in every term : and being so proclaimed, shall be a final bar, and conclude all privies and strangers, except, &c. Vide 1 Leo. 75.

And by the st. 32 H. 8. 36. fines with proclamations by persons of full age of lands, &c. before such fine levied entailed to the person levying the same, or any of his ancestors, in possession, reversion, remainder, or use, shall be a sufficient bar and discharge for ever against them, or any of their heirs claiming only by such entail, &c.

And therefore if tenant in tail levies a fine of lands to him entailed with proclamations, the issue in tail shall be barred by it : for the st. 32 H. 8. makes it a bar to the issue expressly. R. Raym. 359. 3 Co. 84.

Though the fine was levied of an estate tail in reversion or remainder, and not in possession. 3 Co. 84. Cro. El. 610.

So, if tenant in tail be disseised and afterwards levies a fine with proclamations, the issue shall be barred by it : for the statute does not speak of a seisin at the time of the fine, and the issue, being privy, is estopped to say, *quod partes finis nihil habuerunt*. R. 3 Co. 89. 90. Cro. El. 610.

Or makes a discontinuance, and afterwards disseises the discontinuee, and levies a fine. R. 3 Co. 91. a. Bend. pl. 156. Cro. El. 610.

Though the discontinuee enters and avoids the fine, before all the proclamations pass. R. 3 Co. 91. a. Cro. El. 610.

So, if the king tenant in tail levies a fine, &c. the issue is barred. R. 7 Co. 32.

If the issue in tail levies a fine, &c. in the life of the tenant in tail, who afterwards dies, the issue and all his issues are barred ; for the statute speaks of lands entailed to the person levying the same, or any of his ancestors. R. 3 Co. 51. a. 90. b.

So, if the issue in tail disseises his father, and afterwards levies the fine. R. 3 Co. 90.

So, if tenant in tail has issue two sons, the eldest levies a fine in the life of his father, who dies, and afterwards the eldest dies without issue ; the fine shall be a bar to the younger brother : for he claims the entail through his eldest brother. Per Periam, Mo. 252. Hob. 258. Co. L. 372. a. Jon. 32.

So, if there be grandfather, father, and son, the grandfather tenant  
in



in tail, the father levies a fine in the life of the grandfather, and dies in the life of the grandfather, and then the estate descends to the son; he shall be barred by the fine of his father: for, though he claims from the grandfather, yet he derives his title through the blood of his father. 3 Co. 90. b. Hob. 333.

So, if A. tenant in tail, remainder to the heirs male of his father, levies a fine, and dies without issue; the son of a father by another venter is barred. R. 3 Leo. 10.

So, if an estate tail be devised to B. when he attains twenty-four years of age, and he before such age levies a fine, and after such age dies; the issue is barred: for the statute speaks of land before the time of the fine entailed, &c. which extends to an entail *in futuro*. R. Cro. El. 122. 10 Co. 50. a. 2 Leo. 36. 3 Leo. 211. Cro. El. 610.

So, if husband and wife be tenants in tail, and the husband alone levies a fine; it bars the issue in tail: for he claims as heir of the body of both. R. Dy. 351. b. R. 9 Co. 140. Bend. pl. 257. Dal. 50. R. 1 And. 39. Sav. 9.

And if the husband dies, and his wife afterwards enters and avoids the fine (as she may within five years) whereby she is seised of an estate tail, and the remainders are revested; yet after her death the issue is barred. Hob. 257. 259. Dal. 50.

So, if the husband, after a fine by him alone, declares the uses to him and his wife, by which they are remitted, and the remainders re-vested; yet the issue is barred: for after the death of the wife the remitter ceases, and the estates are turned again to a right. Hob. 260.

So, if tenant in tail of a rent issuing out of the manor of D. levies a fine of the manor, with intent to bar the rent; the issue shall be barred, though the rent was not expressed in the fine: for it is comprised within a fine of the manor out of which it was issuing. Per 2 J. Hut. Cont. 2 Cro. 699. 2 Rol. 500.

So, if tenant in tail of an office, levies a fine of land belonging to the office. 2 Rol. 500.

If tenant in tail levies a fine and dies before all the proclamations are past, yet the issue shall be barred if the proclamations afterwards pass. R. 3 Co. 86. b. 90. a. Semb. 2 And. 112.

And the issue, by entry, or action, or claim, before the proclamations are all past, cannot avoid the fine. R. 3 Co. 87. a. 90. b.

And every fine shall be intended to be with proclamations, till the contrary appears. R. 3 Co. 86. b.

And the statutes which make a fine with proclamations a bar, give all incidents to perfect the fine. If it be levied by him in reversion, &c. a *Quid juris clamat*, &c. R. 3 Co. 86. b.

If tenant in tail levies a fine, the issue shall be barred, though within age, out of the realm, *covert*, *non compos*, or in prison. R. 3 Co. 91. a.

So the king tenant in tail may bar by fine. Cro. Car. 96, 7.

So a fine by tenant in tail not only bars, but extinguishes the estate tail. 4 Mod. 5. 2 Leo. 37. 1 Sal. 338.

For a fine by tenant in tail is as complete a bar to the issue, as a feoffment by tenant in fee. 1 Leo. 85.

And therefore, it will be as effectual a bar when found by verdict, as if it had been pleaded. R. 2 Leo. 37.

But if tenant in tail makes a feoffment, and the feoffee levies a fine, the

the issue in tail is not barred if he claims within five years after the death of the tenant the tail. 3 Co. 87. b.

So, if tenant in tail be disseised, and the disseisor levies a fine, and tenant in tail, or his issue, claims within five years after the fine. 3 Co. 87. b.

So, if the fine by tenant in tail was not with proclamations, but a fine at common law, it is not a bar.

So, if tenant in tail levies a fine *sur grant et render*, the issue may avoid it, if the father dies before the fine is executed. 3 Co. 89. b.

So, if tenant in tail, upon a fine, grants and renders a rent out of the land entailed, the issue is not bound by it: for the fine was not of the land itself, but of a rent newly created. R. 3 Co. 90. a. Semb. Dy. 213. b. Bend. pl. 141. Pl. Com. 435. b.

So, if tenant in tail has issue two sons, and the eldest levies a fine, and dies in the life of his father; the youngest shall not be barred: for he does not claim by his eldest brother, nor need mention him in his pedigree. *Per Periam*, Mo. 252. R. 2 Cro. 689. R. Hob. 332. R. Cro. Car. 434. 2 Rol. 501. Jon. 32.

So, if there be tenant in tail to him and his wife and the heirs males of their bodies, remainder to them and their heirs of their bodies, the husband dies having issue a son and a daughter, the son levies a fine, and dies without issue in the life of his mother; the daughter shall not be barred. R. Hob. 332.

So, if there be three sons, and the middle one levies a fine, and survives his father, but dies without issue in the life of the eldest brother; his fine shall not be a bar to his eldest or youngest brother. Hob. 333.

So, if the issue in tail levies a fine, and afterwards the tenant in tail makes a lease not warranted by the st. 32 H. 8. The lease is good against the conusee, as long as the issue in tail does not fail. R. 2 Cro. 689. 2 Rol. 498. Bridg. 27. Jon. 60. R. 1 Sid. 62. 1 Rol. 843. l. 20. Vide Fine, (L).

So, if tenant for life, and he in remainder in tail, join in a lease to A. for life, remainder to B. for life, and the issue in tail accepts the rent of A. and levies a fine. R. Cro. El. 253.

So, if tenant in tail makes a lease, and afterwards levies a fine; the conusee shall not avoid the lease. 4 Mod. 6. Dub. 1 Lev. 168.

Or, if he and the issue in tail join in a lease or charge, and afterwards join in a fine.

Or, if the tenant in tail makes a lease, &c. and the issue afterwards affirms it by acceptance of rent, and then levies a fine.

Or, if the issue in tail makes a lease, and afterwards dies, and his issue, having then the entail, levies a fine. R. 4 Mod. 5. Dy. 51. b.

Otherwise, if the lease was to commence *in futuro*, and the fine was levied by the issue before the commencement. R. 1 Sal. 338. R. 1 Sid. 260. Skin. 284. 317.

So a fine by tenant in tail of the king's gift, the reversion or remainder to the king, does not bar the issue, in all cases where by the st. 34 H. 8. 20. a recovery by him should not be a bar. Co. L. 372. b. R. 8 Co. 78. a. Vide post, B. 31.)

So a fine by tenant in tail is not a bar to him in reversion or remainder, if he claims, or pursues his action within five years after the tail ended. Co. L. 372. a. Vide Fine, (K 1. 2.)



(B 26.) A real Recovery, &c.

So a recovery in a real action, by verdict upon *ne dona pas*, binds the issue. 1 Rol. 840. l. 5.

So, if tenant in tail forfeits double the value of the marriage to the lord, it binds the issue. 1 Rol. 842. l. 5.

So, if tenant in tail grants a rent rent-charge for a release of a right to the land, it binds the issue. 1 Rol. 842. l. 10.

Or, in pursuance of a condition annexed to an estate tail. 1 Rol. 842. l. 20. 30.

But if a recovery be by default without voucher, the issue may falsify. 1 Rol. 840. l. 10.

Though the recovery be in a writ of right. Co. L. 373. a.

So, if the lord recovers in a *cessavit* against tenant in tail, it does not bind the issue. Co. L. 373. a.

(B 27.) A common Recovery. What Interest shall be barred by it.

So, if tenant in tail suffers a common recovery, it bars the issue in respect of the recompence in value. R. 10 Co. 37. b. R. Poph. 100.

Though he dies before execution. 1 Co. 106. 2 Rol. 396. l. 10. Dy. 374. a. 376. b. Vide Execution, (A 2. 3.)

And this has always been allowed since the st. *de donis*. 10 Co. 37. b.

Though he had before levied a fine, whereby his estate tail is extinct. R. 1 Rol. 223.

Though the recompence in value can never be obtained. R. 10 Co. 38. a.

Though it be erroneous; so long as it stands in force. R. Poph. 100.

So, if tenant for life, remainder in tail, suffers a common recovery, and vouches him in remainder; it bars the estate tail. R. 10 Co. 44. 3 Co. 60. b. Cro. El. 562. 570. Mo. 690.

And the remainder in fee. R. Cro. El. 562, 570. 3 Co. 61. a.

So, if husband and wife are tenants in special tail, remainder to the husband in tail general, remainder to B. and the husband alone suffers a recovery; though it is no bar to the wife and her issue but for a moiety, yet the husband having a remainder in tail general, all subsequent remainders are barred. R. 3 Lev. 108.

So a common recovery by tenant in tail bars all remainders, or the reversion depending upon it. 2 Rol. 396. l. 7. 6 Co. 42.

And all charges granted by him in reversion, or remainder. R. 1 Co. 63. a. Poph. 5.

So, if he in remainder makes a lease for life, upon condition; a recovery by tenant in tail bars the estate for life, and also the condition. R. 2 Co. 52. b.

So a remainder to the right heirs of B. shall be barred, though it be in abeyance. R. 6 Co. 42. a. Per Gawdy, 1 Co. 135. b. 136. a.

So, a remainder for years: for the lessee cannot falsify. Per Twisd. 1 Sid. 102. 2 Lev. 30.

So, a devise to another, upon a contingency after the death of tenant in tail without issue. R. Mo. 73.

So, if an estate tail be granted, and afterwards to the use that B. shall

shall have a rent-charge, remainder over; a common recovery by the tenant in tail bars the rent-charge. R. 2 Lev. 29, 30.

And, this, though the recompence in value does not extend to the rent: for the supposed recompence is the cause of the bar to the issue, but the ground of the bar of the reversion or remainder is, that it is a common assurance, and *quasi* excepted out of the st. *de donis*. Per Hale, 2 Lev. 30.

So, if there be tenant in tail, rendering rent to him in the reversion, with condition of re-entry for non-payment; a common recovery by the tenant in tail bars the condition. 2 Lev. 30. Cont. Sal. 570, 1.

So, by a common recovery, a power to make a jointure, leases, &c. shall be barred. R. 2 Lev. 60. Vide Pojar, (D).

So a common recovery bars the right of having a writ of error to reverse a fine by tenant in tail. R. Mo. 365.

So a common recovery bars a collateral condition annexed to an estate tail: As, if a gift in tail be, upon condition to pay a sum in gross, and for non-payment to re-enter. Sal. 571.

Or, upon condition, that if the donee marries any other than Searle, the estate goes over. R. Sal. 570.

So, if tenant in tail leases for years, acknowledges a judgment, &c. and afterwards suffers a common recovery to make a jointure, &c. the recovery enures for confirmation of the lease, &c. R. Ca. Ch. 120. 2 And. 111. Vide ante, (B 25.)

### (B 28.) If it be with single Voucher.

If the *præcipe* be against the tenant in tail himself, the estate shall be barred of which he was actually seised, and all remainders dependant upon it.

If tenant in tail, in remainder after an estate for life, disseises the tenant for life, and suffers a recovery with single voucher, the entail is barred: for the disseisin extends only to the estate for life, and does not turn the estate tail to a right. Cont. Semb. 3 Co. 59. a. Acc. 2 Rol. 395. l. 10.

But no estate shall be barred, which was turned to a right, and of which the tenant to the *præcipe* had not actual seisin, or seisin in law. 2 Rol. 394. l. 50.

And therefore, if tenant in tail makes a feoffment to the use of himself in fee, or in tail, and afterwards suffers a recovery, the first estate tail is not barred: for he was seised only of the estate raised by the feoffment. Pl. Com. 8. a. Manxel.

So, if he covenants to stand seised to the use of himself for life, and afterwards to his son in tail, and afterwards suffers a recovery with single voucher. R. Yel. 51.

So, if tenant in tail discontinues, and takes back an estate tail, and a recovery is had against him. 3 Co. 5. b.

So, if tenant in tail be disseised, and the disseisor enfeoffs him, and afterwards he suffers a recovery with single voucher. R. 3 Co. 59. a. 2 Rol. 395. l. 5.

So, if there be tenant for life, remainder to A. in tail, and a recovery is pleaded to be had against A. *tunc tenentem liberi tenementi*, (which ought to be intended to be by disseisin, when the tenant for

life appears by the same record to be living,) with single voucher; the entail is not barred by it. 3 Co. 59. a.

So, if husband and wife are seised in tail, and a recovery is had against the husband alone. 3 Co. 5. b.

So, if A. tenant for life, remainder to B. in tail, joins in a fine *sur greut et render* to A. for life, and afterwards to B. in fee, and then B. suffers a recovery with single voucher to the use of himself in fee; the entail is not barred; for though the fine did not make a discontinuance, being by B. not seised in tail, yet the estate tail was divested by it, so that he was not seised in tail at the time of the recovery. R. Cro. El. 826.

If A. tenant in tail leases to B. for life, (which is a discontinuance,) and dies, and B. surrenders upon condition to C. who has the remainder in tail, against whom a *præcipe* is brought, and a recovery had; the estate tail of C. is not barred; for C. was not remitted. R. Skin. 3. 63.

(B 29.) If it be by tenant in tail as vouchee.

If tenant in tail be vouchee in a common recovery, he comes in in privity of such estate as he ever had. Pl. Com. 8. a. Manxel.

And therefore, if husband and wife, seised to them and the heirs of the body of the husband, make a discontinuance, and the discontinuee suffers a recovery, and vouches the husband; the tail shall be barred. R. 3 Co. 6. R. 6 Co. 32. a.

If tenant in special tail discontinues, and takes back an estate in tail general, and afterwards takes back an estate to him and his heirs upon B. begotten, and afterwards discontinues, and the discontinuee suffers a recovery, and vouches the tenant in tail; the three several entails are barred by one recompence: for the vouchee comes in in privity of all the estates. Pl. Comb. 8. b. 3 Co. 6.

So, if the tenant vouches a stranger at first, who afterwards vouches the tenant in tail; his estate shall be barred. R. Sal. 571.

So, if the heir be vouched, he comes in in privity of the estate of his ancestor to whom he was heir: as, if tenant in fee makes a feoffment, and the feoffee suffers a recovery, and vouches the heir of the feoffor. Semb. Pl. Com. 7. b.

So, if tenant in tail in possession and he in remainder be jointly vouched, though it be not so regular, yet the vouchee shall be barred: for the joining of a stranger with him does not prejudice. R. Sal. 571.

But the vouchee comes in in the same degree as he had the estate at first: and therefore, if a recovery would not bar his estate when he was seised, it shall not be barred if he be a vouchee. Pl. Com. 7. b.

So, if a parson enfeoffs with warranty, and be vouched, he shall pray in aid of the patron and ordinary. Pl. Com. 7. a.

If tenant by the curtesy enfeoffs with warranty, and is vouched; he shall have aid: for he comes in in the same plight as when he was seised of the land. Pl. Com. 7. b.

(B 30.) What interest is not barred.

But a common recovery does not bar an interest precedent to the estate tail of which the recovery was suffered: as, if tenant in tail, remainder to A. remainder to B. remainder to C. makes a feoffment, and the feoffee suffers a recovery, and vouches B.; his estate tail and all the subsequent

subsequent remainders are barred; but not the estate of A. or other precedent estates. R. 3 Co. 6.

So, if tenant in tail makes a lease, and afterwards suffers a recovery; the precedent lease is not barred. R. Cro. El. 718. Eq. Abr. 257. Vide ante, (B 25.)

So, if an estate be granted to B. in tail, rendering rent to him in the reversion, and B. suffers a recovery; the rent shall not be barred. R. Cro. El. 792. Per Hale, 2 Lev. 30. Sal. 571.

So, if tenant in tail makes a mortgage, and afterwards suffers a recovery for a collateral purpose; the mortgage shall be confirmed by the recovery. Eq. Abr. 257.

So, generally, a common recovery does not bar a thing to which the recompence in value does not extend; as, if a man be not in in privity of the estate tail: as, if tenant in tail be attainted of treason, and the king grants his estate to A. who enfeoffs B. who suffers a recovery, in which A. is vouched; the estate tail is not barred; for A. claims paramount the entail. 2 Rol. 394. l. 40.

So, if tenant in tail be attainted of treason, and afterwards suffers a recovery; this does not bar the remainder. 2 Rol. 394. l. 37.

If tenant in tail enfeoffs B. who suffers a common recovery without vouching the tenant in tail. Ray. 29.

So a mere possibility shall not be barred by a recovery: as, if a devise be to A. and his heirs, and if he dies without issue in the life of B. to B.; a recovery by A. without joining B. does not bar his possibility. R. 2 Cro. 593. 2 Rol. 394. l. 20.

But if B. comes in as vouchee, his possibility shall be barred. 2 Cro. 593.

So in all cases of an executory devise, a recovery does not bar him who claims by such devise. R. 1 Lev. 136.

So a recovery by a mortgagee, does not bar the mortgagor, if he be not vouched. R. 2 Cro. 593.

So, if an estate be granted to A. and his heirs so long as B. has heirs of his body; a recovery by A. does not bar the donor: for a recovery by tenant in fee does not bar a collateral interest; as a condition, covenant, &c. Per Houghton, 2 Cro. 593.

(B 31.) If the reversion, or remainder, be in the king.

So, by the st. 34 & 35 H. 8. 20. a common recovery by tenant in tail of lands, &c. whereof the reversion, or remainder at the time of such recovery shall be in the king, shall not bind the heirs in tail. R. Dy. 32. a. in marg.

So, if there be tenant in tail, remainder in tail, the reversion or remainder to the king; a common recovery by the tenant in tail does not bar the first remainder, any more than the heirs in tail. Co. L. 372. b.

So, if the king after a gift in tail, grants the reversion to another in tail, the fee to the king; a recovery by tenant in tail does not bar the reversion in tail. R. 8 Co. 77. 8.

So, if the king procures a subject, for money, &c. to make to B. an estate tail, for recompence of service, &c. remainder to the king, and this appears upon record; B. by recovery cannot bar the entail. Co. L. 372. b. 2 Co. 16. a.

And

And this statute extends to subsequent as well as precedent gifts in tail by the king. Co. L. 373. a.

So a fine does not bar the estate tail, where it was given by the king, and the reversion continues in the crown. 1 Sid. 166. Acc. Cro. El. 595.

But this st. 34 H. 8. 20. does not extend to an estate tail made by a subject, though he afterwards grants the reversion or remainder to the king. Co. L. 372. b. 2 Rol. 393. l. 50. 396. l. 15. R. Mo. 195. 2 Co. 15. b. 1 And. 142. 46. Lut. 848.

Or, it descends afterwards to the king. Co. L. 372. b. R. 2 Co. 15. b.

Or, if the reversion or remainder be to the king only for life, or years. Co. L. 372. b.

Or, if the reversion or remainder be granted over by the king, before the recovery suffered. Co. L. 372. b. Raym. 288.

So, if the estate tail be created by the king for a valuable consideration. Per 3 J. Dy. 32. a. in marg.

So, if an estate tail be varied by a new act of parliament. Dub. Ray. 260. 286. 319.

If the reversion be granted by the king to A. to the intent that there shall be a recovery, and that it shall be afterwards regranted to the king. R. Hard. 409.

Yet where a reversion or remainder is in the king, a recovery by tenant in tail cannot bar or divest such reversion, &c. And therefore, if a recovery be by tenant in tail, (which was not by gift of the king,) the reversion or remainder to the king; the estate tail and all remainders are barred, except the estate of the king. 2 Rol. 394. l. 2. R. Bend. pl. 254. Dy. 32. a. 1 And. 142.

So, if a recovery be by tenant in tail, remainder to the king in tail, remainder to B. in fee; the estate tail and remainder in fee are barred. 2 Rol. 394. l. 5. Lut. 848.

And where a recovery is a bar, a fine with proclamations shall be a bar to the entail, though the reversion be in the king. Co. L. 373. a.

So, a fine *sur grant et render*. Sav. 106.

So a fine by a disseisee of an estate tail of the gift of the king, and non-claim for five years, shall be a bar to the tail. Co. L. 373. a. Dub. Cro. El. 595. said that it is not law. 1 Sid. 166. Vide Fine, (K 1. 2.)

So, a collateral warranty of the ancestor of the tenant in tail. Co. L. 373. a.

But a fine by tenant in tail, where the reversion is in the king, does not divest the reversion, but passes the estate to the conusee, during the continuance of the entail. R. 3 Leo. 57. 4 Leo. 40. Per 3 J. before the st. 34 H. 8. Dy. 32. a.

If a reversion upon an estate tail be granted to the king, and before the deed is inrolled, a recovery is suffered; the reversion is barred. Dub. Mo. 752.

(B 32.) A demise pursuant to the st. 32 H. 8.

So, by st. (d) 32 H. 8. 28. All leases by writing indented under seal,

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(B) 1. An estate in fee tail, though an estate of inheritance, is of a limited nature, being a gift to a man and the heirs of his body, who are prohibited from alienation, except,

seal, for years, or life, by any of full age, having an estate in fee tail, shall be good against the lessor and his heirs, in like sort as if he had been seised in fee simple.

Provided

except by particular modes prescribed by law. — 2. If, however, tenant in tail after the statute *de donis* had made a lease for years and died, the lease was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it as he thought fit. — 3. Acceptance by tenant in tail of the rent or fealty, or bringing an action for the recovery thereof, or an action of waste, were such acts as amounted to a confirmation of the lease, because these plainly manifested his intent, to continue the lessee in possession upon the terms of his lease; and by consequence such issue could never afterwards avoid it during his own life. Bac. Abr. Leases, D. — 4. If a tenant in tail makes a lease to A. for twenty years, and the lessee makes a lease to B. for ten years, and then the tenant in tail dies, and the issue accepts the rent of B., this is no affirmation of the lease, because B. was under no obligation to pay his rent to him, and is answerable for it over again to A.; and therefore his payment to the issue in tail was voluntary, and in his own wrong, and the issue's acceptance thereof not conclusive, more than if he had received it of a mere stranger; and by consequence the issue in tail may enter and avoid the lease; but if the issue had accepted the rent from A., this had amounted to a confirmation of the lease made to A. and by consequence he could not after avoid the lease to B. which was derived thereout. Ibid. — 5. But if A. had assigned five acres of the land in lease to B. for the residue of twenty years, and the issue in tail had accepted the rent from B., this would amount to a confirmation of the entire lease to A. because the rent issuing out of the whole and out of every part of the land, B. as to these five acres, succeeded in the place of A. by having his whole interest therein; and then the issue in tail, by acceptance of the rent from one whose part as to him was equally chargeable with the whole rent, had given his consent that the whole estate chargeable therewith shall continue, though he choose to take his rent out of part only; for otherwise he would do injustice to A. who would be liable to make recompense to B. for the overplus of the rent, and yet have no recompense himself, if the issue might defeat the residue of the lease remaining in his hands. Ibid. — 6. If a tenant in tail makes a lease for ten years, to begin ten years hence, and dies, and the issue within the ten years enters and makes a feoffment in fee; the feoffee, at the end of the ten years, shall have election either to affirm and make good such lease, or to avoid it; for upon the death of tenant in tail, the possession has become vacant, and none had a right to enter but the issue in tail, for the time of the lessee's entry has not yet come; then when the issue enters generally, his primary right was, in respect of the inheritance, descended to him as issue in tail, and he had no occasion to direct his entry at that time to any other purpose; and therefore his entry shall be intended in respect of the estate tail descended to him; and when after such entry, he makes a feoffment in fee to a stranger, this transfers the possession just in the same plight as the issue in tail himself had it, without any thing done to determine his election, one way or another; and then the same power of election passes incorporated in the feoffment; and the feoffee, when the time for making use thereof is come, may use it either to determine the lease by ousting the lessee, or to affirm or make it good by acceptance of rent from him. — 7. If tenant in tail make a lease for life, whereby he gains a new reversion in fee so long as tenant for life lives, and he grants a rent charge out of the reversion, and afterwards tenant for life dies, whereby the grantor becomes tenant in tail again, and the reversion in fee is defeated; yet because the grantor had a right of the entail in him, clothed with a defeasible fee simple, the rent charge remains good against him, but not against his issue. Co. Litt. c. 12. 66. — 8. A man seised in fee made a lease for ninety-nine years, if three persons so long lived; then he settled the reversion upon himself in tail, with power to make leases for twenty-one years, and then he made such a lease and died; the son, who was the issue in tail, levied a fine and sold the reversion; the first lease determined, and the court thought that the cognizee might avoid the second lease, because it never was in the election of the tenant in tail, or his issue, to avoid it, they having conveyed away their estates, before this second lease was to commence; for if tenant in tail make a lease to commence *in presenti*, and convey away his estate by fine, the cognizee must hold it charged with such lease; but if it be to commence in future, it is otherwise, because it cannot be avoided before the commencement. — 9. Therefore if tenant in tail makes a voidable lease for years or life, and dies, and the issue



Provided not to extend to leases of lands then in lease, if the same be not surrendered or ended within a year after the new lease, nor of lands not most commonly letten for twenty years next before, nor to leases without impeachment of waste, or above 21 years, or three lives from the day of making, or whereon is not reserved during the term the most accustomable rent paid for the same tenements for twenty years next before. Vide Baron and Feme, (G 3.) Vide post, (G 4. 5.)

And that the issue in tail may have the reversion, rents, and services, and all remedies and advantages after the death of the lessor, in the same manner as the lessor himself if living might have had.

But a demise by any, not having the estate tail, does not bind his issue: as, if land be given to A. and his wife, and the heirs of the body of the survivor, and they make a lease for twenty-one years, or three lives, pursuant to the directions of the statute; that does not bind the issue: for the estate tail does not vest, till the time of the survivorship, in the survivor. R. 10 Co. 51. a.

So a demise by tenant in tail does not bind his issue, if it be not by indenture. Vide post, (G 5.)

If it does not commence from the making, or the day of the making. Vide post, (G 5, 8.) (e)

If

issue before entry on the lessee levies a fine to a stranger, the cognizee shall not avoid the lease, because such lease being only voidable by entry, when the issue before entry conveys over the land by fine, the power of entry, which was the only means of avoiding such lease, is by the fine destroyed and gone; for a right of entry cannot be transferred to a stranger any more than a right of action. — 10. So if the tenant in tail himself after such lease, had levied a fine to a stranger, or even to the reversioner, and died, yet they could not avoid the lease ever after, because if they could it must be by reason of the right of entry transferred by the fine, which would have come to the issue if no such fine had been levied; and the law absolutely condemns all alienations of right only, whether it be right of entry or of action, and consequently in these cases, by such alienation, the lease is become absolute and unavoidable. Bac. Abr. Leases, D. 3 Salk. 336. 4 Mod. 1. — 11. If tenant in tail makes a lease for thirty or forty years, rendering rent, and dies leaving his wife *privement enseint*, with a son, and the donor enters, and as to himself avoids the lease, and then the son is born, and the lessee re-enters; the son at full age may either affirm or avoid such lease as he thinks fit; for the lease was not absolutely determined or avoided, more than the estate tail itself out of which it was derived, but only *secundum quid*, and subject to be set up again upon the birth of the issue, which revived the estate tail. — 12. But if such lease were made by the tenant in tail before marriage, rendering rent, and then he married and died, leaving his wife *privement enseint*, and the donor enters, and as to himself avoids the lease, yet if the wife be afterwards endowed, the lease is revived as against her, because her estate is, *quodam modo*, a continuance of the estate tail of the husband, and therefore revives all charges made by him before the marriage: but if the wife be after delivered of a son, and dies, now the issue may again avoid that lease or affirm it, as he thinks fit: or if such lease were made after marriage, and the wife, being endowed thereof, avoids that lease, yet after her death the issue in tail may revive it. — 13. For in all these cases the avoidance of such leases being only by those who had a temporary estate or interest in the land, it cannot bind those who succeed to the inheritance thereof, but that they may if they think fit, re-establish and set up such lease again, which, as to them, was at first only voidable, and not absolutely void. And herein a lease at common law by the tenant in tail differs from rent granted by such tenant, which is void by the death of the grantor; whereas a lease is only voidable by the issue in tail, whose acceptance of rent amounts to a confirmation. Wood, L. & T. 34. Bro. Abr. tit. Grant, 145. 2 Ld. Raym. 779.

(e) 1. Tenant in tail makes a lease for twenty years, rendering the usual rent, *habendum* from Michaelmas next ensuing; this seems a good lease, though it did not begin from the making of the lease, according to the proviso 32 H. 8. c. 28.; for the intent of the statute was only that the lease should not exceed the number of twenty-one years from the making, which this lease did not; and in the case of Thompson and

If it be above three lives, or twenty-one years. Vide post, (G 5.) (f)

Or, dispunishable for waste. Vide post, (G 5.) (g)

Or, of lands not most commonly letten, or occupied by the farmers thereof, by the space of twenty years next before. Vide post, (G 5.) (h)

Or, if there be not reserved during the term the most accustomed (i) rent paid within twenty years before. Vide post, (G 5.)

Yet if more be reserved than the accustomed rent, it is good. Co. L. 44. b.

So, if the ancient yearly rent be reserved, it is sufficient; though a heriot, fine upon the death of the tenant, or other casual profit, not annual, be not reserved. Co. L. 44. b. Vide post, (G 5.)

So, if tenant in tail demises part of land most accustomedly letten, and reserves a rent *pro rata*, it is sufficient. Co. L. 44. b.

Or, if parceners in tail make partition, and each demises her part, reserving a rent *pro rata*. Co. L. 44. b.

So, if tenant in tail to him and the heirs male of the body of his grandfather, demises, rendering rent to him and his heirs, and dies without issue male, having a daughter who is his heir; the lease shall be good: for the rent follows the reversion. R. Hard. 90, 95. (k)

Trafford, Poph. 8. it was so adjudged; though Lord Coke lays it down for one of his rules, that leases upon that statute are not good, if they do not commence from the day of the making; which perhaps may be reconciled upon the same diversity, where they are under twenty-one years, and where not so, that from the time of the sealing and executing the lease, till the expiration thereof, there does not intervene more than twenty-one years. For, if the commencement of the lease be at such a distance, that between the time of sealing and executing thereof, and the expiration, there do not intervene above twenty-one years, then such lease seems to be without any aid from this statute, though the time for continuance thereof in the possession of the lessee be under twenty-one years; for otherwise the tenant in tail might so procrastinate the commencement of the lease, as to have always the greatest part of the twenty-one years running out in the time of his issue, which the statute never intended to countenance. Bac. Abr. Leases, D. 2. — 2. So where one made a lease for ten years, and after made another lease for eleven years; both these leases are good, because they do not in all exceed twenty-one years, and so the inheritance is not charged with more than a lease for twenty-one years, which the statute allows. Ibid.

(f) Lease by tenant in tail for more than twenty-one years, is void only for the excess. 1 Anst. 77.

(g) 1. Therefore, if a lease be made for life, the remainder for life, &c., this is not warranted by the statute, because it is dispunishable of waste. Co. Litt. 44. b. Mo. 387. — 2. But if a lease be made to one during three lives, this is good; for the occupant if any happen, shall be punished for waste. Co. Litt. 44. b.

(h) And where other lands are demised along with those entailed, and an entire rent is reserved, the lease does not bind the issue. Wightw. 69.

(i) On a question whether the reservation of the ancient 'copyhold' rent, or more, would answer the description of the ancient 'accustomed' rent, within the statute; it was held that it would. Mo. 759.

(k) Tenant in tail male had issue two sons by divers venters, and died; the eldest son entered and made a lease for twenty-one years, reserving rent generally to him, his heirs, and assigns, and died without issue, leaving two sisters his heirs at law; and the question arose, whether by this reservation the rent belonged to the second brother, to whom the reversion descended, as heir male of the body of the father; for if not, then the lease could not bind him within the stat. 32 H. 8. c. 28. The lease was adjudged good, and that the rent should go along with the reversion; for the words of the statute are, that the rent shall be reserved to the lessor, and his heirs, or "to those to whom the lands would go if no such lease had been made," and here the intent was, that the rent should go along with the reversion; and so it might here, for rent naturally follows the reversion, and the second brother is heir to the entail and reversion, though not to the lessor. Bac. Abr. Leases, D. 2.

So

So a demise by tenant in tail does not bind him in reversion, or remainder. Noy, 6. R. Cro. El. 602. R. 8 Co. 34. a. Cont. Dy. 48. b. But acc. in marg. (1)

So a lease by a woman tenant in tail, who takes husband, and the husband, being tenant by the curtesy, surrenders to the issue, does not bind the issue. Mo. 8.

(B 33.) How an alienation by tenant in tail operates as to himself.

If tenant in tail levies a fine, or suffers a recovery, the whole right of the entail is barred and extinguished. Hob. 337.

If he levies a fine to him in reversion; the entail is extinct, and the conusee is in his reversion. Jon. 33.

If he makes a feoffment, the whole estate is gone as to himself; but the right of the entail remains in him, which shall afterwards descend to his issue in tail. Hob. 336.

But if tenant in tail, in remainder after an estate for life, levies a fine *sur concessit* to the tenant for life, it does not make an alteration of the entail after the life determined. R. 2 Cro. 40.

Though it be to husband and wife for the life of the wife who was tenant for life; and it is no discontinuance or bar to the entail but for her life only. R. 2 Cro. 40.

If tenant in tail grants *totum statum suum* to another; the grantee has an estate only for the life of tenant in tail; but the estate tail shall be in abeyance. Lit. S. 650.

So, if he releases to a disseisor all his right, the right to the inheritance in tail is in abeyance. Lit. S. 649.

So, if tenant in tail be attainted for felony, and the king, upon office, enters; the estate tail shall be in abeyance. Co. L. 345. a.

And after a grant of *totum statum suum*, the tenant in tail cannot maintain waste: for no reversion remains in him. Lit. S. 650.

So, if he grants *totum statum suum*, remainder to another, the remainder is void: for nothing remains in him after his whole estate is granted. R. 2 Co. 52. a.

If tenant for life, the reversion or remainder to the king, grants *totum statum* to A. who dies in the life of the grantor; the king shall have it immediately. Sav. 62.

But a grant of his whole estate by the king tenant in tail is void: for the king is deceived in his grant. 1 Co. 46. a. 52. a.

If there be tenant in tail, remainder to B. in tail, and B. by deed inrolled conveys to the king and his heirs; nothing passes but for the life of B. Dub. Godb. 442.

If tenant in tail covenants to stand seised to the use of himself for life, remainder to his son in tail; this does not make an alteration in his estate, but he remains tenant in tail as before, and his wife shall be endowed, &c. R. Mo. 32. R. Yel. 51. R. 2 Co. 52. a. R. Cro.

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(1) If tenant in tail male demise for a term of ninety-nine years, and his lessee assign over to another, but before such assignment tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representative of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. 1 N. R. 158.

El. (471.) And though these books speak of an alteration for his own life, yet in reality there is not any alteration. R. Tr. 1 An. B. R. inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.) (m) R. Cro. El. 895. Noy, 46. 1 Brownl. 193. R. 1 And. 291. R. Cro. El. 279.

So, if he makes a bargain and sale to B. who rebargains to him, he shall be tenant in tail as before. Yel. 51.

So, if he grants an advowson to B. to the use of himself and his wife and to the heirs male of the husband; it shall be void as to the wife after the death of the husband. R. 1 Brownl. 161.

Yet it seems that to some respects there is an alteration as to himself: for a recovery afterwards by him with single voucher, does not bar remainders depending on the first entail: for he was not seised of the first estate tail. R. Yel. 51.

But if tenant in tail bargains and sells to B. and his heirs; a base fee passes, which shall not be avoided till entry of the issue. Per Holt, Tr. 1 An. inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.) R. 10 Co. 96. a.

So, if he conveys by lease and release to B. and his heirs. R. inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.) It is called a freehold descendible, 1 Sand. 261.

Or, covenants to stand seised to B. and his heirs. Per Holt, inter Machel and Clerk.

So, if he covenants to stand seised to the use of himself for life, remainder to B. and his heirs. R. Tr. 1 An. inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.)

Or, bargains and sells to the use of himself for life, remainder to B. and his heirs. R. inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.)

Or, if he covenants to stand seised to A. for life, remainder to B. and his heirs; though A. dies in the life-time of the tenant in tail. Per Holt, inter Machel and Clerk. (Vide Sal. 619. Comyns's Rep. 119.)

Or, to himself for years if he shall so long live, remainder to his son for life, &c. Dub. 2 Lev. 84.

If the bargainee of tenant in tail, &c. enters; his estate descends to his heir, till it be avoided. D. 10 Co. 98. a.

And his wife shall be endowed. 24 Ed. 3. 28. b. 10 Co. 98. a. Cont. per Vau. Cart. 210. D. Cont. Cro. El. 805.

Nor shall he be subject to waste or forfeiture. 10 Co. 98. Cart. 210.

And his devise is good till avoided. Dy. 253. Cont. Cro. El. 805. Cart. 210. R. that the devise is void. 1 Sand. 261.

## (C) An estate tail after possibility of issue extinct.

### (C 1.) What shall be.

Tenant in tail after possibility of issue extinct, is, when by the death of one of the tenants in special tail, there is no possibility of issue inheritable to the same entail, the survivor is tenant in tail after possibility, &c. As, if a gift in tail be to husband and wife and the

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(m) 1. L. Raym. 778. 7 Mod. 18. 11 Mod. 19.—2. It was however laid down, that an estate created by a tenant in tail, which must, or by possibility might, commence in the life-time of the tenant in tail, was good. Ibid.

heirs of their bodies begotten, and one of them dies without issue. Lit. S. 32.

Or, if they have issue, and after the death of one, the issue dies without issue. Lit. S. 32.

So, if a gift be to a husband and the heirs of his body begotten upon A. his wife, and A. dies without issue. Lit. S. 33.

Or, to a husband with a daughter or cousin in frankmarriage, and the wife dies without issue; the husband is tenant in tail after possibility, &c. Co. L. 28. b.

But if there be any possibility of issue inheritable to the entail, the survivor shall not be tenant in tail after possibility, &c. As, if husband and wife to them and the heirs of their bodies be each one hundred years of age, they are not tenants after possibility, &c. for the law does not intend an impossibility of issue. Co. L. 28. a.

So donee in tail general can never be tenant in tail after possibility; for there never can be in him an impossibility of issue inheritable to his estate. Lit. S. 34.

Nor, the issue of a donee in special tail. Lit. S. 34.

And therefore, if a gift be to a husband and the heirs of his body, remainder to him and his wife and the heirs of their bodies, though the husband dies without issue, the wife shall not be tenant after possibility, &c. for the remainder after the tail general never took effect. Co. L. 28. b.

So no one can become tenant after possibility but by the act of God: and therefore, if husband and wife by feoffment take an estate which is limited to the use of them for their lives, and afterwards to their first issue male in tail, and afterwards to the heirs of their bodies; though they have an estate in special tail executed, (n) yet if issue be born, they become tenants for life only, (o) and not tenants in tail after possibility, &c. Co. L. 28. a.

(a) 1. The Annotator subjoins, Cordall's case, Cro. Eliz. 315. is to the contrary; for there land was devised to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of A.'s body, and, according to Croke, who mentions the case as reported to him by Lord Coke, it was resolved, that A.'s estate tail was not executed for the possibility of the mean estates interposing, but was so disjoined during A.'s life, that his wife could not be endowed. — 2. But see C. T. H. 17, where Lord Hardwicke says, that Cordall's case has been several times denied to be law.

(o) 1. With remainder to the son in tail, remainder to themselves in special tail. Ibid. — 2. The Annotator subjoins from Hal. MSS, *Sic nota* remainder supported without particular estate, by the possibility that issue may be born. But if such tenant levies a fine, now this remainder is destroyed, because the estates are confounded. — 3. Here, he continues, it is proper to add, that there is a difference between subjoining the inheritance to the particular estate by the *same* conveyance as limits the intermediate contingent remainder, and an accession of one to the other by a *distinct* and *subsequent* act or conveyance; for in the latter case the contingent remainder is destroyed, though not in the former. See accord. Purefoy and Rogers, 1 Saund. 380. — 4. It has even been adjudged that in the latter case, the *descent* of the inheritance on the person having the particular estate will destroy the contingent remainder, where the descent has been *subsequent* to the commencement of the particular estate. See Kent and Harpool, 1 Vent. 506. T. Jo. 76. Hooker and Hooker, Ca. in B. R. Temp. Hard. 13. — 5. But a descent of the fee on tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place at the *same time*, and are derived from the *same person*; as where land is devised to A. for life, remainder over on a contingency, and at the deviser's death the reversion descends upon A. as his heir. See acc. Archer's case, 1 Co. 96. Plunkett and Holmes, 1 Lev. 111. and Boothby and Vernon, 9 Mod. 147. The case of Wood and Ingersole, Cro. Jac. 260. seems contra; but see the observations on the last case in T. Jo. 79. and Pollexf. 481. See in Contingent Remainder.



So, if tenants in special tail are divorced *à vinculo*, they have but an estate for life: but neither shall have the privilege of tenant after possibility, &c. because the divorce was not by the act of God, but *ex provisione hominis*. Co. L. 28. (p)

(C 2.) In what respects tenant in tail after possibility, &c. is regarded only as tenant for life.

Tenant in tail after possibility, &c. may make an exchange with tenant for life: for their estates are equal in quantity, though not in quality. Co. L. 28. a. Vide ante, (C 1.)

So, if tenant in tail after possibility, &c. makes a feoffment, it will be a forfeiture. Co. L. 28. a. (q) Vide Forfeiture, (A 1.)

Or, if he otherwise aliens in fee. Co. L. 28. b.

So his estate shall be merged by a descent or conveyance of the reversion, or remainder to him in fee, or in tail: for the fee, or the estate tail shall be executed. Co. L. 28. a.

So, upon his default there shall be receipt of him in reversion, or remainder. Co. L. 28. a. (r)

So, if he cuts down trees, the lessor shall take them, though waste does not lie against him. 4 Co. 53. a. (s)

(C 3.) What privileges he claims above a tenant for life.

But in respect of his estate, which was originally an estate tail, tenant after possibility, &c. shall not be punished for waste. Co. L. 27. b. (t)

Nor

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(p) 1. The Annotator subjoins from MSS., husband and wife tenants in special tail; the husband was attainted of treason, or levies fine with proclamations; the husband dies having issue by the wife; the issue cannot inherit, and yet to many purposes the wife surviving, is tenant in tail after possibility, for if she makes lease for twenty-one years according to the statute, it shall bind the conusee, or if it is for three lives, it shall not be a forfeiture. Hil. 22 Jac. Rot. Crocker and Kelsey. Hob. Rep. Melton's case. Vide 9 Rep. Beaumont's case. — 2. It seems, she cannot suffer recovery after. Quere, vide this case of Beaumont afterwards debated. H. 13 Cha. B. R. in Balkler and Willis, Cro. Car. 476. — 3. He adds, the case of Crocker and Kelsey is in W. Jo. 60. Hutt. 84. Cro. Jac. 688. Bridgm. 27. 2 Ro. Rep. 490. 498. 1 Ro. Abr. 843. pl. 3. and O. Bendl. 139. 143. Beaumont's case is in 9 Co. 138. b. and Melton's case is in Hob. 254. — 4. Note, that in the case of Crocker and Kelsey, the question was on the operation of a lease for twenty-one years *not* warranted by the 32 H. 8., the ancient rent not having been reserved; but the issue in tail having levied a fine during the wife's life, it was adjudged that the lease was good; but it seems to have been agreed, that the wife, notwithstanding the husband's death, was tenant in tail so as to be capable of making leases within the statute. Indeed this latter point had been adjudged in a former case, which is in Godb. 102. See too 4 Leon. 57. As to the former point, besides the books already cited, see 2 Sidf. 62.

(q) So if he mispleads 39 E. 3. 16. Hal. MSS. Ibid. in notis.

(r) 28 Edw. 3. 96. Contra as to receipt. Hal. MSS. Ibid. in notis.

(s) Vide infra, (C 3.)

(t) 1. To which the Annotator subjoins, see acc. 2 Inst. 302. — 2. But yet he cannot have an action of waste against another, for he cannot count *ad exhaeredationem* [but he may have an action upon the case in nature of waste]; and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail after possibility of issue extinct pending the writ. See Bro. Abr. Waste, pl. 14. 69. 60. 2 Ro. Abr. 825. pl. 5. Mo. 18; and Co. Litt. 53. b. — 3. Note also that it is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4 Rep. 63. And as to this difference between being dispensable for waste in felling trees, and having the



Nor compellable to attorn to a grant of the reversion. Co. L. 27. b.

Nor shall he have aid of him in the reversion. Co. L. 27. b.

So a writ of *consimili casu* does not lie upon his alienation ; nor a writ of intrusion after his death. Co. L. 27. b.

So in a writ of right he may join the *mise* in a special manner. Co. L. 27. b.

And in a *præcipe* by or against him, he shall not be named as tenant for life. Co. L. 27. b.

But an assignee of an estate after possibility, &c. shall not have any privilege above a tenant for life : for the privity, by the assignment, is gone ; and with it the privileges. Co. L. 28. a. 11 Co. 83. b. (u)

## (D) Tenant by the curtesy of England.

### (D 1.) Who shall be.

If a man takes a wife seised in fee, or in tail, by whom he has issue, he shall hold, by the curtesy of *England*, the lands after the death of his wife, for his life. Lit. S. 35.

So, if the wife be seised of any estate which such issue might inherit.

Though the wife afterwards dies without issue, by which her estate is determined. R. 8 Co. 34. Paine.

So, if the wife ever was seised, though she be afterwards disseised. Co. L. 30. a.

So, if the wife had only a seisin in law, where a seisin in fact was not possible : as, if an advowson (x) descends to a woman, who takes husband, has issue, and dies before avoidance. Co. L. 29. a. (y)

Or a rent descends, and she dies before rent incurs. Co. L. 29. a.

A man shall be tenant by the curtesy of lands, or tenements.

Of rents, advowsons, commons, &c.

Though the rent, common, &c. be suspended, when the suspension is only for years. Co. L. 29. b.

Of an office, or dignity. Co. L. 29. a. b. (z)

Of a castle, or *caput baroniæ vel comitatûs*. Co. L. 30. b.

Of

the property in them, see 1 P. Wms. 528. — 4. In 15 Ves. 427. it is stated, that tenant in tail after possibility of issue extinct, being dispunishable for waste by the law, has equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber.

(u) 1. The Annotator subjoins from Hal. MSS. 28 E.3. 96. Grantee has the privilege (of exemption from atornment) but, he adds, see the reasons for the judgment cited by Lord Coke in 2 Leon. 40. 3 Leon. 241. 1 Leon. 290. 3 Leon. 121. — 2. And Sir Matthew Hale farther queries if the grantee is punishable for waste. See 2 Inst. 302.

(x) 1. Whether it be an advowson in gross or appendant. — 2. A. seised of a manor to which an advowson is appendant, dies, having issue a daughter, who takes husband and dies before entry into the manor. It seems that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal. Hal. MSS. Ibid. in notis.

(y) 1. According to Perkins, the husband shall have curtesy of an advowson, although he suffers the ordinary to present by lapse on an avoidance in his wife's life-time. Perk. 468. — 2. But the Annotator questions this, the case not being within Lord Coke's reason for allowing curtesy of an advowson without seisin in deed. Ibid. in notis.

(z) 1. Sir Matthew Hale adds, to a case quoted by Lord Coke, So *nota* till issue the husband

Of common *sans nombre*. Co. L. 30. b.

So a man shall be tenant by the curtesy though the estate tail, &c. of which the wife was seised be determined. Co. L. 30. a. (a)

And if a husband has issue by his wife, it is sufficient to make him tenant by the curtesy, though the issue dies immediately: for if it be born alive it is sufficient. Co. L. 29. b.

Though it was never heard to cry: for crying is but evidence of the life. Co. L. 29. b. (b)

Though

husband cannot use the title of his wife's dignity; but afterwards he may. So adjudged by Hen. 8. in the case of Wimby, who claimed the title of Lord Talboys in right of his wife. Hal. MSS. — 2. The Annotator continues, This annotation shews that, in the opinion of Lord Hale a title of honour admits of curtesy. But Lord Coke, after stating two precedents, one of curtesy in a title of honour, and another of curtesy in an office of honour, avoids making the least inference, and professedly leaves ~~the~~ reader to his own judgment; from which reserve it may be conjectured ~~that~~ he had his doubts. In fact the point had been several times controverted in Lord Coke's time. About the year 1580, Richard Bertie claimed the barony of Willoughby in right of his lady, Catherine duchess of Suffolk, he having had issue by her. The claim was referred by Queen Elizabeth to Lord Burghley, and two other commissioners, as was also a claim of the same dignity by Peregrine Bertie, the son and heir of the Duchess of Suffolk by Richard Bertie. At one time the precedents urged for the husband were thought to make an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1. to 23. But notwithstanding this case, two other claims of a like kind were made within a few years after; the first about 1586, by Sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry Lord Bergavenny; and the second about 1604, by Sampson Lennard, in right of his wife Margaret Lady Dacres. Of the event of the *former* claim I do not find any account; but as to the *latter* it appears, that King James referred it to commissioners, and that Lady Dacres dying before any decision, the affair was compromised in 1612, by the king's granting precedency to the husband as eldest son of Lord Dacres. The letters patent giving this precedency recite, that the commissioners *had found baronies on the like right conferred on the husband in several families, and, in this particular barony of Dacres, three several precedents*. There are other expressions equally remarkable for a studied ambiguity; such as leave undecided, whether the pretension to the wife's title was deemed a claim of *favour* or of *right* from the crown, and appear calculated to avoid an adjudication of the point; and in this unsettled state of things it is not surprising, that Lord Coke should be so cautious of advancing any positive doctrine on the subject. I cannot learn that there have been any claims of dignities by curtesy since Lord Coke's time; and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However I have not yet discovered, whether this great question has ever formally received the judgment of the House of Lords. For the particulars of Wimby's case cited by Lord Hale, *supra*, see Coll. Claims of Bar. 11. 44. & 72. Co. Litt. 29. b. n. (1).

(a) 1. But, says Lord Coke, if a woman maketh a gift in tail, and reserve a rent to her and to her heirs, and the donor taketh a husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesy of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But if a man be seised in fee of a rent, and maketh a gift in tail general to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesy of the rent, because the rent remaineth. — 2. To which the Annotator subjoins from Hal. MSS. So if it was a rent *de novo* granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy.

(b) 1. The Annotator subjoins from Hal. MSS. Vide Pasch. 9 Ed. 1. rot. 4. *Si habuit exitum, qui auditus fuit clamare seu vocem edere infra quatuor parietes; quia puer, non fuit visus nec auditus clamare ab hominibus masculis, licet per feminas nominatus fuit*

Though the issue be born and dies before the estate descends to the wife. Co. L. 29. b. 8 Co. 35. b. Bro. Tenant per Curtesy, 12.

So, by the custom of gavelkind, a man shall be tenant by the curtesy without having issue. Co. L. 30. a. (c)

And by having issue, the husband, in the life of his wife, shall do homage alone. Co. L. 30. a.

And an avowry shall be made upon the husband alone. Co. L. 30. a.

If the husband after issues makes a feoffment, the feoffee shall hold during the life of the husband: for his feoffment was not a forfeiture. Co. L. 30. a. (d)

But by the feoffment his title to be tenant by the curtesy was extinguished: and therefore, if the feoffment was upon condition, and he enters for the condition broken; he shall not afterwards be tenant by the curtesy. Co. L. 30. b.

So, if he levies a fine, which is reversed after the death of his wife; his title to be tenant by the curtesy shall be extinct. Semb. 5 Mod. 67.

Otherwise, if the fine be reversed by error in the life of his wife: for he has afterwards a new title. 5 Mod. 67.

### (D 2.) Who not.

But a man shall not be tenant by the curtesy, where the wife is not seised of such estate as that the issue which her husband has by her may, by possibility, inherit the same estate. (e)

As, if a woman has an estate to her and the heirs male of her body, and she has issue a daughter; her husband shall not be tenant by the curtesy. Co. L. 29. b.

If a woman tenant in tail makes a discontinuance, and takes back an estate in fee, and then takes husband, has issue, and dies; the issue, by a *formedon*, may recover the estate tail in the life of its

*fact Johannez.* Therefore husband not tenant by the curtesy. H. 5 Ed. 1. rot. 1. Wigborn. — 2. I cannot guess, he continues, what Lord Hale's view could be in citing this record, unless it was to shew, that anciently in the case of curtesy, the having *male issue* born alive could be proved by *men* only; which must be confessed to have been a most unaccountable peculiarity.

(c) On the other hand, subjoins the Annotator, by the custom of *gavelkind* the tenancy is subject to several disadvantages; for it is only of a *moiety* of the wife's land, and it *ceases* if the husband *marries again*. See Rob. Gav. b. 2. c. 1. where the learned author suggests, that some have doubted, whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record.

(d) 1. For, says Lord Coke, that the estate at the time of the feoffment, was an estate of tenancy by the curtesy initiate, and not consummate. — 2. And the Annotator subjoins from Hal. MSS. 4 Ed. 2. *cur in vita*, 15. 34 Ed. 1. Ibid. 30. 10 Ed. 3. 11. 22 H. 6. 24. If husband entitled to be tenant by the curtesy aliens, and retakes estate to him and his wife, by which the wife is remitted, he shall not be tenant by the curtesy. *Contrà* if it was before issue had. See Ley's Rep. 9.

(e) 1. As if, says Lord Coke, a tenant make a lease for life of the tenancy to the *seignioress*, who taketh a husband, and hath issue; the wife dieth; he shall not be tenant by the curtesy. — 2. To which the Annotator subjoins, that Lord Coke's meaning is, that the husband shall not be tenant by the curtesy of the *seignior*, it being suspended during the whole time of the marriage by the lease of the *tenancy* to the wife. And he refers to Perk. sect. 459. 460. 461. 462. as to the effect of *suspension* on curtesy.

father.

father: for she was not seised of the tail during the coverture. Co. L. 29. b. (f)

If an estate be given to two women and the heirs of their bodies, and one of them takes husband, and has issue. Cont. Co. L. 30. a. Acc. 2 Rol. 90. l. 50. Semb. acc. Co. L. 183. Eq. Ca. 150. (2d Part of 2 Mod. Ca.)

So he shall not be tenant by the curtesy of a seisin in law, where by possibility she might have obtained an actual seisin: as, if lands descend to a woman, who takes husband, has issue, and dies before entry. Co. L. 29. a.

So he shall not be tenant by the curtesy of a bare right or title. Co. L. 29. a. (g)

Nor, of a reversion, (h) or remainder, expectant upon an estate of freehold. Co. L. 29. a.

Nor, of a seignior, rent, or common, &c. suspended for life. Co. L. 29. b.

So, if the estate of the wife determines with her life by express limitation or condition, though the wife had a fee by a subsequent remainder, or by descent, the husband shall not be tenant by the cur-

(f) The Annotator subjoins, the husband could not have curtesy in respect of the *fee*, because that was defeated by the son's recovery in the *formedon*; nor in respect of the *tail*, because the wife's feoffment *before* the marriage had discontinued the *tail*, and consequently there could be no seisin of it *during* the marriage. This seems to be the *rationale* of the case put by Lord Coke.

(g) 1. Lord Coke adds, nor of a *use*. — 2. Upon which the Annotator observes, that an use *before* or *not executed* by the 27 H. 8. must be meant; for an use within that statute is a legal estate: see acc. 2 And. 75. 147. and by Lord Coke himself in Cro. Jac. 201. See also 1 New Abridgm. 660. — 3. But though in strictness of law there cannot be curtesy of trusts, yet since Lord Coke's time our courts of equity have allowed curtesy both of trusts and other interests, which though in *law* were rights and *titles*, are deemed *estates* in *equity*, and made to conform to many of the rules and consequences incident to estates in *law*. See 1 Atk. 603., the case of Cashborn and English, in which Lord Ch. Hardwicke, decreed curtesy of an equity of redemption. See S. C. more fully reported in Vin. Abr. Curtesy, E. pl. 23. — 4. However a *wife in point of benefit* may have a trust of inheritance, which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid for her *separate use*; for in such a case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 Atk. 715. — 5. And though curtesy out of a trust is allowed, yet dower has been refused; a partiality not easy to be reconciled with reason, however settled by the current of authorities. — 6. But, continues Lord Coke, if she or her husband had, during her life entered, he should have been tenant by the curtesy. — 7. And the Annotator subjoins, but entry is not always necessary to give seisin *in deed*; for if the land is in lease for *years*, curtesy may be without entry, or even receipt of rent, the possession of the lessee for years being deemed the possession of the husband and wife. See the case of De Grey and Richardson, 3 Atk. 469. Lord Coke's doctrine about seisin, for a *possessio fratris* is the same. Co. Litt. 15. a. — 8. And in 2 Wils. 516., the court construed the possession of a mother to be a possession for an infant her son, as his guardian by law, she being next of blood to whom the inheritance could not descend, and held it a sufficient seisin to exclude the daughters by a former venter.

(h) 1. Mr. Perkins makes a *quære*, whether, if a woman seised in fee makes lease for life, reserving rent for her and her heirs, the husband shall not have curtesy in the rent during the lease; but he seems to admit, that the husband shall not have curtesy of the land itself, unless the lease determines before the wife's death. Perk. sect. 467. — 2. See Co. Litt. 32. a. where in a like case Lord Coke says, that the wife shall not have dower. But if a rent is incident to a reversion *expectant* on an estate tail, the husband shall have curtesy of the rent till the tail determines. Co. Litt. 30. a. Note to the principal position.

tesy;

tesy; as, if an estate be limited to the wife for life, afterwards to the first, second, and other sons in tail, remainder to the right heirs of the body of the wife, remainder to her in fee; her husband shall not have it by the curtesy. Eq. Ca. 150. (2d Part of 2 Mod. Ca.)

Or, if a devise be to a woman for life, with a contingent remainder to her issue, by which the fee descends in the mean time to the woman, being heir to the testator; her husband shall not be tenant by the curtesy. R. Eq. Ca. 150. (i) (2d Part of 2 Mod. Ca.)

So he shall not be tenant by the curtesy, if he has not issue born alive.

If the issue be ript out of the belly of its mother, though it be alive. Co. L. 29. b.

If the issue be a monster which has not human form. Co. L. 29. b.

So, if after issue he be attainted for felony, and pardoned; he shall not be tenant by the curtesy, if he has not issue after the pardon. Per Keble, 13 H. 7. 17. a.

**Tenant in Dower; Who shall be and who not.** Vide in DOWER, (A 1. 2. &c.)

## (E) Tenant for life.

### (E 1.) Who shall be.

Tenant for term of life shall be, when lands are demised to a man for his life. Lit. S. 56. Vide Copyhold, (C 10.) — Devise, (N 7.)

Or, for the life of another. Lit. S. 56.

Or, for the life of himself and several others. Co. L. 41. b. Mo. 8.

So, if tenant for life, by curtesy, or in dower, grants his or her estate over, the grantee shall be tenant *pur autre vie*. Co. L. 41. b.

So, if lands (k) are demised or granted to a man, generally, and livery (l) made upon it. Co. L. 42. a. (m)

(i) 1. A woman taketh husband, and hath issue; lands descend to the wife; the husband enters; and after the wife is found an idiot by office; the lands shall be seised by the king; for the title of the tenancy by the curtesy and of the king begin at one instant, and the title of the king shall be preferred. — 2. The Annotator subjoins, that Mr. Serjeant Hawkins makes a quære of this, observing that the fee and freehold were in the wife, and that the wife of the idiot shall have dower. Hawk. Abr. of Co. Litt. 42. But that it has been also remarked, that there is not any concurrence of titles, between the king and the husband; the husband's title by curtesy not being consummate till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the editor. However note the reasoning in Plowden. — 3. See also 8 Co. 170, where it is adjudged, that though in the case of idiotcy the office for some purposes has relation to the time when the idiot's estate commenced, yet the king is only entitled to the profits from the finding of the office; which as it may have some influence on the point of curtesy, is proper to be attended to.

(k) Or tenements, reversions, remainders, rents, advowsons, commons, or the like. Co. Litt. 42. a.

(l) Or due ceremonies requisite by law, be performed. Co. Litt. 42. a.

(m) 1. The Annotator from Lord Hale's MSS. subjoins, Litt. s. 283. But if termor for years devises his house generally without shewing what estate, the whole term passes. 14 Eliz. Dy. 307 — 2. Lord Coke continues, the same law is of a declaration of a use. — 3. And Lord Hale subjoins. 21 H. 8. 5. by Shelley.

And



And such demise or grant to another, generally, by tenant in fee, shall be an estate to the lessee for his own life. Co. L. 42. a. (n)

By tenant in tail, it shall be for the life of the lessor: for that is all which he can lawfully grant. Co. L. 42. a.

So a demise to another for a time indeterminate, passes for life, if livery be made; or of things which lie in grant, without livery: (o) As, a lease to a man *quamdiu se bene gesserit*. Co. L. 42. a.

To a woman *durante viduitate*; or, *dum sola*. Co. L. 42. a.

To husband and wife, during coverture. Co. L. 42. a.

To A. as long as he inhabits. Co. L. 42. a.

Or, pays such rent. Co. L. 42. a.

Or, till he be preferred to such a benefice. Co. L. 42. a.

Or, till out of the profits he has paid 100*l.* or other sum. Co. L. 42. a. (p)

Or, during his exile, if he be absent from his country; though not by edict, but voluntarily. R. 1 Vent. 326.

So, if the king grants office at will, and a rent for it for his life; he has an estate for life in the rent, though it determines with the office. Co. L. 42. a.

### (E 2.) What interest he has.

Tenant for life has a (q) freehold, as well as tenant in fee, or tail. Co. L. 43. b.

So

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(n) The Annotator from Hal. MSS. subjoins. Vid. 8 E. 3. 3. A lessee for life makes lease to B. & C. on condition that if they die leaving A. then the land shall revert to A. without determining any estate certain in the grant. All the estate passes under the condition, for in *præcipe* A. was not received in default of B. & C.

(o) 1. And, says Lord Coke, in count or pleading he shall allege the lease, and conclude that by force thereof he was seised generally for term of his life. — 2. To which the Annotator subjoins from Hal. MSS. A. leases to B. till A. makes J. S. baily of his manor; adjudged a freehold. H. 37 El. Butler and Ridgely. vid. 1 Rep. Bredon's case. Rent granted to A. for life if B. or C. shall so long live. But if there be an estate with such conditional limitation it ought to be pleaded with the limitations, and continuance shall be averred; for otherwise it fails. Vid. Dy. 192.

(p) 1. To which the Annotator subjoins from Hal MSS. But feoffment to the use of A. for life, remainder to the use of B. his executors and assigns, till ten pounds shall be levied out of the profits, ruled to be a chattel. — 2. But, continues Lord Coke if a man grant a rent of 20*l.* per annum until 100*l.* be paid, there he hath an estate for five years, for there it is certain, and depends upon no uncertainty. And yet in some cases a man shall have an incertain interest in lands or tenements, and yet neither an estate for life, for years, or at will. (Lord Hale subjoins, Plowd. Comm. 273.) As if a man, by his will in writing, devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattel, and an incertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts; and so, he concludes, note a diversity between a devise and a conveyance at the common law in his life-time.

(q) 1. And, albeit, says Lord Coke, an estate for term of a man's own life be but *one* freehold, yet may *several* freeholds, in certain cases be derived out of the same. As if tenant for life maketh a lease by deed or without deed to him in the remainder, or reversion in tail or in fee, for the term of the life of him in the remainder or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again; for forfeiture it cannot be, for he in the remainder was party; and surrender it cannot be, for that his whole estate was not given. Co. Litt. 42. a. — 2. And the Annotator subjoins from Hal. MSS. 1 E. 3. 15. Vid. 41 Ass. 2. A. tenant for life, remainder to B. in



So his life is greater than another's life: and therefore, if he leases (*r*) to him in remainder or reversion for his life; he shall have it after the death of the lessee: for it was not a surrender. Co. L. 42. a.

So, if tenant for life takes husband, and they lease to him in reversion or remainder for the life of the husband. Co. L. 42. a.

And upon such lease a rent may be reserved. Co. L. 42. a.

So, if tenant for life and he in reversion join (*s*) in a lease for life, they

B in tail, remainder to C. in fee: A. enfeoffs B. and his wife, and their heirs; B. dies without issue; now there is a forfeiture and C. may enter.

(*r*) 1. Tenant for life can make no leases to continue longer than his own life; for his leases are absolutely void at his death. Bac. Abr. Leases, I. — 2. Thus where tenant for life leases premises for twenty-one years, and before the expiration of that term died, and the trustees of the remainder-man, then an infant, continued to receive the rent reserved, and he, on coming of age, sold the premises by auction, and in the conditions of sale the premises were declared to be subject to the lease, and in the conveyance to the purchaser, the lease was referred to as in the possession of the lessee, and, in the covenant against incumbrances, that lease was excepted, and the purchaser mortgaged, and, in the mortgage deeds, the like notice was taken of the lease, and the mortgagee for some time received the rent reserved; it was held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. 1 B. & P. 531. — 3. Hence, too, a lease so rendered void against him in remainder, cannot be set up in a court of law by such remainder man's acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession. Dougl. 50. Cowp. 482. B. N. P. 96. 7 T. R. 83. 4 A. 3 Atk. 395. — 4. Where, however, a remainder man lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it; all these circumstances taken together will bind him in a court of equity from controverting the lease afterwards. Woodf. L. & T. 39.

(*s*) 1. A lease executed by a tenant for life, in which the reversioner, who was then under age, is named, but which he does not execute, is void on the death of the tenant for life, and an execution by the reversioner afterwards is no confirmation of it. 1 T. R. 14. — 2. But if tenant for life makes a lease for twenty years generally, and afterwards he in reversion confirms that lease, and then the tenant for life dies; though this at first would have determined by the death of the lessor, yet the confirmation hath made it good for the whole term. Bac. Abr. Leases, L. 2. — 3. But if the lease had been for twenty years, if the lessor tenant for life should so long live; there if the reversioner had confirmed the lease, yet would it not prevent its voidance upon the death of the tenant for life. — 4. The diversity between which cases is this; that in the first case, the lease being made generally for twenty years, nothing appears to the contrary, but that it was a good lease for that time absolutely; for the death of the lessor, which would determine it sooner, does not appear in the lease itself; then when the reversioner who alone could take advantage of that implied condition, thinks fit to name it, and confirms the lease as it was made at first for twenty years absolutely, this makes it his own lease, for so much of the time as would have fallen into his reversion by the death of the tenant for life being made the express limitation and circumscription of the twenty years in the lease itself, no confirmation of that lease so limited can enlarge it to extend beyond the life of the lessor, that being the express determination affixed to it. For although we find one case, where it is held, that if a man makes a lease for twenty-one years, if the lessee so long live, and afterwards the lessor and lessee join in a grant by deed of the term to another, after which the first lessee dies within the twenty-one years, yet the grantee shall enjoy it during the residue of the term absolutely: To reconcile this case with the other, it must be intended, that in the assignment no notice is taken of the express limitation affixed to the lease, but that they joined in an assignment of the lease for the residue of the twenty-one years, and then it may be well construed to amount to a confirmation by the lessor for that time, as the lessor may confirm the land to the lessee for any longer time, and thereby enlarge his estate or interest. Bac. Abr. Leases, L. 2. — 5. B. tenant for the life of C. and he in remainder or reversion in fee, join in a lease for years by indenture; this during the life of C. is the lease of B. who then only had the present interest in the lands, and the confirmation of him in remainder or reversion. But after the death of C., then this becomes the lease of him in the reversion or remainder, and the confirmation of B

For

they may join in waste, and he for life shall have *locum vastatum*, and he in reversion, damages. Co. L. 42. a. (t)

So, joint-tenants the one for life, the other in fee. (u) Co. L. 42. a.

So, if A. recovers dower against tenant for life, he shall have the land after the death of A. Co. L. 42. a.

### (E 3.) What privileges he shall have.

Tenant for life, or for years, shall have house-bote, plough-bote, hay-bote; viz. *estoveria ædificandi, ardendi, arandi, et claudendi*. Co. L. 41. b.

And these reasonable estovers he shall have upon the land demised, without assignment; if he be not restrained. Co. L. 41. b.

So, if the lessor covenants that he shall take estovers in a wood not demised; he shall take in both. R. Dal. 4 Mo. 7.

If he demises a manor, (except Frith-Close,) and covenants that he shall take them *super præmissa*; he shall not take them in Frith-Close. R. 1 Leo. 117.

Otherwise, if the demise was (except the trees) (x) and a covenant so; he shall take the trees excepted for estovers. R. 1 Leo. 117.

Or, if it be averred, that there are no estovers but in the land excepted. R. Cro. El. 125.

If a grant be to a lessee to take estovers from time to time in a close not demised, without saying, for what time; he shall take them during the term. R. Mo. 7.

But the lessee cannot take fire-bote except of underwood. 3 Leo. 16.

Or, if fire-bote be expressly granted, and there be not sufficient underwood; he may take it of the great trees. 3 Leo. 16.

Estovers may be claimed *in alieno solo* by grant, or by prescription.

If a grant be to a lessee to take estovers, he shall have them during his term, and his executor after him. R. Dal. 4.

For the lessor having several estates in them in several degrees, the lease shall be construed to move out of each one's respective estate or interest, as they become capable of supporting it, which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each. Therefore during the life of tenant for life, if the lessee being evicted, should declare of a lease from both; this, as has been adjudged, would be against him, because for that time it was only the lease of the tenant for life. Ibid. — 6. If tenant for life and he in remainder in tail join a lease to A. for life, remainder to B. for life, and the issue in tail accepts the rent of A. and levies a fine, the lease in remainder is good notwithstanding the feoffment. Cro. Eliz. 252. — 7. A conveyance by a tenant for life of all his estate, right, title, interest, &c. *habendum* for 99 years, passes a leasehold interest only, not the freehold. 1 East, 502.

(t) To which the Annotator subjoins from Hal. MSS. 3 H. 7. 9. P. 43 Eliz. C. B. D. D. n. 4. But if the lease be without deed, it is a surrender. 10 H. 7. 3. 1 Rep. Bredon's case.

(u) Join, says lord Coke in a lease for life, the joint tenant for life hath a reversion, and shall join in an action of waste. And the Annotator subjoins from Hal. MSS. 13 E. 4. 4 Dy. 27. So of a gift in tail. 38 E. 3. 7. and the writ ought to be *ad exheredationem*, B. 13. E. 2. Brief. 835.

(x) 1. Where lessee for life makes a lease for years, excepting the wood, underwood, and trees growing upon the land, it is a good exception, although he has no interest in them but as lessee; because he remains always tenant, and is chargeable in waste, and therefore to prevent it he may make the exception. Cro. Jac. 296. — 2. But if lessee for years assign over his term, with such an exception, it is a void exception. Ibid.

If

If there be no timber for repairs, it shall be found by the lessor, if there be no default in the lessee. Per 2 J. Dal. 4.

But a grant of estovers to A. gives him a right only for his life.

Though the grant be to A. *pro easiamento ipsius et hæredum*, and pursuant to a covenant to convey to him and his heirs. R. 1 Leo. 2.

## (F) Occupant.

### (F 1.) Who shall be.

If tenant *pur auter vie* (y) of lands or tenements dies before the *cestuy que vie*, he who first enters and takes possession of the land, shall have it during the life of the *cestuy que vie*, as occupant. Co. L. 41. b. (z)

And therefore, if any enters to the use of another; he who enters shall be occupant. R. 2 Rol. 151. l. 35.

If tenant *pur auter vie* leases for years, and dies before the *cestuy que vie*; the lessee shall be occupant, and his lease shall be extinct. Q. Dy. 328. b. R. 2 Rol. 151. l. 22. 2 Bul. 11.

If such lessee leases to B. at will, B. being in possession shall be occupant. R. 2 Cro. 554. R. 2 Rol. 151. l. 30. 2 Bul. 11.

Though B. claims nothing but as tenant at will. R. 2 Bul. 11. 2 Rol. 151. l. 30. 2 Cro. 554.

If tenant *pur auter vie* leases to a feme covert at will, her husband shall be occupant. Per Twisden, 1 Sid. 347.

(y) 1. And so if tenant for his own life grant over his estate to another, if the grantee dieth there shall be an occupant. Co. Litt. 41. b. — 2. In like manner it is of an estate created by law; for if tenant by the curtesy or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an occupant. Ibid. — 3. To which the Annotator subjoins, that in some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. Cro. Eliz. 58. 1 Bulst. 135. 2 Ro. Rep. 123. Probably the assertion was meant to be confined to the former; for as to the latter the authorities seem decisive in favour of the heirs taking, as special occupants, if named in granting over curtesy or any other estate created by law. See 27 Ass. pl. 31. Plowd. 28. & 556. But even the doctrine against general occupancy of estates created by law, comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15 E. 3. Fitzh. Abr. Scire Facias, pl. 17. which appears foreign to the purpose.

(z) The annotator from Hal. MSS. subjoins, Who shall be occupant? A. makes lease to B. for one hundred years, and afterwards ousts him and makes lease to C. for the life of D; B. re-enters; C. dies; B. shall not be occupant against his will, for so his term would be drowned. H. 6. Jac. C. B. Rawlin's case. Lessee for another's life, makes lessee at will, who continues in possession after the death of his lessor; he is an occupant. If A. lessee for another's life makes lessee for years, who is possessed, and A. dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A. dies, lessee at will shall be occupant, though he claims to the use of the lessee for years, or though lessee for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or hawk, doth not make an occupant. Vid. Dy. 328. H. 15 Jac. B. R. Rot. 356. Stellicorn and Hayes, and M. 10. Jac. Bulst. n. 6. Chamberlain and Ewer. A. lessee for life of B. makes lease to C. for 20 years, rendering 5*l.* C. makes lease to D. for 10 years, rendering 3*l.* A. dies; D. is occupant, yet he shall pay the rent of 3*l.* to C., and C. shall pay the rent of 5*l.* to D., for D's term is prevented from merging by the intervenient reversion in C., but D. has the freehold in reversion expectant on C's term, and the rent incident to it. And he adds, see Stellicorn and Hayes, in 2 Ro. Rep. 123. and Cro. Jac. 554. and Chamberlain and Ewer in 2 Bulst. 11. 2 Ro. Abr. 151. E. pl. 3. 4. and Palm. 42.

If lessee at will cuts down trees, which is a determination of the will, yet he shall be occupant. Per Twisden, 1 Sid. 347.

So, if tenant *pur auter vie* was disseised, and dies, the disseisor shall be occupant. Per Croke, 2 Bul. 12. D. Cont. 2 Leo. 121.

If tenant for life levies a fine to the use of himself and A., and if A. dies in the life of tenant for life to B.; A. dies in the life-time of tenant for life; by equity it goes to B. 2 Cro. 201.

But he, who claims to be occupant, if he does not take actual possession, shall not be occupant, Vau. 188. 1 Sid. 347. 3 Leo. 36.

So, if a man goes cross the land, without other intent, he shall not be occupant. D. Cart. 61. (a)

If at the death of tenant *pur auter vie*, his wife and son be upon the tenements, they shall not be occupants without more, for the incertainty. D. Cart. 61.

So, if a man makes a lease in trust for himself for life, and afterwards for his wife, and enters, and dies; the lessee shall not be occupant. Vide 1 Sid. 347.

So, if tenant *pur auter vie* makes a lease upon the same trust; the lessee shall not be occupant, but the wife, if she enters. R. per 3 J. Bridgman cont. and affirmed in error. Cart. 57. 1 Sid. 347. 1 Lev. 202.

So, if a lease be to A. and his heirs *pur auter vie*, and A. dies; his heir shall be special occupant. Co. L. 41. b. 2 Rol. 150. l. 15. 151. l. 40, 50. D. 10 Co. 98. a.

So, if tenant *pur auter vie* grants a lease to commence after his death; the lessee may enter and have it during his term, though a stranger first entered. Per 2 J. Cro. El. 182. Agreed 1 Lev. 202.

But if a lease be to A., his executors or assigns, *pur auter vie*; his executor shall not have it as special occupant: for an occupant has the freehold, which an executor cannot take. Dy. 328. b. R. 2 Rol. 152. l. 5. Yel. 9.

Nor his administrator; for he is not an assignee to such intent. R. Cro. El. 901. Mo. 664. R. Yel. 9.

Nor shall he be subject to payment of debts. 1 Ver. 234.

Yet by the st. 29 Car. 2. 3. If tenant *pur auter vie* does not devise his estate, and there be not a special occupant, it shall go to the executors or administrators of the grantee, and be assets in their hands. (b)  
And

(a) Vide supra.

(b) 1. The title by *general* occupancy is now universally prevented by the 29 Car. 2. c. 3. s. 12. and 14 G. 2. c. 20. s. 9. The first statute enacts that estates *pur auter vie* shall be devisable, and if not devised, chargeable in the hands of the heir as assets by descent, where the estate falls on him as special occupant; and if he is not entitled as such, shall go to the grantee's executors or administrators, and be assets. On this statute a doubt arose, whether it operated farther, than by making such estates devisable and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts if not devised, for his own benefit, as in the place of a *general* occupant. See 12 Mod. 103. This gave occasion to the second statute, which expressly makes the surplus in case of intestacy distributable as personal estate. Co. Litt. 41. b. n. (5).—2. Sir William Blackstone is of opinion, that notwithstanding these statutes, the grant of an incorporeal hereditament *pur auter vie* will, as at common law, be entirely determined by the death of the grantee. But Lord Keeper Harcourt has declared, that these statutes are sufficiently comprehensive to include it. The reason given for Sir William Blackstone's opinion is "for these statutes must not be construed so as to create any new estate, or to keep that alive

And this ought to be understood, for want of assets : for the executor shall not have it if he does not prove such want. R. 1 Ver. 234. for in its nature it is an inheritable estate and goes to the heir. Semb. 2 Ver. 320.

And he who enters shall be occupant ; but *quoad* creditors he is executor *de son tort*. Carth. 166.

### (F 2.) Of what things.

Occupancy ought to be of things of which there may be an actual possession : as, of land, or sea. Vau. 188.

But there cannot be an occupant of a rent. Co. L. 41. b. (c) Cro. El. 721. 901. R. Mo. 664. 2 Rol. 150. l. 48.

Nor, of a thing, existing solely by creation of law : as, of an advowson, common, fair, title, dignity, &c. Vau. 190. 194.

Nor, of tithes, &c. Vau. 201.

Nor, of an use before the st. 27 H. 8. 10. 2 Cro. 201.

And things, of which there cannot be an occupant, determine by the death of tenant for life. Vau. 201.

And if there be a remainder limited upon his estate, it commences immediately. Per Poph. Mo. 664.

So there cannot be an occupant against the king. Co. L. 41. b. Sav. 62.

Yet an occupant may take a common, advowson, &c. as appendant to land which he occupies. Vau. 190. 196.

So, if a lease be of land and tithes rendering rent, the occupant of the land shall have the tithes : for the rent is increased in respect of it, though it wholly issues out of the land. Per Vaughan ; but judgment was against him. Vau. 202.

An occupant, in the nature of the thing has but a bare possession, which he may take, or leave, at his pleasure. Vau. 189.

alive which by the common law was determined, and thereby to defer the grantee's reversion." Now as the contracting parties intended that the estate should continue during the life of *cestui que vie*, the lord keeper's construction of the statutes will not bear hard upon the grantor ; which is a consequence seemingly pointed at by the expression closing the sentence just quoted, and to avoid which consequence seems the reason of the commentator's opinion. On the contrary, the hardship by the extinction of the right at common law was all upon the side of the purchaser. Those who assert the contrary must assume, that the contracting parties included in their calculation the chance of the grantee's dying before *cestui que vie* ; but if so, then the right would not be transferable property, which it is ; for the proprietor may assign it to another, in whom it will be continued notwithstanding his death. (Moor. 664. pl. 307.) So that its determination at common law, with his life, in a case where it had not been assigned, was purely the result of accident. The statutes having placed estates *pur autre vie* upon the footing of mere personalty, it should seem that they must necessarily vest in the representative of that estate.

(c) 1. Lord Coke's doctrine is general, there can be no occupant of any thing that hath in grant, and that cannot pass without deed, because every occupant must claim by a *que* estate, and aver the life of the *cestui que vie*.— 2. To which the Annotator subscribes, vide M. 44, 45 Eliz. B. R. Salter's case. Rent granted to one his executors and administrators *pur autre vie*, and the grantee dies ; it shall not go to the administrator as special occupant, but determines by the death unless there has been an assignment. And he adds, see S. C. in Cro. Eliz. 901. Noy, 46. Yelv. 9. and Mo. 664. See also S. P. accord. 2 Ro. Abr. 151. G. pl. 3. — 3. However some have thought that executors and administrators if named in the grant, might take an estate *pur autre vie*, though a freehold, even before the statutes of occupancy, by which they are now entitled. See 3 Ask. 466. The authority relied on is Dy. 328. b.



And therefore, he cannot be subject to a tenure, condition, &c. Vau. 189.

But civil constitutions may subject him: and therefore, by the common law, the freehold is cast upon the occupant. Vau. 191. 195.

So an occupant shall be subject to a rent reserved upon the lease *pur auter vie*. Vau. 190. Co. L. 41. b.

So, if tenant *pur auter vie* leases for years to one, who leases at will; though the lessee at will be occupant, yet the lease for years is not extinct. R. 2 Bul. 12. 2 Rol. 151. l. 30. 2 Cro. 554.

Or, if a remainder was upon a lease for years, or the lease was of coven, &c. it shall not be extinct.

So an occupant shall be subject to waste. Co. L. 41. b. Vau. 190.

So, to a forfeiture, condition, &c. Vau. 190.

## (G) Tenant for years.

### (G. 1.) By what words a lease shall be.

Tenant for term (*d*) of years shall be, where a man lets (*e*) lands to another for a term of certain years. Lit. S. 58.

The usual words to make a lease are, demise, grant, to farm let, &c. Co. L. 45. b.

So any words, which amount to a grant, (*f*) are sufficient for a lease. Co. L. 45. b.

As, if a man covenants, grants, and agrees, that B. shall have such land for so many years, and B. covenants to pay the rent; it is a good lease for years. R. Mo. 861. Hob. 35. Win. Ent. 119. R. 2 Cro. 92. R. 1 Rol. 847. l. 40. R. Cro. Car. 207. Jon. 231.

So, if he covenants, (*g*) that the covenantee shall enjoy such land for such a time, rendering rent. (*h*) R. 1 Leo. 136.

So, articles, which say, it is agreed that A. shall lease to B. for seven years, provided that B. shall render rent amounting to the present

(*d*) 1. *Terminus*; because the duration of the lease is bounded, limited, and determined. 2 Blk. Com. 143. — 2. It is properly called a term of years, and the lease is made for ten, a hundred, a thousand years, and the like, as the lessor and lessee agree; for the word *term* doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time. Shep. Touch, c. 14. 267.

(*e*) It is essential to a lease, that some reversionary interest be left in the lessor. 3 Burr. 1556. 1 Blk. 482.

(*f*) 1. Hence the word *dedi* is a sufficient word to create a lease for years. Co. Litt. 301. B. — 2. So a licence to inhabit amounts to a lease. 4 Burr. 2209. 1 Mod. 14. 11 Mod. 42. 1 Ld. Rd. 404. 2 Salk. 223. — 3. And therefore if one man license another to enjoy such a house or land from such a time to such a time, it is a lease. Bac. Abr. Leases.

(*g*) 1. Omitting 'grants and agrees.' 2 Mod. 80. — 2. So a covenant to stand seised. 3 Burr. 1446.

(*h*) 1. A reservation of rent is not essential to the validity of a lease, unless specifically enjoined by statute, or a power under which it is created. 3 H. 7. M. 7. p. 12. 5 H. 7. H. 2. p. 11. 20 H. 7. M. 22. p. 13. 21 H. 7. M. 45. p. 36. 5 Rep. 55. 9 Rep. 124. 132. 4 Leon. pl. 82. p. 29. Keilw. 174. ca. 5. Latch. 100. Bendl. 22. pl. 86. though 7 Edw. 4. Trin. 2. p. 11. is contra, and holds that a reservation is essential even on a feoffment; and see farther Serjeant Hill's note to 3 Burr. 1563. — 2. Hence a tenancy may be created though the quantum of rent is not ascertained at the time. 4 East 29.

lease;



lease: though it be covenanted to make a lease according to the agreement. R. 1 Rol. 847. l. 50. Cro. El. 486. (i)

So, if any man says, you shall have a lease of land in D. for twenty-one years at 10*l.* per annum, make a lease in writing, and I will seal it; it will be a lease by parol, (k) though not in writing. Cro. El. 33. Mo. 8. (l)

But

(i) 1. 385. Cro. Car. 207. — 2. Vide the note to the next plac. — 3 If, says C. B. Gilbert, the most proper form of words of leasing are made use of, yet if upon the whole there appears no such intent, but that the instrument is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing them a present lease when the intent was manifestly otherwise. Bac. Abr. Leases 164. — 4 So where instruments containing words of present demise have operated as actual leases, although something further was covenanted to be done, yet all the terms of the contract were specified and ascertained, and nothing but a more regular conveyance was wanting. 1 B. & B.

(k) 1. With respect to parol leases; their duration has been limited by the statute of frauds. The first section of that statute declares the legal effect of leases, which are not in writing, by enacting that all leases, estates, interest of freehold or terms of years, or any uncertain interests, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or (by) their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary, notwithstanding. And the second section makes the following exception of certain leases; except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount unto two-thirds at least of the full improved value of the thing demised. — 2. The meaning of which two sections appears to be, that such leases of messuages, manors, lands, &c. as do not exceed the term of three years from the making thereof, and upon which the rent reserved to the landlord during the term amounts to two-thirds at least of the full improved value of the thing demised, are valid without writing, provided that no writing were necessary before the statute of frauds; but that all leases of messuages, lands, &c. which exceed the term of three years from the making thereof, (whatever may be the amount of the rent reserved,) or upon which, if they do not exceed that term, less than the two-thirds of the full improved value is reserved, have the force and effect only of leases or estates at will, unless put in writing and signed as the statute directs; and further that all other interests, created without writing, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, whether they are interest of freehold or terms of years, or for an uncertain duration, can only have the same effect, namely, of leases or estates at will. Phill. Evid. 457. 2 Str. 651. Say. 4. — 3. The first section seems to embrace interest of every description, while the exception in the second section relates only to leases of a particular description. Phill. Ibid. Sugden's L. V. & P. 56. 59. — 4. A mere easement in lands or tenements, &c. is not an interest within the provision of the first section. Agreements, therefore, for the liberty of using a way over another person's field, or for stacking coals upon his close, or for nailing the frame-work of a sky light against the wall of his house, are valid without writing. Phill. Ibid. Say. 3. 8 East, 310. n. — 5. A parol lease for three years to commence *in futuro* is not warranted by the statute. 12 Mod. 610. L. R. 736. — 6. But a lease by parol for a year and a half, to commence after the expiration of a lease which wants a year of expiring, is warranted; since it does not exceed three years from the making. B. N. P. 177. Str. 651. — 7. And if land be leased to A for a year, and so from year to year as long as both parties shall agree, this is a lease for two years certain; and if the lessee hold on after two years, he is not a lessee at will, as the old opinion was, but for a year certain, and his lease is not determinable till that year be ended; for his holding on is an agreement to the original contract. Such executory contract too, is not void by the statute of frauds, for there is no term for above two years ever subsisting at the same time; and there can be no fraud to a purchaser, for the utmost interest that can be to bind him can be only for one year. But if the original contract were only for a year at 8*l.* per annum

But a covenant, that a stranger shall enjoy such land for so many years

annum rent, without mentioning any time certain, it would be a tenancy at will after the expiration of the year; unless there was some evidence, of a regular payment of rent annually, or half yearly, that the intent of the parties was that he should be tenant for a year. B. N. P. 84. Cro. Eliz. 775. 2 Salk. 414. 1 Wils. 262. — 8. Leases by parol not within the exception before mentioned, are not available as to the duration of the interest; for the statute enacts, that they shall have the force and effect of leases or estates at will only; but still they may, in some cases, be applied to regulate the terms, in which the tenancy subsists in other respects, as, for example, the amount of the rent, or the time of the year when the tenant is to quit. Phill. Evid. 438. — 9. Therefore where a tenant, who entered upon the premises on Lady-day under a parol lease for seven years, and was to quit at Candlemas, held over, after receiving a notice to quit on Lady-day; the notice, it was held, was irregular, and that the tenancy could only be determined at Candlemas, which was the time for quitting fixed by the agreement. 5 T. R. 471. — 10. And though the statute, after enacting that such leases shall have the force and effect of leases or estates at will, further enacts, 'that they shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; yet these words have been understood to mean, that a parol lease exceeding three years should not operate as a term, but that a holding under such a lease will now operate as a tenancy from year to year; because that is now construed to enure as a tenancy from year to year, which was then considered as a tenancy at will. Phill. Evid. 439. 8 T. R. 3. — 11. Though some hold, that if the party granting such parol lease do no act acknowledging the lessee as tenant, only a tenancy at will, or rather no tenancy at all, will be created by the lease, and that a notice to quit will be unnecessary. Adams, Eject. 112. citing 4 T. R. 680. 2 Esp. 717. 3 East, 449.

(D) 1. Whether an instrument shall operate as a demise, or only as an agreement, depends upon the intention of the parties, to be gathered from the whole instrument, provided such intention may be effectuated without transgressing a rule of law. 3 Taunt. 65. — 2. And if an instrument professing to be an agreement for a lease, is in itself a transfer of possession, whether immediate or *in futuro*, it is a lease, though it contain a stipulation for executing a regular lease under seal. *Supra* the preceding plac. and Hob. 34. 2 Blk. 973. 5 T. R. 165. 167. 2 Campb. 286. 12 East, 168. 13 East, 18. 15 East, 244. — 3. *Secus* where possession is not meant to pass under it. 13 East, 18. — 4. But the court cannot, by construction in order to avoid circuitry of action, make words, which import only a covenant, a lease, when such lease would be inconsistent with the nature and quality of the estate held of the lessor. Thus where the lands are copyhold, demiseable for three years only, and there is a covenant in a lease for three years to grant for twenty-one, and that lessee shall hold for that period. 2 M. & S. 255. — 5. Which rules will now be illustrated by examples; and first by *examples in which instruments have been held to operate as demises*: Thus a deed that a person 'shall hold and enjoy the premises from seven years to seven years, for and during the term of forty-nine years,' with a proviso that it shall be void on payment of so much money,' though intended only as a collateral security, amounts to a present lease. Cro. Jac. 172. 2 Mod. 8. — 6 So where one by his will declared that he *had* made a lease to J. S. for a term of twenty-one years, paying but 20s rent, this was held a lease or demise by the will for twenty-one years, by construing the word *had* in the present tense, as *dedi* is in a deed of feoffment, in order to effectuate the testator's intention. Bac. Leases, 163. — 7. So an agreement to grant a lease, whereby the lessor did let and set for twenty-one years, from a future day, is a lease in *presenti*, the intention so appearing. 2 Blk. 973. — 8. And under a demise of the milk and calves of so many cows to be provided by the lessor, and to be depastured at his expence on a certain close belonging to him, exclusive of all other cattle, except a bull to be put with the cows for a certain time, the exclusive right to the herbage and feeding of the close is in the lessee. 5 T. R. 329. — 9. And if the owner of premises sells them by a written instrument, and there is also a parol agreement between himself and the vendee (founded upon a sufficient consideration and other than the sale of the premises) that a third person shall be tenant to the vendee from year to year; this agreement being quite collateral to the sale, and not a condition thereof, enures to create such tenancy, though not inserted in the instrument. 4 East 29. — 10. So where the following instrument was written on an agreement stamp; A. agrees to let, and B. agrees to take, all that land, &c. for the term of sixty-one years from Lady-day next, at the yearly rent of 120*l.* and for and

years at such a rent, does not amount to a lease, but a covenant. 1 Leo. 136. (m)

So,

and in consideration of a lease to be granted by the said A. for the said term of years, the said B. agrees to expend 2000*l.* in building within four years five houses of a third class of building; and the said A. agrees to grant a lease or leases of the said land, as soon as the said houses are covered in, and the said B. agrees to take such lease or leases, and execute a counterpart or counterparts thereof; this agreement to be considered binding, till one fully prepared can be produced; it was held to be a lease. 12 East, 168. — 11. So likewise was an instrument which ran thus; A. agrees to let and also upon demand to execute to B. a lease of certain lands; and B. agrees to take and upon demand to execute, a counterpart of a lease of the said lands for a certain term at a certain rent; the lease to contain the usual covenants, and the agreement to bind until the said lease be made and executed. 15 East 244. — 12. So lastly, were these words in an instrument, 'be it remembered that A. B. hath let and by these presents doth demise,' though the instrument contained a further covenant for a future lease. 5 T. R. 165. — 13. Next of *examples in which instruments have been held not to operate as demises*: where a lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre, it was held to be no lease, 413. — 14. So likewise where one made a lease for life, *et provision est*, that if the lessee die within sixty years, then his executors and assigns should enjoy the land in his right for so many years as should be behind of the sixty years from the date of the lease; this was held to be a covenant only, and no lease. Bac. Abr. Leases K. — 15. So the following articles were construed to be an agreement only: A. doth demise his close to S. to have it for forty years; and a rent was reserved with a clause of distress; upon which articles a memorandum was also written, that the articles were to be ordered by counsel of both parties, according to the due form of law. Noy, 128. — 16. So was a writing, whereby A. agreed to let and B. to take premises, upon which he was to enter immediately, at a certain rent, the payment of which was not to commence until Lady-day next; and leases with the usual covenants were to be executed on or before next Michaelmas. 1 T. R. 735. — 17. So was an instrument containing words of present demise of a copyhold, to commence at the death of B., with a stipulation by the land owner, that in that event, and on the other party becoming entitled to the premises, he would procure a licence from the lord; and for this reason, that the stipulation for procuring the licence shewed, that the parties meant to guard against the forfeiture, which to hold the instrument a lease would be incurred. 2 T. R. 739. — 18. And where A. being seised of freehold and copyhold lands, demised by indenture the whole at one entire yearly rent; *habendum* as to so much as was freehold for twenty-one years, and as to so much as was copyhold, for three years; and then followed covenants; and then the indenture reciting that it was thereby agreed that for the said rent, and under the said covenants the lessee might hold the said premises, as well copyhold as freehold, for twenty-one years, to commence as aforesaid as if that demise had been so made, but that the copyhold was not grantable for any longer term than three years successively, the lessor covenanted three months before the expiration of each successive three years to execute under like covenants and without any increase of rent, a new lease of copyhold for three years, to commence after the expiration of the former term; and 'it was agreed,' that until such new leases were executed, the lessee should hold and enjoy for twenty-one years; it was held, that this covenant &c. for a new lease was only a covenant, and did not operate as a lease conveying to the lessee an indefeasible interest for twenty-one years: it was the lessor's intention not to transgress the custom, which he would have done had he granted a lease for more than three years. 1 M. & S. 255. — 19. So an agreement that A. shall enjoy, and I engage to give him a lease in the premises from Whitsuntide next, was held to be no demise. 5 T. R. 163. — 20. So where a lessor covenanted to give the lessee of a messuage free ingress and egress through a certain passage into a yard, with the free use of the pump in the said yard, jointly with the lessor, whilst the same should remain there, paying half the expence of keeping it in repair; this was held not to be an absolute demise of the use of the pump; but that the lessor might remove it at pleasure. 3 Smith, 173. 7 East, 116. — 21. So an instrument in which the words were, 'agreed this day to let

So a covenant, that he shall permit the covenantee himself to hold the land for so many years, does not amount to a lease: for it sounds only in covenant. R. 1. Rol. 848. l. 5. (n)

So, an article, that he is content A. shall have a lease for six years, that the rent shall be 10*l.* &c. for it appears to be only instructions for a lease. R. 1 Rol. 848. l. 10.

So a defeazance of a recognizance, that A. shall convey an advowson to B. and that B. shall alway quietly enjoy it, does not amount to a present lease. (o) R. Co. Ent. 85. a.

So

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my house to B.' for a certain term, 'a clause to be added in the lease to give my son a power,' &c., was considered an agreement only. 6 East, 530. — 22. So likewise was an instrument setting forth the conditions of letting a farm, the term to be from year to year, and the lands to be entered upon at a period fixed, &c., and that a lease was to be made upon these conditions with all usual covenants, at the foot of which instrument the intended lessee wrote, 'I agree to take the premises at the rent of, &c. subject to the covenants. 13 East, 18. — 23. So an instrument not under seal, whereby 'A. agrees to let to B. certain premises; to hold from a day past; at a specific rent; under all usual covenants and agreements, as between landlord and tenant, where the premises are situate; with stipulations for certain acts to be done by both parties, amongst others, that 'out of the rent, a proportionate abatement should be made in respect of certain excepted parts of the premises,' was held to be only an agreement. 3 Taunt. 65. — 24. So in the case of a paper entitled 'memorandum of an agreement,' between A. & B. and signed by them, expressing, that in consideration of 40*l.* A. 'doth agree to let,' and B. 'doth agree to take a messuage, at 40*l.* per annum rent; 'and it is farther agreed,' that A. 'shall not raise the rent nor turn out' B. so long as the rent is duly paid quarterly, and he does not sell any article injurious to A. in his business; it was considered, that though the terms did not exclude the construction of actual demise, yet the import of the whole looking to some future instrument, and more permanent interest than from year to year, a demurrer to a bill for specific performance against A., who had succeeded in an ejectment, was over-ruled. 14 Ves. 156. 409. — 25. And lastly, where A. by an instrument demised or agreed to demise lands to B. for three lives (not named) at a yearly rent, and further agreed that leases should be perfected at the request of either party; as an essential part of the contract, the nomination of the lives, was wanting, this it was held, could not operate as a lease for three lives, nor as a lease for the life of a tenant, that not being the intention of the grantor; but merely as an executory agreement for a lease. 2 B. & B. 68.

(n) 1. Quere. — 2. The words 'shall enjoy,' when unqualified pass an interest, 5 T. R. 163.

(o) 1. As to *implied* tenancies; a general occupation of lands enures now as a tenancy from year to year, determinable only by a regular notice to quit. 8 East, 165. — 2. And the general rule is, that if a tenant for a year, hold on with the landlord's consent, after the term has expired, the lease is tacitly renewed for another year. 1 T. R. 159. — 3. To which rule the case of lodgings is an exception. Ibid. — 4. So if, after the expiration of a tenancy determined by the effluxion of time, or the happening of a particular event, the reversioner or remainder man receive rent *qua* rent, from the person in possession, or in any way acknowledge him as tenant; a tenancy from year to year will be thereby created, subject to the conditions of the original lease, and determinable only by a regular notice to quit, 1 H. Bl. 97. — 5. Where, however rent is not paid and received as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created thereby, nor will a notice to quit be necessary. 3 East, 260. 10 East, 261. — 6. The payment of a customary rent for copyhold premises, is not a payment as between landlord and tenant; and if the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the lord, will not create a tenancy from year to year. 3 East, 260. — 7. And where tenant in tail received an ancient rent which was but trifling when compared to the real value of the premises, and which had been reserved under a void lease granted by the tenant for life, under a power; it seems that a tenancy from year to year was not thereby created, though some notice to quit was necessary to make the party a trespasser. 10 East, 261. — 8. And where a remainder-man on the death of the tenant for life, gave notice to the tenant in possession under a lease granted by the tenant for life, but void against the remainder-man, to quit at the



So a covenant to levy a fine, upon condition, that if A. shall pay 100*l.* within thirteen years to B. it shall be to the use of A ; and in the mean time to the use of B. and that B. shall enjoy it for thirteen years, does not amount to a lease to B. if the fine be not levied. R. 2 Cro. 172. 1 Rol. 847. U.

(G 2.) By what persons.

Tenant (*p*) in (*q*) fee simple may make leases, without limitation, or restraint.

So tenant in tail may make a lease for his own life.

And now, by the stat. 32 H. 8. 28. he may make leases for three lives, or twenty-one years. Vide ante, (B 32.) — post, (G 4, 5.)

So, by the same st. husband and wife may make leases for three lives, or twenty-one years, &c. Vide Baron and Feme, (G 3.)

(G 3.) By spiritual persons, &c. at common law.

So, by the common law, spiritual or ecclesiastical corporations might make leases for lives, or years, without limitation, or restraint, *concurrentibus iis quæ in jure requiruntur*. Co. L. 44. a. 2 Inst. 457. (*r*)

So, a master and fellows of a college, hospital, &c. Co. L. 44. a.

An archbishop, or bishop might make a lease, with the confirmation

the end of six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was ruled by Blackstone J. that the previous notice to quit rebutted the presumption of a tenancy from year to year, raised by the acceptance of the rent. 1 T. R. 161. — 9. And where a tenancy has expired, a new tenancy is not created merely by the landlord's neglecting to take possession. 8 East, 358. — 10. Nor will a mere treaty for a new lease be a sufficient acknowledgement to constitute a tenancy from year to year, although the tenant should continue in possession during the treaty. 2 Esp. C. 717. 2 Camp. 505. — 11. And a notice to quit 'the premises which you hold under me, your term therein having some time since expired,' does not recognize an existing tenancy. 3 Taunt. 54. — 12. Possession and payment of rent under a written, but invalid agreement, to let lands at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, was held to create a tenancy from year to year. 8 East, 165. — 13. Where lands descended to an infant, with respect to whom the tenant in possession was a trespasser, and an ejectment was brought by the infant, and compromised by his attorney, although after the infant was of age he accepted no rent from the tenant, nor in any wise confirmed the agreement which his attorney had entered into, it was held that he could not then maintain a second ejectment without a regular notice to quit, provided there was no fraud or collusion in the first instance, because the compromise having been entered into for his benefit, he ought to be bound by it. 2 Esp. C. 528.

(*p*) 1. All who are capable of alienating their property, or of entering into contracts respecting it, may make leases. — 2. And all estates but those in fee simple being conditional, any smaller interests carved out of them will expire with the determination of the estates upon which they are dependent, unless the tenant who creates them has been expressly empowered to charge the land *in futuro*. — 3. But a fee simple is accounted the absolute property of the feoffee, which he may charge and burthen as he thinks fit. So that although it shall happen to reversion from any cause whatever, yet shall the charges with which he (previously) has thought fit to burthen it, still remain. 21 H. 6. Trin. 8. p. 55.

(*q*) 1. A tenant for years may lease or assign his term. 1 East. 598. — 2. But so cannot a tenant at will. 1 Inst. 57. a. Cro. Eliz. 156. Dougl. 283. — 3. Nor can a tenant at sufferance.

(*r*) Shep. Touch. 281.

of the dean and chapter. Co. L. 44, a. 10 Co. 60. a. 2 Lev. 137. (s)

So a dean and chapter, by common consent under their common seal.

So a prebendary, with the assent of bishop, dean, and chapter. 2 And. 168.

And the bishop, and dean and chapter may confirm, (t) by (u) several deeds. R. 1 And. 47.

So, a parson, or vicar of a church, with the consent of patron and ordinary. Co. L. 44. a. 2 Lev. 61.

Though the lease was to commence after his death, it would be good against the successor. Dy. 69. a. Hob. 7.

So a lease by a parson, or vicar before the st. 13 El. 10. was good, being confirmed; though the confirmation was after (x) the statute. R. Cro. El. 18. Vide post, (G 5.)

But

(s) 1. At common law, if a parson had made a lease for years of his glebe land, to begin after his death, or granted a rent charge in that manner, and such lease or grant were confirmed by the patron and ordinary, this would have bound the successor of the parson; because here were the consent and concurrence of all persons interested, and the lease or charge bound immediately from the perfecting of the deed by the parson, patron, and ordinary, though it was not to take effect in possession till after the parson's death. Bac. Abr. Leases, E. — 2. Now, however, no confirmation whatever will make such lease or grant good against the successor, by reason of the statutes made to avoid them. Ibid. — 3. Though if a parson obtain a grant to build houses on church or college lands, which is confirmed, (where confirmation is necessary) yet this grant is no alienation against the statutes, but is only a covenant or licence, and nothing else; for the soil remains in the grantor, and by consequence the houses built thereon are in him. Ibid.

(t) 1. As to the estate which patrons making confirmation ought to have, to make the lease effectually binding upon the successors; this regards chiefly the patron, whose advowson or right of patronage being a temporary inheritance and considered as such, is to be governed by the same rules as other temporal inheritances are; his confirmation therefore being in nature of a charge upon the advowson, is to be divested by the estate which he hath in the advowson, and can continue no longer than that endures. Bac. Abr. Leases, G. 3. — 2. If, therefore, the patron had a conditional estate in the advowson, and he confirm a lease of the parson's, and afterwards the condition be broken, this defeats also his confirmation, so that the succeeding incumbent shall not be bound by it. Ibid. — 3. So, if a church be full of a parson, and afterwards another is made parson, and he makes a lease for years, which is confirmed by the patron and ordinary, yet the lease is void; because he who made it was not parson, the church being full before. Ibid.

(u) 1. As a patron may confirm explicitly by his deed or writing, so may he also confirm by consequence of law. — 2. For if a parson makes a lease for years to the patron, who grants or assigns it over to another, this amounts to a confirmation in law by the patron, because a confirmation being nothing but an assent under the hand and seal of the party confirming, such assent, in this case, sufficiently appears by his assigning over the lease to another. Bac. Abr. Leases, G. 2. — 3. And another difference is observable in the manner of confirming, with respect to the duration or continuance of the lease; for if a parson make a lease for twenty-one years at this day, and the patron and ordinary confirm his estate therein for seven years, or (after reciting the lease) 'not beyond' that term, yet is the estate or lease well confirmed for the twenty-one years; for when they confirm the estate of the lessee, that is entire and cannot be divided. Ibid.

(x) 1. As to the time of confirmation; generally speaking, it is not material whether it be before or after the making of the lease which is to be confirmed, so it be made in the lifetime of the parties who make the lease; for the confirmation is but an assent or agreement by deed to the making such lease or grant, and not a confirmation of the estate itself. Bac. Abr. Leases, G. 3. 4. — 2. Thus where a bishop made a lease on the 2d of May, which was confirmed the 3d of May, and sealed the 4th of May, this was held a good confirmation. Ibid. — 3. Yet it has been held on the contrary that if a confirmation be made and delivered before the grant or lease be confirmed, this



But a lease by an ecclesiastical person, before he was intitled to possession, was void; as, if the king appropriated a church, in the life of the incumbent, to a bishop, &c. and the bishop made a lease for forty years to commence after the death of the incumbent; it would be void: for he had nothing in the life-time of the incumbent. R. Dy. 244.

So a lease by a parson, provost, &c. not confirmed, was void by his death. Dy. 239. b. 2 H. 4. 5. a. (y)

Or, confirmed by patron and ordinary, but not by the grantee of the next avoidance. Jon. 454.

And though the grantee presents, and his presentee does not avoid the lease; the patron in fee may afterwards avoid it, though he confirmed it: for being once void, it shall not afterwards be good. R. Jon. 454.

(G 4.) By the st. 32 H. 8. 28., 1 El. 19. and 13 El. 10.

So, by the st. 32 H. 8. 28. all leases of any hereditaments by indenture under seal, for term of years, or life, by any person having an estate of inheritance in right of their churches, shall be good against them and their successors, in the same manner as if seised in fee.

Provided, not to extend to leases of lands in farm by virtue of any old lease, unless such old lease be expired, surrendered, or ended within one year after making of a new lease; nor to a grant of any reversion of lands, &c. nor to a lease of lands not most commonly letten by the space of twenty years before; nor to a lease without impeachment of waste; nor to a lease above twenty-one years or three lives from the day

this is not a good confirmation; and though after the grant or lease the deed or confirmation be delivered again, yet that will not make it good; for that it was a deed by the first delivery, and the second delivery will not make it good as an assent, because the assent ought to be by deed, and the first delivery was void; but that confirmation may be made before the grant or lease be confirmed, the other cases are express. Ibid. — 4. If a bishop, parson, or any other sole ecclesiastical corporation, make a lease for years, which needs confirmation, his confirmation ought to be made in the life and during the incumbency of the lessor, for after his death, resignation, deprivation, or other amotion, the lease is become void for want of confirmation, and then confirmation made after cannot revive it, though it be made in the vacation before any successor comes in. Ibid. — 5. But if a parson make a lease for years, which is not confirmed by the bishop or patron, then in being, but by the succeeding bishop and succeeding patron, this is a good lease, and shall bind the successor. Ibid.

(y) 1. In some cases the confirmation of the patron is necessary, and in some not; wherein this diversity is taken in the books. That such corporations who have not the absolute fee and inheritance in them, as prebends, parsons, vicars, and such like, if they make any leases on estates, there in order to bind their successors, the patron must confirm the same. But such sole corporations who have the whole estate and right in them, as bishops, abbots, &c. or such corporations aggregate who have the whole fee and inheritance in them, as dean and chapter, masters, fellows, and scholars of any college, hospital, &c. these may make leases to bind their successors, without any confirmation of the patron or founder, though the bishop, abbot, dean, master, &c. were presentable. And the reason of this diversity appears in the nature of the right with which each is invested. Bac. Abr. Leases, G. 2. — 2. But if a parsonage or vicarage be a donative, then the confirmation of the patron alone is sufficient to all leases, &c. made by the parson or vicar, and shall bind the successor without the confirmation of any other. Ibid. — 3. Yet if there be a lord paramount as well as an immediate patron, confirmation by the immediate patron, without the other's confirmation, is not good; as if a parson be patron of the vicarage of the same church, and the vicar makes a lease confirmed by the parson and ordinary, this is not good without the confirmation of the patron of the rectory also, because both have an interest in the possessions of the vicarage. Ibid.

of the making; and that on such lease be reserved the most accustomed rent paid for the same within twenty years next before.

Provided, not to give power to any parson, or vicar, to lease lands, &c. of their churches, otherwise than before.

By the st. 1 El. 19. (z) all estates made by any archbishop, or bishop, (to any but the queen, and by the st. 1 Jac. 3. estates to the crown,) and by the st. 13 El. 10. estates, leases, &c. by the master and fellows of any college, dean and chapter, master or guardian of an hospital, parson, vicar, or any having any spiritual or ecclesiastical living, of any lands belonging to their college, church, &c. shall be void, other than leases for twenty-one years or three lives from the time such leases shall be made, whereon the accustomed yearly rent shall be reserved payable during the said term.

Provided, not to make good any lease, or grant, by any college or collegiate church, for more years than warranted by their private statutes.

Provided, not to extend to any lease or surrender of a former lease, or by force of a covenant in a former lease then continuing; so that the new lease do not contain more years nor less rent than the former.

And by the st. 14 El. 11. the st. 13 El. 10. does not extend to leases of houses in any city, borough, town corporate, or market-town, or the suburbs thereof, made as by the law before, and the private statutes of any college, &c. they might have been made; so as such houses be not the capital or dwelling house, and have not above ten acres of land; and so as the lease be not made in reversion, and reserve the accustomed yearly rent, and charge the lessee with reparation, and be not made longer than for forty years.

Nor to alienations, when before, with, or presently after, assurance be made to such colleges and their successors, &c. in fee absolutely of lands, &c. of as good value, and as great yearly rent.

So, by the st. 18 El. 11. the leases upon the st. 13 El. 10. shall be void, if leases of lands, &c. whereof any former lease is in being, not to be surrendered or ended in three years next after making such new lease.

So, by the st. 18 El. 11. bonds, covenants, &c. to make or renew leases contrary to this act, and the st. 13 El. 10. are void.

By the st. 13 El. 20. no lease of any benefice, or ecclesiastical promotion with cure, shall be good, longer than the lessor is resident, serving the cure, without absence above eighty days in one year.

Provided, that a parson, having two benefices, may demise that on which he is not resident to his curate who shall serve the cure: but such lease shall endure no longer than the curate's residence, without absence above forty days in any one year.

And by the st. 14 El. 11. leases by curates shall be of no better force, than if made by him for whom he serves the cure. (a)

And

(z) The Annotator subjoins from Hal. MSS. these disabling statutes extend only to their own possessions. The archdeacon of Ely, 12 Eliz. makes lease for fifty years, which after the st. 13 Eliz. is confirmed by the bishop, and dean, and chapter. Ruled, that this a good lease to bind the successor, though after the st. 1 Eliz., and though confirmed after the st. 13 Eliz. H. 37 Eliz. Rot. 882. Sir Edward Denny's case.

(a) 1. These statutes, however, are in some respects altered by st. 39 & 40 G. 3. c. 41., by the first section of which it is enacted, that where any part of the possessions of any archbishop, bishop, masters and fellows, dean and chapter, master or guardian of any hospital,

And therefore now, all persons seised in right of their church are enabled to make leases for three lives, or twenty-one years, observing the

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hospital, or any other person or persons, or body or bodies politic or corporate, having any ecclesiastical living, shall be demised by several leases which formerly were demised by one, or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts, shall be taken to be the ancient rents within the meaning of the statutes 32 H. 8. c. 28., 1 Eliz. c. 19., 13 Eliz. c. 10., & 14 Eliz. c. 11. — 2. By the second section it is provided, that no demise made before passing the act shall be valid, unless the several rents reserved upon the separate demises of separate parts of tenements accustomedly demised under one lease, or if part be reserved in the possession of the lessor or lessors, unless the rent reserved on the parts demised shall be at least so far equal to the whole amount of the ancient rent or rents, that the part not demised shall be sufficient to answer the difference. — 3. And the third section provides, that where the whole of such demises shall in future be demised in parts, the aggregate rents reserved shall not be less than the accustomed old rent, and so in proportion where a part shall be retained in possession by the lessor. — 4. And the fourth section provides, that no greater proportion of the accustomed rent shall be reserved by any separate lease than the part of the premises demised will bear. — 5. And the fifth section provides, that where a specific thing shall have been reserved by the lessor, it may be charged on a competent part of the premises; and in case such provision shall have been made for payment of any sum of money, stipend, &c. it shall be deemed lawful if the lands, &c. charged be of greater annual value, exclusive of the rent reserved. — 6. And the sixth section provides, that no lease shall be confirmed, whereon no annual rent is reserved to the lessors, &c. — 7. And the seventh section provides, that the act shall not authorise the reservation of any rent, on any such lease, made by any master, &c. of any college, in any other manner than required by 18 Eliz. c. 6. — 8. And the eighth and ninth sections provide, that where payments have been reserved to vicars, curates, schoolmasters, and other persons than the lessor, provision shall be made in the leases for the future payment thereof out of premises of three times the annual value, exclusive of the rent, except such payment depends only on the will of the person granting or renewing the lease. — 9. And the tenth section provides, that persons holding such leases in trust, or granting under-leases of specific parts under covenants of renewal, may surrender them, in order that separate leases may be granted by the original lessors to the *cestui que* trusts, and under leases on reasonable terms, subject to the accustomed rent, &c. and every such surrender, and the new leases granted thereupon, shall be good in law and equity, notwithstanding such under-leases and *cestui que* trusts, may be infants, issue unborn, &c. or other persons incapacitated to act for themselves; provided such new leases be for their benefit, and such be expressly declared in the body of each lease. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars are restrained from making any leases of their lands unless under the following regulations: 1°. They must not exceed twenty-one years or three lives from the making. 2°. The accustomed rent or more must be yearly reversed thereon, respecting which the first sections of 39 & 40 G. 3. are particularly explanatory. 3°. Houses in corporations, or market towns, may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair; and they may also be alienated in fee simple for lands of equal value in recompence; (Hob. 269.) and, therefore, a bond or covenant for rendering or making a lease within a city or town, may be enforced, (2. Blk. Com. 320.) 4°. Where there is an old lease in being, no concurrent lease shall be made unless where the old one will expire within three years. (Bac. Abr. Leases, G. 3.) 5°. No lease (by the equity of the statute) shall be made without impeachment of waste. 6°. All bonds and covenants, tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void. 2 Blk. Com. 320. — 11. As to leases, therefore, made by parsons, vicars, and others having benefices or promotions with cure of souls, these things are to be observed: 1°. That parsons and vicars are expressly excepted out of 32 H. 8. c. 28., so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors without the confirmation of the patron and ordinary, but remain, as they did, perfectly at common law, for any thing in that statute. 2°. That an annual rent must be reserved to the lessor or lessors, otherwise the lease cannot be confirmed. 3°. That they are not

the directions of the st. 32 H. 8. and the restrictions of 1 & 13 El. Co. L. 44. a.

So, a bishop seised in right of his bishoprick. Co. L. 44. b.

A dean, archdeacon, or prebendary, &c. seised of sole possessions in right of his deanery, &c. for they are all seised *jure ecclesiæ*. Co. L. 44. b. (b) R. Cro. El. 350. 4 Leo. 51.

So,

not restrained by 13 Eliz. c. 10., from making leases for twenty-one years, or three lives; but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity to the rules or qualities before mentioned, otherwise they will not bind the successors. 4°. They, as well as others, are restrained by 13 Eliz. c. 10., from making leases for any longer term, notwithstanding any confirmation, or conformity to those rules or qualities. Bac. Abr. Leases, F. — 12. Another restriction occurs with regard to college leases, which is created by st. 18 Eliz. c. 6., (and is specifically exempted from the operation of the 39 & 40 G. 3. c. 41., by the seventh section of that act,) by which it is directed, that one third of the old rent then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s., or that the lessees should pay the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market day before the rent becomes due. 2 Blk. Com. 322. — 13. The leases of beneficed clergymen were farther restrained, in case of their non-residence, by 13 Eliz. c. 20., 14 Eliz. c. 11., & 43 Eliz. c. 9. — 14. And the courts held, that a lease by an ecclesiastic, avoided, under 13 Eliz. c. 20., by his non-residence for eighty days in one year, was void as to all the world; and that himself might recover the premises in ejectment. 2 T. R. 749. 2 East, 467. — 15. The 43 G. 3. c. 84. § 10., repealed the 13 Eliz. c. 20., together with every explanation, &c. thereof made by 14 Eliz. c. 11., 18 Eliz. c. 11., & 43 Eliz. c. 9. — 16. And the provisions made by that statute, and subsequently by the 57 G. 3. c. 99. § 32., are, that all contracts or agreements, made for the letting of the house of residence, or the buildings, gardens, orchards, and appurtenances necessary for the convenient occupation of the same, belonging to any benefice, in which house any spiritual person shall be required by order of the bishop as (in that act) aforesaid to reside, or which shall be assigned as a residence to any curate by the bishop, shall, upon a copy of such order, assignment, or appointment, being served upon the occupier thereof, or left at the house, &c. be null and void, and a copy of every such order shall immediately on the issuing thereof be transmitted to one of the churchwardens of the parish, or such other person as the bishop shall think fit, and be by him forthwith served on the occupier of such house, or left at the same; and any person continuing to hold any such house, &c. or appurtenances, after the day on which such person shall be directed by such order to reside in such house, or which shall be specified in any such assignment or appointment, and after service of such copy as aforesaid, or the same being so left as aforesaid, shall forfeit 40s. for every day he shall, without the permission of the bishop in writing, wilfully continue to hold such house, &c. together with the expence of serving such order, in case it shall have been deemed necessary specially to serve such order, to be allowed by the bishop issuing the order, or making such assignment, &c. as aforesaid, and to be recovered and applied in like manner as the penalties for non-residence are directed to be recovered, &c. by this act; and it shall also be lawful for the person so directed to reside, or curate to whom such residence is assigned, to apply to any justice of the peace or magistrate of the county, &c. or place, for a warrant for the taking possession thereof, and the justice of peace to whom any such order for possession is produced, shall thereupon give a warrant for such possession; and possession may thereupon be taken of such house under such warrant, at any time in the day-time, by entering the same by force if necessary, without any other proceeding by ejectment or otherwise.

(b) 1. The Annotator, from Hal. MSS. subjoins, Vid. for leases by bishop tenant in tail, &c. A. seised in tail of a manor, of which three acres parcel of the demesnes had been usually demised at 5s. rent, and the residue not, demises the three acres, and also the manor, *habendum* for twenty-one years, rendering for the three acres and all other the premises therewith demised 5s., and for the manor 5l. This is good to bind the issue for the three acres, but not for the residue. H. 37 Eliz. Fairfield and Rogers. — 2. The bishop of G. seised of a manor, of which one tenement was usually demised for life at

So, a chancellor of a church, treasurer, præcentor. R. 1 Lev. 112.

But a parson, or vicar, are not enabled by the st. 32 H. 8. (c) Yet they are restrained by the st. 13 El. 10. to make leases above three lives, or twenty-one years. Co. L. 44. b.

(G 5.) What leases are warranted by those statutes, and what not. Vide Baron and Feme, (G 3. — K.) Vide ante, (B 32.)

By the st. 32 H. 28. Persons seised of an estate of inheritance in right of their churches, may lease all manors, lands, tenements, or other hereditaments, whereof they are so seised.

And this extends to all persons seised in fee in right of their church: as, to a chancellor of a cathedral church. R. 1 Lev. 112.

To a prebendary, treasurer, &c. 1 Lev. 112. R. Cro. El. 350. 4 Leo. 51.

A dean, archdeacon, and all others seised in right of the church, except a parson, and vicar.

But a lease, grant, estate, &c. is void by the st. 1 El. 19. and 13 El. 10. (d) made of any manors, lands, &c. or other hereditaments, being parcel of the possessions of such bishoprick, college, &c. (or belonging to the same, by the st. 1 El.)

And these words shall be understood of possessions, &c. concerning the bishoprick. 10 Co. 61. a.

And therefore, if a bishop grants a rent-charge, it does not bind his successor. 5 Co. 15. a.

Or, grants an annuity; though it is personal: for it is a charge in respect of the bishoprick, and his successor would be charged. 5 Co. 14. b. R. 10 Co. 61. b. Bridg. 31.

Or, suffers a recovery against him in a writ of annuity, by verdict or confession. 10 Co. 61. a.

Or, makes any charge or incumbrance. 10 Co. 60. b.

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5s. rent, and the manor usually at 10s. rent, makes lease of the tenement for three lives, rendering 5s., and afterwards leases the whole manor for three lives to another rendering rent, and dies. Ruled, 1°. that the reversion of the tenement passes by the lease of the manor; 2°. and, therefore, that the lease of the manor *quoad* the tenement shall not bind the successor, because there would then be six lives in being for the tenement, and the lease would be dispunishable of waste. 3°. It seems, that the lease of the manor is also voidable, because the rent issues also out of the tenement. (Quære of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted, the entire rent for the manor would continue.) 4°. But it was agreed that the lease of a copyhold manor usually demised, or of a manor consisting of demesnes, copyholds, and services usually demised, is good to bind the successor. 5°. The lease is only voidable by the successor; and, therefore, if he accepts the rent, it is good against him. M. 20. Jac. C. B. Bishop of Gloucester against Wood, M. 5. Car. C. B. Sheir and Penter, on lease by the Bishop of Exeter.

(c) The Annotator adds, from Hal. MSS., prebend simple, or prebend with office, as is præcentor, is enabled by the st. 32 H. 8. adjudged. Bro. Leases, 62. M. 36, 37 Eliz. Watson and Major. T. 18 Jac. case of Precentor of Paul's.

(d) 1. The Annotator subjoins to Co. Litt. 45. a. from Hal. MSS. *Nota*, the stat. 13 Eliz. c. 10. *quoad* tenements in cities, is altered by the stat. 14 Eliz. c. 11., which permits leases of them for forty years; and therefore it has been ruled, that covenants for renewing leases of messuages in cities, are not prohibited by 18 Eliz. c. 11., which only restrains leases against the statute of 13 Eliz. Hob. Ca. 352. Crane and Taylor. — 2. He adds, see Hob. 269. — 3. Vide supra, 74. n. (a).

Or,



Or, makes a confirmation of a lease by his lessee. 5 Co. 15. a.

So, if he grants the next avoidance. R. 10 Co. 60. b. Cro. Car. 259. R. Cro. El. 440. 5 Co. 15. a. 1 And. 244.

Or, makes a disposition of any thing in his power, except by lease for lives, or years, not restrained. 10 Co. 60. b.

Or, permits an usurpation upon a church which belongs to him. R. Jon. 46.

So, if he grants new offices, which are not of necessity, &c. R. 1 And. 244.

Or, an antient office with a new fee. R. per 3 J. Cro. Car. 49.

Or, an antient fee, *una cum 3l. per annum*: for the grant is intire; and therefore, being with a new fee, it is void. Dub. Cro. Car. 48. Semb. that it is void only for the new fee. Bridg. 32. Ley, 71. Vide infra.

So, if he grants an antient office to two, where it was usually granted only to one. R. 10 Co. 61. R. Cro. Car. 259. R. Jon. 264.

Or, grants in reversion, an office granted only in possession. R. 10 Co. 61. R. Cro. Car. 259. R. Jon. 264.

So, if the grant be of things in grant, out of which a rent cannot be reserved: as, of an advowson, fair, franchises, &c. Co. L. 44. b. 10 Co. 60. b. R. 5 Co. 3. D. Bridg. 30.

Yet a grant of offices of necessity, confirmed by the dean and chapter, &c. is not restrained by the st. 1 El. or 13 El. if it be with the antient fee: because there is no diminution of the revenue; and it is therefore good against the successor. R. 10 Co. 61. (e)

So a grant of a new office of necessity, with a reasonable fee, being confirmed by the dean and chapter, is not restrained; and the reasonableness of the fee shall be adjudged by the court: as, the office of keeper of his house and gardens, with a fee of 3l. R. Cro. Car. 48. 10 Co. 61. b. Bridg. 31.

The office of parker, and steward. R. Cro. Car. 48. Bridg. 29. Ley, 71.

The office of commissary, or official. R. Jon. 264. Cro. Car. 258.

So a grant of the office of register by the bishop of Bristol, &c.

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(e) 1. Co. Litt. 44. a. — 2. The Annotator subjoins from Hal. MSS. Vid. 29 Eliz. Case of the bishop of Chester, who had antiently used to have a counsel who had a fee. This grantable by the bishop with consent of dean and chapter. *Nota*, though it be not an office of time which, &c. yet grantable, if of necessity, as in the case of the bishop of Gloucester, founded within time of memory. M. 1. Car. C. B. Crook, n. 8. Cook and Young. — 3. Vide that it is holden, that though it be a new office, yet if necessary and the fee is reasonable, being confirmed, it shall bind the successor; and vide the grant of antient office and fee, with the addition of a new fee, which notwithstanding seems good, because, the office is antient. M. 2 Car. C. B. Crook, n. 7. Gee's case. — 4. If it had been usual to grant an antient office to one only, a grant to two is not good. But if it has been once granted to two, or granted in reversion before the statute 1 Eliz., then it shall be intended to have been usually so granted, and such grant to two or in reversion shall bind the successor. T. 8 Car. B. R. Crook, n. 2. Walker and Lamb. M. 8 Car. B. R. Crook, n. 19. Young and Steele concerning the official and commissary of the bishop of Lincoln, and the register of the bishop of Rochester. — 5. He adds, Ley, 75. is contrary to Gee's case cited by Lord Hale. — 6. See farther as to the grant of offices, New Abridg. Offices, D. — 7. See also 1 Burr. 219. the case of Sir John Trelawney, and the bishop of Winchester, in which the court held, that an office and fee which existed before the 1st of Eliz., are not within the restraint of that statute, but that they may be granted as before the statute, and that the utility or necessity of the office is not more material since, than it was before.



newly founded, as well as by an antient bishoprick, if it was usually granted before the st. 13 El. 10. R. 2 Lev. 137.

So, a grant of an antient office with an antient fee, if by another grant a new fee be also added, it is void only as to the new fee. Vide supra.

So a grant in reversion is good, where antient grants have been in reversion. Cro. Car. 259.

Or a grant to two, where antient grants were so; though they were not of late time. 4 Mod. 17.

And usage since the statute is evidence of antient usage at the time of the statute. R. 4 Mod. 17.

So, a confirmation of a lease after 13 El. if the lease was made before the st. 13 El. 10. 5 Co. 15. Vide Ante, (G 3.)

So a lease by a bishop, as trustee for a charity, is good against his successor; though it be not conformable to the statute. Duke, 139.

A lease within this statute ought to be by indenture; and not by deed poll, or parol. Co. L. 44. a.

So it ought to commence from the making. Co. L. 44. a. Mo. 253. Vide post, (G 8. 9.) (f)

Or, from the day of the making. Vide the st. 13 El. 10. Co. L. 44. a. (g). Cont. Co. L. 45. a.

Or, *a datu*; for, that shall be construed to be from the delivery, *ut res magis valeat*. R. per 3 J. Treby cont. 3 Lev. 439. Semb. Mo. 107.

And therefore, to commence at a future day, is void. 1 Leo. 36. 3 Leo. 131.

So it ought not to exceed three lives, or twenty-one years. Co. L. 44. b.

And therefore, if it be for four lives, it shall be void; though one of them dies in the life of the lessor. 10 Co. 62.

So, if it be for three lives and twenty-one years also, both together; for the statute speaks in the disjunctive. Co. L. 44. b. (h) R. 5 Co. 2. Mo. 253. R. Cro. El. 141.

But a lease for three lives, though the lessee is not one of them, shall be good. R. 6 Co. 37. b. 2 Cro. 76.

So a lease for one, or two lives, or for less than twenty-one years. Co. L. 44. b. R. 1 Leo. 306.

Or, for ten years, and afterwards for eleven years. 1 Leo. 148.

Or, for twenty years from Michaelmas next. 1 Leo. 148.

So a lease for twenty years, and another for twenty years after the end of the former, is good within the st. 14 El. (i) Poph. 9. Cont. Semb. 3 Keb. 196. (k)

So

(f) Supra, (B 32.)

(g) The Annotator from Hal. MSS. subjoins, Vid. 7 Eliz. Dy. 246. Lease for twenty years, to begin at next Michaelmas seems good.

(h) 1. The Annotator subjoins from Hal. MSS. M. 29, 30 Eliz. Clench, 138. Grindal's case. — 2. He adds, see S. C. 4 Leon. 78. 1. and 65. and Mo. 107. and the observations upon it, New Abrid. Leases, E. rule 3.

(i) 1. If, says Lord Coke, a bishop make a lease for twenty-one years, and all those years being spent saving three or more, yet may the bishop make a new lease to another for twenty-one years, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath been said. Co. Litt. 45. a. — 2. The Annotator subjoins from Hal. MSS. accordingly adjudged, though the concurrent lease was to commence *a datu indenturæ*. T. 21 Eliz. rot. 124. Fox and Collier, M. 22, 23 Eliz. C. B. rot. 2409. Scot and Brewster. H. 22 Jac. B. R. rot. 11. Evans and Ascu adjudged. T. 3 Car. P. 33 Eliz. W. 14. Southcot's case.

(k) 1. If there be an old lease in being, it must be surrendered, or expired, or ended within

So it shall not be, without impeachment of waste. Co. L. 44. b.

And therefore, a lease to one for life, remainder to another for life, is not good: because waste cannot be punished. Co. L. 44. b. Mo. 387.

So a concurrent lease for life shall be void, though it be confirmed by the dean and chapter, &c. for the former would be dispunishable for waste. Co. L. 45. a.

But a lease for three lives is good: for the occupant shall be punishable for waste. Co. L. 44. b.

So it ought to be of lands most usually demised, or occupied by the farmers of it, for twenty years next before. Co. L. 44. b.

And the demise ought to be by him who has the inheritance: for a demise by tenant by the curtesy, or in dower, or guardian in chivalry, &c. is not sufficient. Co. L. 44. b. (l)

But it is sufficient, if the land has been usually demised, or occupied by farmers within twenty years, in the disjunctive: and therefore, if land antiently demised, be purchased by a bishop, and manured fifteen years in his hands, it may be afterwards demised. R. per 2 J. 1 Sid. 316. 416. 1 Lev. 213. but 2 J. Cont. there. Ray. 165.

So a demise by will, or a grant by copy, is sufficient, if it be for eleven years or more, at one or several times. Co. L. 44; b. R. 6 Co. 37. 2 Cro. 76. R. Mo. 759.

And the most accustomable, (m) rent, paid for twenty years next before, ought to be reserved annually during the term. Co. L. 44. b. (n)

And therefore, a lease of a thing, out of which rent cannot be reserved, shall be void against the successor; as, a lease of a fair, franchise, or other thing not manurable. R. 5 Co. 3. a. 2 Cro. 111.

Or, of tithes, &c. R. per 3 J. Mo. 778. R. 2 Cro. 173. 112. (o)

Though the antient rent be reserved; for it is not incident to the reversion, though it be good by way of a contract. R. 5 Co. 3. a.

within a year of the making of the lease, and the surrender must be absolute, not conditional. — 2. The Annotator from Hal. MSS. subjoins, Feme covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged that this is a good lease to bind the issue. Sydenham and Cops cited by Popham. Mo. 783.

(l) The Annotator from Hal. MSS. subjoins; lease by the king during vacancy of bishopric will not enable. B. R. Denny's case. Vid. Dy. 271.

(m) A lease by a bishop, wherein more than the old rent was reserved, was held good; two of the judges, however, who were absent when the case was argued, were of a different opinion. 2 Mod. 57.

(n) 1. The Annotator from Hal. MSS. subjoins, 6 Rep. 37. T. 3 Jac. Crook, n. 6. — 2. He adds, see Cro. Jac. 76.

(o) 1. Co. Litt. 44. b. — 2. The Annotator subjoins from Hal. MSS., But if tithes have been usually let to farm, they cannot be leased for life to bind the successor; but they may be leased for twenty-one years, rendering the antient rent, and it shall bind the successor. Mo. 778. T. 2 Jac. B. R. Adjudged in Denny's case, and the rent goes with the reversion. *Nota*, It was the case of the precentor of Paul's. — 3. He adds, see New Abridg. Leases, E., rule 5., where many authorities are cited to prove this difference between leasing tithes for life and for years, and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. — 4. But the distinction is no longer of any importance; for the 5 G. 3. c. 17. makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor, for rent reserved on freehold leases.

Yet

Yet if the demise was for years, for which the successor may have remedy for the rent in respect of the contract, it may be good. R. 2 Cro. 112. D. 2 Sand. 304. Per Hale, Hard. 326.

So a lease is not good, where part of the lands never were demised: for then the antient rent cannot be reserved. Mo. 199.

So a lease is not good, which reserves the rent in silver, which was before in gold; for it is not the accustomed rent. R. 5 Co. 5. b.

Or, reserves the antient rent *pro ratâ*. 5 Co. 5. b.

Or, joins two farms, and reserves the rent of both together. 5 Co. 5. b.

Or, if two farms were antiently demised, and the demise is of one, rendering the antient rent, without saying, what rent. R. Cro. Car. 95.

Or, if a copyhold be purchased in, and the antient rent is augmented *pro ratâ*. R. 5 Co. 5. b. Mo. 199.

Or, if two acres with other lands, are demised, and the antient rent of the two acres be reserved for the whole. R. 2 Jon. 111.

Or, if two acres are demised, without an exception of trees, which usually were excepted, reserving the same rent. R. 2 Cro. 458. (p)

So, by st. 18 Eliz. 6. No master, provost, &c. of any college, &c. in any of the universities, Winchester, or Eton, shall lease any the lands, &c. to which any any tithes, arable land, meadow, or pasture belong, unless a third of the old rent be reserved in corn, &c.

The rent reserved upon the last lease is the accustomed rent. Hard. 326.

If there be a covenant to pay, which is effectual, it is tantamount to a reservation. Hard. 326.

But if a copyhold escheats, or is forfeited, it may be demised with the manor rendering the antient rent, with an augmentation *pro ratâ*. 5 Co. 5. b. Mo. 199. 759.

Or a partition be made, and the rent of each part be reserved *pro ratâ*. Co. L. 44. b.

So it shall be good if the rent be reserved yearly or half-yearly, where it was before quarterly. Semb. cont. 5 Co. 5. b. R. acc. 6 Co. 38. a. 2 Cro. 76. R. Cro. Car. 17. Co. L. 44. b.

Or, if he reserves eight bushels of corn, where it was before one quarter. 5 Co. 5. b.

So, if he reserves the antient yearly rent; though an heriot, fine upon the death of the tenant, or other profit or casualty, not annual, be not reserved; for the statute speaks only of yearly rent. Co. L. 44. b. R. 6 Co. 38. 2 Cro. 76. R. Mo. 759.

So, if he reserves the antient rent, though part of the lands antiently demised for it be excepted. R. per 3 J. 2. cont. and afterwards affirmed in B. R. 1 Mod. 203. 2 Mod. 57.

If reserved at the antient days of payment, or twenty days after: for that is for the benefit of the successor. R. 2 Lev. 62.

(p) The Annotator, from Hal. MSS. subjoins to Co. Litt. 44. b. Prebend makes lease for years, reserving the running of a colt, rendering rent. A new lease rendering the same rent, without reserving the running of a colt, adjudged good; because *quoad* this it is neither reservation nor exception. But if lease be of a manor, except the woods, rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad. T. 18 Jac. B. R., case of Prebend of Paul's.

So a lease by a college is not void by the st. 18 El. 6. though no rent be reserved in corn, where land, meadow, pasture, or tithes of corn are not part of the demise. R. Sav. 68.

So it shall not be intended, that it is not the antient rent, if it be not specially found. R. 1 Leo. 306.

And it need not be shewn, that the third part of the rent was reserved in corn, according to 18 El. 6. R. 1 Leo. 306.

So a lease by the st. 32 H. 8. 28. is not enabled to be made of a reversion, nor if a former lease be *in esse*, not surrendered or determined within a year after the new lease. Co. L. 44. b.

And such surrender ought to be absolute, and not conditional. Co. L. 44. b. R. 5 Co. 2. b.

So a lease of a reversion, *in futuro*, or concurrent, cannot be made within the 14 El. 11. for they are all leases in reversion. R. Cart. 14. 15. R. Hob. 269. R. Cro. El. 473. 564. Cont. as to a concurrent lease within three years of the former lease expired, Per Hale. But R. acc. as to a lease *in futuro*. 3 Keb. 46. 107. 193. 2 Lev. 61. 62.

But a bishop may make a concurrent lease for twenty-one years, if it be confirmed by the dean and chapter, though there be a former lease *in esse*, not determined within a year: for the st. 1 El. does not restrain leases, which do not exceed three lives or twenty-one years; and therefore, if it has the circumstances required by the common law, the lease shall be good, though it be not enabled by the st. 32 H. 8. Co. L. 45. a. R. per 10 J. Mo. 108. 1 Leo. 148. And this, since the 18 El. 11., for a bishop is not there mentioned. Cart. 14.

Though the former lease has four, or more years to come. Mo. 108.

So a master and fellows of a college, dean, and chapter, &c. all restrained by the st. 13 El. may make a concurrent lease (*concurrentibus iis quæ in jure requiruntur*) for years, though the former lease be not determined within a year; so that, since the st. 18 El. 11. it be to be surrendered or determined within three years. Co. L. 45. a.

So every lease, not enabled by the st. 32 H. 8. nor restrained by the st. 1 El. or 13 El. ought to be made with the circumstances and consent required by the common law. Co. L. 45. a.

So a lease of a house in a city, &c. not enabled by the st. 14 El. 11. shall be good, if it be not within the restriction of the 13 El. and 18 El. Semb. Cart. 15.

So a lease of a house in a city, &c. pursuant to the st. 14 El. is not within the st. 13 El. or 18 El. R. Hob. 269.

So a lease by a bishop, or other spiritual corporation sole, shall be good against himself, though he does not pursue the directions of the statutes, though the statute says, that it shall be void to all intents, &c. Co. L. 45. a. (q) R. 3 Co. 59. b. R. 1 And. 244.

So

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(q) 1. The Annotator subjoins, from Hal. MSS., *Nota*, lease for three lives by bishop not warranted by the statute, is not voidable against himself, but shall bind him. M. 44 & 45 Eliz. C. B. D. D. n. 32. Saunders's case.—2. And it is not void, but only voidable against the successor; for if he accepts the rent, the lease is good against him. M. 3 Car. C. B. Crook, n. 21. Owen and App. Rees.—3. But lease by A. dean of B. and his chapter not warranted, is void immediately against A. himself. Adjudged so, because the corporation is aggregate. M. 15 Car. B. R. Lloyd and Gregory.—4. He adds, the case of Lloyd and Gregory is reported in Cro. Car. 502. W. Jo. 405. 1 Ro. Abr. 728. and

So a lease by a corporation aggregate, not pursuant, shall be good against them during the life of the dean, or other head of the corporation. Co. L. 45. a. R. 3 Co. 60. a. R. Mo. 875. R. 1 Leo. 308.

But it shall be void immediately upon the death or removal, &c. of the bishop, dean, or other head. R. 10 Co. 62. a.

And the acceptance of rent by the successor, does not make it good for his time. Cont. 1 Rol. 476. l. 15. Dub. Cro. Car. 95. R. acc. 2 Cro. 173. Dub. Cart. 16.

So a lease by a corporation aggregate, which has not an head, shall be void as to themselves. Hard. 326.

(G 6.) A lease by several persons ; how it operates.

If parceners or joint-tenants join in a lease, this shall be but one lease: for they have but one freehold. 2 Rol. 64. l. 20.

If tenants in common join in a lease, it shall be several leases of their several interests. 2 Rol. 64. l. 15.

So, if A. the owner of the land and a stranger join in a lease by indenture; it shall be the lease of A. only, and the confirmation of the stranger. Co. L. 45. a.

So, if A. and B. join in a lease of their several lands; it shall be several leases of their several estates, and a confirmation by each of the lease of the other. Co. L. 45. a. (r)

So, if tenant for life, and he in remainder or reversion in fee, join in a lease; it shall be the lease of tenant for life during his life, and the confirmation of him in remainder or reversion; and after the death of tenant for life, it shall be the lease of him in remainder or reversion. Co. L. 45. a.

So, if tenant *pur autre vie*, and he in remainder or reversion join; it shall be the lease of the tenant for life during the life of *cestuy que vie*, and afterwards the lease of him in reversion or remainder, and the confirmation of tenant for life. Co. L. 45. a.

(G 7.) A lease by estoppel, &c. Vide Estoppel.

So, if a stranger makes a lease by indenture, it shall be good against himself by estoppel: for he cannot say, *nil habet in tenementis*. Co. L. 45. a.

So, if A. who has right in land, and a stranger join in a lease; it shall be good against the stranger, by estoppel. Co. L. 45. a.

So a lease by indenture, or fine, shall be good by estoppel, though there was another lease *in esse* for the same time. Pl. Com. 434.

So a lease for years may be good by estoppel, for part of the years,

and 2 Ro. Abr. 495. But none of these books mention the point to which Lord Hale cites the case. — 5. See New Abr. Leases, H. where several authorities, besides that of Lord Coke, are cited to shew, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time of the person who was head of the corporation when the lease was made.

(r) 1. The Annotator subjoins, from Hal. MSS., and, therefore, where the declaration in ejectment was of a joint demise of A. and B., and on the evidence it appeared that they were tenants in common, the plaintiff failed. M. 5 Jac. Blakaspers case. Noy, a. 43. — 2. He adds, see Noy, 13.



for which there is a former lease *in esse*; and for the residue it shall be good in point of interest. R. 1 Sal. 275.

If A. by indenture leases for years the land of B. and afterwards purchases the land, the lease shall be good against his heir by estoppel. Mo. 20.

So a lease shall be good of land in possession.

Or, in reversion, after an estate for life, years, or an estate tail in possession.

So a lease to A. for 21 years, and the same day another lease of the reversion for 21 years, is good. Pl. Com. 432. b.

So a lease of land in possession, to commence after a lease to A. Pl. Com. 432. b.

So A. seised in fee may make a lease to commence after his death. Skin. 543.

So a lease for years may be assigned for part of the years. Skin. 543.

But a lessee for years cannot assign his term to commence after his death: for he has only a possibility. Skin. 543.

### (G 8.) When a lease shall commence.

Every lease for years ought to have a certain commencement, (*s*) and a certain end: and therefore, if it be limited to commence from (*t*) the day of the date, the day after the date the lease begins. Co. L. 46. b. R. 1 Rol. 387.

So, generally, if it be *à datu*: for, *à dutu*, and, *à die datús*, are tantamount. (*u*) Co. L. 46. b. (*x*) R. 2 Rol. 520. l. 37. R. cont. 2 Cro. 135. R. acc. 3 Bul. 203.

But

(*s*) Since a lease for years is a mere chattel, it may be made to commence either *in presenti* or *in futuro*; and the lease that is to commence *in futuro*, is called *interesse termini* or future interest. 2 Blk. Com. 144. Shep. Touch. 267. — 2. A lease for years therefore may begin at a day to come, as at Michaelmas next, or for three or ten years after, or after the death of the lessor, or of J.S., and this is as good as where it doth begin presently. Id. 272. — 3. A lease may commence at one day in point of computation, and at another in point of interest. Burr. 1090. — 4. Therefore, a lease 'to hold from a day past for fifty years then next ensuing, the said term to commence and begin immediately after the determination of an existing lease in the same premises,' was not considered uncertain as to its commencement. Ibid. — 5. So a lease *habendum* to the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good. Cro. Eliz. 269. — 6. So if an indenture of demise bear teste 25th March, 15 Car., and is delivered the day of the date, and the *habendum* is from and after the day of the date of these presents, for and during the time and term of seven years from henceforth next and immediately following, fully to be complete and ended; this lease begins in computation from the delivery of the deed which was the day of the date, and in interest the next day after the date, and so all the words will have an operation; for it appears that he was not to have the possession till the next day after the date, by the words *habendum* from and after the day of the date, which includes the day of the date; but that the seven years should commence by computation from the delivery, viz. from henceforth, which refers to the limitation of the seven years. Bac. Abr. Leases, L. 1.

(*t*) 1. This word *from* may mean either *inclusively* or *exclusively*. Cowp. 714. Lofft. 276. — 2. But *primâ facie* means *inclusively*. Dougl. 463.

(*u*) 1. Cro. Car. 400. — 2. Which rule, that if a former lease be misrecited in the date, &c., and a new lease made to begin after the expiration of the said recited lease, that such new lease shall begin presently, holds as well in the lease itself, as where the jury find an indenture of lease, whereby it is recited, that the lessor made such former lease of such date and under such rent without finding it in fact, but only by way of recital



But when a lease would otherwise be void, *à datu*, shall be construed, from the delivery. R. per 3 J. Treby cont. 3 Lev. 439. Sal. 413.

So, if a lease be made to commence from the date, when it has none, or an impossible date (*y*), it commences upon the day of the delivery. Co. L. 46. b. (*z*)

So, if it be made to commence from a former lease, when there is no such lease, or such lease is void, (*a*) or expired, or misrecited (*b*) in a material point; it commences from the delivery. Co. L. 46. b. (*c*) R. Jon. 355.

So,

recital in the deed, such second lease shall in construction of law be adjudged to begin presently, though in the deed it is limited to begin after the expiration of the first lease so recited; because the jury do not actually find the first lease, but only a recital of it in another deed, which recital may be false for ought that appears to the court: And then the second lease shall begin presently, as if no such first lease were at all, since the not finding it effectually, is as if there were none such made. Bac. Abr. Leases, L. 1.

(*x*) 1. The Annotator subjoins from Hal. MSS., Date and day of the date the same in point of computation, 5 Rep. — 2. But in point of interest date is taken *inclusive*, day of the date exclusive in many cases. T. 9 Jac. B. R. Bulst. n. 177. — 3. A., on the second day of August, 1 Jam., makes an obligation to B., and afterwards on the same day B. releases all actions *usque datum scripti*; the obligation is discharged; because date is delivery; otherwise if it had been to the day of the date. T. 9 Car. B. R. Rooke and Richards. — 4. Condition of obligation to stand to an award, so that it be made within four days after the date; a good award may be made the same day; and so it seems if it be the day of the date. M. 1653. Street's case. Stiles, 382. — 5. Obligation dated 2d January; release dated 1st January of all actions *usque diem hujus presentis temporis*, but delivered 3d January; *præsens tempus* is the date, and so the obligation stood. P. 7 Jac. — 6. He adds, see farther as to the difference between date and day of the date, Com. Dig. Estates, (G 8.) Bargain and Sale, (B 8.) Temps, (A); and Vin. Abr. Estate, Z. a. Time A.; and 1 Wils, 165.

(*y*) 1. Where a lease is made to begin from the Nativity of our Lord last past, without saying from the feast of the Nativity, this lease shall begin presently; because it could be no part of the agreement between the parties, that the lease should begin from the nativity itself, which is past so many hundred years ago; and therefore for this impossibility of relation the lease shall begin presently. Bac. Abr. Leases, L. 1. — 2. But if it were to begin from the Nativity of our Lord generally, or next ensuing, omitting the word 'feast,' Twisden J. (Sid. 161.) was of opinion that such a lease should be void for the uncertainty of the commencement; but Siderfin, in reporting the case, makes a quere if it shall not begin presently; and in truth this seems the most reasonable opinion; for as to impossibility of relation there is the same in this as there is in the other, and therefore by the same reason it shall begin presently. Ibid. — 3. And the editor of Bacon asks, what sound reason can be assigned why it should not commence from the Christmas intended by the parties? which well applies to the lease to begin from the Nativity of our Lord next ensuing, if not to the former. — 4. Where a lessee for 100 years made a lease for forty years to B. if he should so long live, and afterwards leased the same lands to C. *habendum* for twenty-one years, from the end of the term of B., to begin and be accounted from the date of these presents; and the question was, if the lease to C. should be said to begin presently, or after the term of B. And held, that the lease to C. should not be accounted from the time of the date, but from the end of the term of B., because by the first words it is a good lease in reversion in that manner, and then it shall not be made void by any subsequent words. Bac. Abr. Leases, L. 1.

(*z*) But where the limitation is uncertain, as a lease made the 10th day of October, *habendum* from the 20th day of November, without saying what November was meant, whether last past, or next ensuing, or what other November, the lease is thereby vitiated, because the limitation was part of the agreement, but the court cannot determine it, not knowing how the contract was. 1 Mod. 180.

(*a*) Cro. Car. 398. 502.

(*b*) A lease from the day of the date, and from henceforth, is the same thing. Cro. Jac. 258.

(*c*) 1. The Annotator subjoins from Hal. MSS., For misrecital a lease shall commence immediately

So, if a lease be made for twenty-one years, without saying, when it shall commence; it commences upon the day of the delivery. Co. L. 46. b.

So, if it be made to commence from the making. Co. L. 46. b. 2 Rol. 520. l. 34.

Or, from henceforth. Co. L. 46. b.

Or, from the sealing and delivery. 2 Rol. 520. l. 30.

But if it be *à die confectionis*, it commences the day after the delivery. Co. L. 46. b.

So, if a lease be the 25th of March, to commence *abinde* for one year, rendering rent at Michaelmas and Lady-day; *abinde* shall be taken exclusive of the day of the date: otherwise, the reservation would be after the term. R. 2 Rol. 521. l. 10. (d)

### (G 9.) What shall be a good commencement.

The commencement of every lease ought to be fixed and determined by express words, or such as may be ascertained by construction of law, or by reference to a certainty. (e) Co. L. 45. b.

And therefore, if a lease mentions a time of commencement at a day future or past, it shall be good. (f)

So, if it mentions no time of commencement: for by construction of law it commences at the delivery. Vide ante, (G 8.)

So, if a termor leases for a less term, to commence after his death; it shall be a good lease of so many years as remain, after his death, of the first term. Per Holt, Sal. 413.

So, if it be limited to commence upon a possible contingency (g); as, when A. pays 20s. Co. L. 45. b. 6 Co. 35. (h)

*Cum*

immediately, 6 Rep. Bishop of Bath's case. — 2. The Earl of Oxford, by deed dated 10 Feb. 27 H. 8. demises to A. for twenty-one years; and afterwards by indenture reciting that he by indenture dated 10 Feb. 28 H. 8. had demised to A. for twenty-one years, demises the same land to B. *habendum* for thirty-one years, from and after the expiration, surrender, or forfeiture of the *said* lease. It was ruled that B.'s lease should commence in computation immediately, because A.'s lease was misrecited. H. 10 Car. B. R. Crook, n. 8. Miller and Manwaringe. — 3. But if in case of such a misrecital, the *habendum* be from and after the demise and indenture made to A. and it is not said the *said* demise, then the second lease shall commence after the true lease, notwithstanding the misrecital. M. 1 & 2 P. & M. rot. 648. Mount & Hodgken, Bendl. n. 71. — 4. He adds, see Cro. Car. 397. and n. Bendl. 38. — 5. See farther as to the commencement of leases and the effect of misrecitals in that respect, Shep. Touch. 272. New Abr. Leases, L. & Vin. Abr. Estate, Z. a. and Grant, R. 4.

(d) 1. A lease of lands by deed, since the new style, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas; and cannot be shewn by extrinsic evidence to refer to a holding from Old Michaelmas. 11 East. 312. — 2. And it seems that if a tenant for life lease and die, and the remainder man accepts rent from the tenant at the next day of payment, the implied tenancy thereby created is to be reckoned, not from the death of the tenant for life, but as was the original tenancy. 1 T. R. 161.

(e) As if a lease be granted for twenty-one years after three lives in being; though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty. 8 T. R. 463.

(f) A lease to commence *ad festum Annunciationis*, after the determination of a former lease, is as good as if it had been *à festo*. Cro. Car. 398. 502.

(g) A lease to commence or terminate on a contingency which must happen, is valid, since then its duration is made certain. 3 T. R. 462.

(h) If the years be certain when the lease is to take effect in interest or possession, it

*Cum post mortem, sive per mortem, sursum-redditionem, seu forisfacturam* of a former lease for years with a proviso that the lessor might enter if the lessees died within the term, *vacari contingat* : for it commences at the end of the former term. R. per 3 J. 2 Cont. 2 Cro. 71. 6 Co. 36. (i)

So, if it be to commence upon a disjunctive; it shall commence if the one part happens, though the other does not. Semb. 3 Lev. 99. (k)

So, if it commences upon the death of such an one without issue. R. 1 Lev. 35. (l)

So,

it is sufficient; for until that time it may depend upon an uncertainty, viz. upon a possible condition precedent before it begin in possession or interest, or upon a limitation or condition subsequent. But in case it is to be reduced to a certainty upon a condition precedent, the contingency must happen in the lives of the parties. Shep. Touch. 272.

(i) If one makes a lease for years after the death of C., if C. dies within ten years; this is a good lease if C. dies within the ten years, otherwise not. Shep. Touch. 273.

(k) A lease in reversion of several parcels of land, made to commence on the happening of several contingencies, shall take effect and commence respectively as those contingencies happen. Cro. Eliz. 199.

(l) 1. If a lease for years be made of land in lease for life, to have and to hold from the death of the tenant for life; or to have and to hold from Michaelmas next after the death of the tenant for life; or from Michaelmas next after the determination of the estate of the tenant for life; such leases are good. Shep. Touch. 273.

— 2. And even if one make a lease to begin after the death of J. S. and to continue until Michaelmas which shall be *anno Domini*, 1650, this is a good lease. Ibid.

— 3. So if a man makes a lease to B. for ninety years to begin after the death of A., on condition to be avoided upon the doing of divers acts by others; and afterwards makes another lease of the land, *habendum* after the determination or redemption of the former lease; it seems that this lease is certain enough. Shep. Touch. 274.

— 4. So if a man have a lease of land for an hundred years, and he make a lease of this land to another to have and to hold to him for forty years, to begin after his death; this is a good lease for the whole forty years, if there shall be so many of the hundred years come at the time of the death of the lessor. So if he grant all his estate or all his term, or all his interest, in the premises of the deed, and then say, to have and to hold the land, &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death; by this, the whole estate and interest of the grantor in the land doth pass presently, by these words in the deed; and if in this case the lessee for an hundred years make a lease of the land, to have and to hold after his death for an hundred years, this will be a good lease for as many of the first hundred years, as shall be to come at the time of his death. Ibid. — 5. So if A. makes a lease of land to B. for so many years as B. hath in the manor of Dale, and B. hath then a lease for ten years in such manor, this is a good lease for ten years. Ibid. — 6. So if a lease be made during the minority of J. S. or until J. S. shall come to the age of twenty-one years, these are good leases; and if J. S. die before he come to his full age, the lease is ended. Ibid. — 7. So if a man make a lease for twenty-one years, if J. S. live so long; or if the coverture between J. S. and D. S. shall so long continue; or if J. S. shall continue to be parson of Dale so long; these and such like leases are good. Ibid. — 8. If one makes a lease to A. for twenty-one years, and after makes another lease to B. for years, to begin from the end and expiration of the aforesaid term of twenty-one years demised to A.; and then the lease to A. is determined, either by an express surrender, or by an implied surrender in law, as by A.'s acceptance of a new lease for life from the lessor; the lease to B. shall begin presently. Bac. Abr. Leases, L 1. — But if the lease to B. had been to begin after the end and expiration of the aforesaid term of twenty-one years, there the lease to B. should not begin upon the surrender, forfeiture, or other determination of the first term, to A. till the twenty-one years actually run out by effluxion of time. Ibid. — 10. The reason of which difference is, that in the first case the word 'term' comprehends as well the estate or interest in the land, as the time for which it is demised, and therefore the second lease being limited to begin from the end and expiration of the aforesaid term of twenty-one years, whenever the term is determined the lease to B. shall begin; but in the other case the lease to B. is not to begin till after the end and expiration of the twenty-one years, which cannot be ended but by effluxion of time. Ibid. — 11. So if one makes a lease to another for so many years as J. S. shall name, this at the beginning is

So, if the commencement be defeated by any impediment, it may commence after the impediment removed: as, if a man leases to A. for twenty-one years, and afterwards to B. the same day by parol for thirty-one years; it shall not commence immediately, because he had not power to lease during the twenty-one years before granted, but as a reversion; yet it shall commence after the end of twenty-one years, for ten years. Pl. Com. 432.

(G 10.) What shall be a good determination.

The continuance of a lease ought to be certain.

And it shall be certain, where the express number of years is named, or by reference, or matter *ex post facto*, or construction of law, the years may be reduced to a certainty. 6 Co. 35. a.

As, if the limitation be express, for ten, twenty, or other number of years. 6 Co. 35. a.

Or, for so many years as A. has in such a manor, who has in it ten years. 6 Co. 35. b.

As A. shall name, and he names in the life of the lessor. 6 Co. 35. b.

(G 11.) When it shall be determined.

If a lease be (*m*) to A., B., and C. for years, if the said A., B., and C. so long live; if any of them dies, the lease determines. Per 2 J. Dal. 2. Otherwise

uncertain; but when J. S. hath named the years (in the life time of the lessor) this ascertains the commencement and continuance of the lease accordingly. Bac. Abr. Leases, L. 2. — 12. But if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination; because to every lease there ought to be a lessor and lessee, and here the nomination, which ascertains the commencement, not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, viz. a lessor, and therefore of consequence must be void. Ibid.

(*m*) 1. If a man makes a lease for years, without saying how many, this shall be a good lease for two years certain; because for more there is no certainty; and for less there can be no sense in the words. Bac. Abr. Leases, L. 3. — 2. So if a parson makes a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live, this is a lease for two years at least, if he lives and continues parson so long; and after the two years, or at most after three years, but an estate at will for the uncertainty, unless livery be made. Ibid. — 3. A parson made a lease of his rectory to one for three years, and at the end of those three years, for other three years, and so from three years to three years, during the life of the lessor; and held a lease for twelve years; but Doddridge J. said, that if the lease had been for three years, and so from three years to three years, and so from the said three years to three years, this had been but a lease for nine years, because the words 'from the said three years' tie up the relation retrospectively to the three years last mentioned, which make in all but six years, and then there are but three years more added, which make the whole but nine years; and for the words 'during the life of the lessor,' they cannot enlarge it to any farther certain number of years, by reason of the uncertainty of the lessor's life; and therefore beyond the twelve years or nine years it amounts only to a lease at will, unless livery were made, which must necessarily pass a freehold determinable upon the lessor's death. Ibid. — 4. Yet in one book where a lease was made for three years and after the end of those three years, for other three years, and so from three years to three years, during the life of the lessor, this was held to be only a lease for nine years; because the words 'and so from three years,' shall be referred the three years last mentioned, for otherwise those words would exclude the three years next after the six years, and make the three last years to begin after nine years, and so make a chasm in the lease by shutting out the three years next after the six years, so as for the three last years, it should be only a future interest; which

Otherwise, if it be in the disjunctive, if A., B., or C. so long live; for then it continues during the life of the survivor.

Or,

which case seems to be of a new stamp, and to thwart the preceding case as to the resolution of its being a lease for twelve years; and there Jones and Wild Js. held, that a lease from three years to three years was but a lease for three years to commence *in futuro*. Ibid. 3 Keb. 760. 768. — 5. One made a lease for three years, and so from three years to three years until ten years be expired: and resolved to be a lease but for nine years, and that the odd year should be rejected, because that cannot come to fall within any three entire years according to the limitation, which in this case are to be taken altogether as one year, or else so much of the limitation as cannot come within that description must be rejected. Bac. Abr. Leases, L. 3. — 6. One lets a stable for a week for 8s. and so from week to week at 8s. a-week, as long as both parties pleased; this was held at most but a lease for three weeks certain, and for the residue at will. Ibid. — 7. Where a lease is to two for forty years, if they so long live, Rolle, in his reports, (309, 310.) seems to think that this does not determine by the death of one of them; because it is an interest in both, which shall survive; but the other books are against it; because their life is but a collateral condition and limitation of the estate, which therefore is broken when one dies. This differs therefore from a lease to two persons for their lives, for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right; which consequently cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lease at first gave it. Bac. Abr. Leases, L. 4. — 8. So where one made a lease for forty years 'if his wife or any of their issue should so long live,' it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation. But had the words been 'if his wife and issue should so long live,' there clearly by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which joins all together, and makes all their lives jointly the measure of the estate. Cro. Eliz. 270. Co. Litt. 255. a. — 9. A lease was for twenty-one years, if the lessee lived so long, and continued in the lessor's service; the lessor died; and three Judges against one, held that the lease was not determined, for there was no laches in the lessee that he did not serve, but it was the act of God that prevented him: the dissenting judge held the contrary; because, he argued, it was a limitation to the estate, that it should not continue longer than he served. Cro. Eliz. 643. — 10. A parol demise to hold from year to year, and so on as long as it shall please both parties, is a lease for two years, and after every subsequent year began, is not determinable till that year be ended. 2 Salk. 414. 313. 1 Wils. 262. 4 East, 32. Woodf. L. and T. 120. — 11. If therefore A. demise lands to B. for a year, and so from year to year, this is not a lease for two years, and afterwards at will, but it is a lease for every particular year, and after the year is begun, the defendant cannot determine the lease before the year is ended. 1 T. R. 380. Salk. 414. b. Woodf. L. and T. 120. — 12. A lease 'for seven, fourteen, or twenty-one years; as the lessee shall think proper,' and whereon the lessee enters and continues in possession, is undoubtedly a good lease for seven years, whatever may be its validity as to the two other eventual terms of fourteen and twenty-one years. 2 Burr. 1034. — 13. A lease for three, six, or nine years, determinable at the expiration of three, six, or nine years, is a lease for nine years, determinable at those periods. 3 T. R. 462. — 14. And a demise 'not for one year only but from year to year,' constitutes a tenancy for two years at least, and is not determinable by a notice to quit at the expiration of the first year, 4 East, 24. — 15. And where the demise was to hold for three, six, or nine years generally, without any stipulation as to the manner in which, or the party by whom the tenancy might be determined at the end of the third or sixth year; the tenancy was held to be determinable at the two earlier periods at the will of the tenant only, and by a regular notice to quit, and that as against the landlord, the demise operated as an indefeasible one for nine years. 3 Burr. 399. 9 East, 15. 1 Ves. J. 363. — 16. Where a party having agreed to become tenant from year to year for the residue of a term consisting of three years and three-quarters, holds over beyond the three years, he must continue tenant for the remaining three quarters. 3 Tamm. 410. — 17. Agreement 'to let to A. a house at a yearly rent, to continue during the life of the lessor, supposing it to be occupied by the lessee himself; or a tenant agreeable to the lessor;' and held, that no interest passed under a lease to be made under this agreement to the executors, but that it must be a lease for the life of the lessor



Or, if A. and B. or any issue of them so long live. R. Cro. El. 270. (Vide Co. L. 225. a.)

So, if a lease be for years, proviso that the lessor may enter if the lessees die within the term; it (*n*) does not cease by the death of the lessees, till the lessor enters. R. 2 Cro. 71. (*o*).

So, if a lease be for twenty-one years, and after the twenty-one years ended for other twenty-one years, and so from twenty-one years to twenty-one years till ninety-nine years are thence complete; the lessee shall have it for ninety-nine years after the first twenty-one years. R. 2 Lev. 241.

So, if a lease be to A. for one year, *et sic de anno in annum*, it shall be a lease only for two years. Mo. 372. (*p*)

(G 12.)

lessor, if the lessee occupies himself, or by a tenant agreeable to the lessee; and that upon his death the lessor may eject the executor without a notice to quit. 2 Smith, 570. 6 East, 530.

(*n*) Neither party can, by his own act, determine an entire demise in part. 14 East, 245.

(*o*) But now an entry is not requisite. Adams Eject. 144. 146.

(*p*) 1. A tenancy may be determined in various ways, as, with two exceptions, may be seen under the appropriate divisions of this digest. The excepted cases are where a tenancy is determined by *effluxion of time*, or *the happening of a particular event*; and where by a *notice to quit*. — 2. Upon the first it is sufficient to observe, that when the time expires, or the particular event happens, the tenancy is at once determined, and that the landlord may immediately maintain an ejectment to recover his possession, without giving any previous notice whatever to the tenant. 1 T. R. 52. 160. 8 East, 358. 1 H. Bl. 97. — 3. As to the determination of a tenancy by *notice*. — Mr. Adams in his treatise on ejectment thus deduces its *original*. Until the reign of king Henry 7. even a tenant having a lease of lands for a definite period, had not a full and complete remedy when ousted of his possession. The tenants, who during those times occupied lands without any specific grant, were in a worse situation: a general occupation, that is to say, a holding by A. of the lands of B., without being limited to any certain or determinable estate, was then considered, as a holding at the will and pleasure of the owner of the land; and the tenant was liable to be ejected, at any moment, by the simple determination of his landlord's will. The same enlightened policy which secured to lessees for years the complete possession of their terms, soon extended itself also to those general holdings, then called tenancies at will; and in the reign of king Henry the 8th, (13 H. 8. 15. b.) we find it holden by the courts, that a general occupation should be considered to be an occupation from year to year; and that a person so holding should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession. It was also at the same time settled, that this reasonable notice should be a notice for half a year expiring, at the end of the tenancy; because otherwise, although a notice, reasonable as to duration, might be given, it might operate greatly to the prejudice of the tenant by ejecting him from his lands, immediately before the harvest, or other valuable period of the year; and this rule has remained unaltered to the present day, except where a different time is established, either by express agreement, or immemorial custom. A general occupation of lands now therefore enures as a tenancy from year to year determinable, and necessarily determinable, by a regular notice to quit, (8 East, 165.) and a holding merely at the will of the landlord, according to the antient meaning of the term is an estate unknown in modern times, (Burr. 1603. 1609. Vide Co. Litt. 55. in notis. 16 Ves. 57. 2 Esp. C. 717.) Cases indeed are to be found, in which the courts have nominated the defendants tenants at will, but it does not appear, in any one of those instances, that the true relation of landlord and tenant subsisted; or that the defendant could be considered in any other light than as a trespasser, or at the most a tenant upon sufferance, (2 Esp. C. 717. 4 T. R. 680. 2 Camp. 505. 5 T. R. 471. 8 T. R. 3. *et vide* 2 Blk. Com. 147. 3 East, 449.) Notwithstanding, however, the principles of this species of tenancy have been so long established, we do not find any decided cases respecting the requisites of notices to quit until within the last half century; though, certainly, since the time they first became objects of attention to our courts,



courts, the decisions upon them have multiplied exceedingly, and they are now reduced to a clear and regular system. Adams, Eject. 105. 107. — 4. As to when a notice to quit is requisite. Where no tenancy express or implied subsists, the occupier may be ejected without one; as to which *vide supra*; and add, that, — 5. A tenancy from year to year cannot be determined without a legal notice to quit. 5 Taunt. 519. — 6. The interest, too, of such tenant is not changed by his death, but vests in his personal representative, who therefore cannot be ejected without a notice similar to that which would have been requisite to have ejected the deceased. 3 T.R. 13. — 7. When however no interest vests in the representative, no notice to quit will be necessary; as where A. agreed to demise a house to B., during the joint lives of A. and B., and B. entered in pursuance of the agreement, and, before any lease was executed, died; after which B.'s executor took possession of the house; and held that A. might maintain ejectment against the executor without notice to quit; because the death of B. determined his interest, and consequently no interest vested in the executor. The court were also of opinion that the case would have been the same if the lease had been executed. 6 East, 580. Adams, Eject. 115. — 8. And upon the same principle, if the ancestor die, leaving an infant heir or devisee, the infant must give the tenants from year to year, a regular notice to quit, before he can maintain ejectment against them. 2 T.R. 159. Adams, *ibid.* — 9. And in an ejectment brought by the lord of a manor, for an inclosure made from the waste twelve or thirteen years before, and which had been seen by the lord and steward from time to time without any objection being made, it was holden that the inclosure should be presumed to have been made by the licence of the lord, and that an ejectment could not be maintained for it without a previous notice to throw it up. 11 East, 56. — 10. But a mortgagee or his assignee may recover possession against the mortgagor, or a tenant under a lease, from the mortgagor, posterior to the mortgage, without a notice. Dougl. 31. 2 East, 449. — 11. As to the person by whom the notice should be given; it must be given by the person interested in the premises, or his agent properly appointed; and the courts it seems will consider in whom the *real* though not *apparent* interest exists. Thus where a *feme sole* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands, which came to her by devise after separation, it was presumed that she received the rents, and acknowledged the tenancy, by her husband's authority; and held that the notice to quit must be given by him. Adams, Eject. 116. 1 Taunt. 367. — 12. So where a lease contained a proviso that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his *executors or administrators* so to do, upon twelve months' notice to the other of them, *his heirs, executors or administrators*, it was considered that the words 'executors or administrators,' were put for representatives in general, and that a notice might be given by an assignee of either party, or by the heir or devisee, as well as by the parties themselves, their executors or administrators. Adams, *ibid.* 12 East, 464. — 13. But where the demise was for twenty-one years, if both parties should so long live, but if either should die before the end of the term, then the heirs and executors, &c. of the party so dying, might determine the lease by giving twelve months' notice to quit; it was holden that this power extended only to the representative of the party dying, and that the lease could not be determined by a notice to quit given by the lessor after the lessee's death, to his representative. Adams, 117. Willes, 43. — 14. A receiver appointed by the court of chancery is an agent sufficiently authorised to give a notice to quit. Adams, *ibid.* Barr. 2694. — 15. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should therefore be binding upon all parties concerned at the time it is given. When therefore several persons are jointly interested in the premises, they all must join in the notice; and if any one of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. Adams, 118. 5 East, 431. — 16. This rule seems also to be construed strictly; for where A., B. and C. were joint-tenants, and A. and B. signed and delivered a notice to the tenant on behalf of themselves and C., it was held that this notice could not be supported, even upon the rule of law that every act of one joint-tenant, which is for the benefit of co-joint-tenants, shall bind them, because *non constat*, that the determination of the tenancy was for C.'s advantage; and although C. joined in the demise in the ejectment, it was held insufficient, for he might join in the ejectment without having originally assented to the notice. *Ibid.* — 17. It has been ruled at *Nisi Prius*, that a verbal notice to quit, given by a person acting as steward of a corporation, is sufficient without evidence that he had authority for that purpose under the corporation seal. This doctrine, adds Mr. Adams, may be sound, but the reason assigned for it, namely, 'that the corporation, by bringing the ejectment, shew that they authorise and adopt the act of the steward,'

steward,' does not seem altogether to correspond with the principles established in the older cases. *Adams*, 119. 2 *Camp.* 96. — 18. As to the person to whom the notice should be given: When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice, notwithstanding a part or even the whole of the premises, may have been underlet; and such tenant will be liable to an ejectment, at the expiration of the notice for the lands in the possession of his undertenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own controul. *Adams*, 119. 2 *N. R.* 330., *et vide* 14 *East*, 234. — 19. When the premises are in the possession of two or more, as joint-tenants, or tenants in common, a written notice to quit, addressed to all, and served upon one only, will be a good notice. *Adams*, *ibid.* 7 *East*, 551. — 20. And it seems also that a parol notice given to one co-tenant only will bind his fellow. *Adams*, *ibid.* 5 *Esp.* 196. — 21. When a corporation aggregate is the tenant, the notice should be addressed to the corporation, and served upon its officers, and a notice addressed to the officers will not be sufficient. *Adams*, 120. 8 *East*, 228. — 22. As to the mode of serving the notice: it may be delivered to the tenant personally, or left at his usual place of abode, although the same should not be upon the demised premises; though it seems doubtful in the latter case whether the service will be considered sufficient, if the person to whom it is delivered should swear, upon the trial, that no intimation thereof had ever been given to the tenant in possession. *Adams*, *ibid.* 4 *T. R.* 464. — 23. It is much to be regretted, says Mr. *Adams*, that a point of such general importance to the proprietors of land, should not be more clearly settled; but difficulties arise upon both sides; for whilst on the one hand, it would be an extreme hard case if landlords were prevented from ejecting tenants, who might be absent from the kingdom, or from other causes incapable of receiving information of the delivery of the notice; so it would, on the contrary, be equally injurious to tenants, if they could be suddenly ejected from their possession, when, from the fraud or negligence of those about them they had received no previous intimation of the landlord's intention to determine their tenancy. *Adams*, 121. — 24. It was ruled by Lord *Ellenborough* at nisi prius, that a notice to quit, addressed to the tenant of the lessor of the plaintiff (who had underlet the premises), and served on the premises, upon the son of the undertenant, was improperly served, and the plaintiff was nonsuited: No evidence was given that the notice had not reached the lessor's tenant, and the action was defended by the undertenant. *Doe d. Mitchell v. Levi*, *Adams*, 121. n. — 25. As to the form of the notice: it is not necessary that it should be in writing, except when required to be so under some express agreement between the parties. *Adams*, *ibid.* *Willes*, 43. 1 *Blk.* 533. 5 *Esp.* 196. 2 *Camp.* 96. — 26. But it is nevertheless the general practice to give written notices, and it is a precaution which should always, where possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. *Adams*, *ibid.* — 27. It is customary also to address the notice to the tenant in possession; and it is perhaps most prudent to adhere to this form; though if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary. *Adams*, 122. 4 *Esp.* 5. — 28. Care should be taken that the words of a notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for although the courts will reluctantly listen to objections of this nature, yet if the notice be really ambiguous, or optional, it will be sufficient to render it invalid, as far at least as the action of ejectment is concerned. *Adams*, *ibid.* — 29. The notice however must contain a real, and *bonâ fide* option, and not merely the appearance of one; though if it appear clearly from the words of the notice that the landlord had no other end in view, than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment upon, notwithstanding an apparent alternative. Thus the words, 'I desire you to quit the possession, at Lady-day next, of the premises, &c. in your possession, or I shall insist upon double rent,' have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and shewing the tenant the legal consequences of holding over. *Adams*, 123. *Dougl.* 175. — 30. Where the notice was to quit 'on the 25th day of March, or 8th day of April next ensuing,' and was delivered before new Michaelmas day; it was held to be a good notice, as being intended to meet an holding commencing either at new or old Lady-day, and not to give an alternative. *Adams*, *ibid.* 4 *Esp.* c. 5. — 31. Upon the same principle the court will not invalidate a notice on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain. And therefore an impossible year has been rejected. *Adams*, 124. 7 *T. R.* 63. — 32. In like manner where there was a misdescription of the premises in the notice, which could lead to no mistakes, the house being described therein,

therein as the Waterman's Arms instead of the Bricklayer's Arms, and no sign called the Waterman's Arms was in the parish, the notice was deemed a valid one. Adams, *ibid.* 4 Esp. c. 185. — 33. When a notice is given to quit at Michaelmas, or Lady-day, generally, it will not be deemed an ambiguous notice, but will be considered *prima facie*, as expiring at *new* Michaelmas, or *new* Lady-day, open however to explanation, that *old* Michaelmas, or *old* Lady-day, was intended; and if it appears that the customary holdings where the lands lie, are from old Michaelmas, or Lady-day, or even that in point of fact the tenants entered at old Michaelmas or Lady-day, though no such custom exist, the notice will be binding upon him. Adams, *ibid.* 1 Esp. 197. 2 Camp. 256. — 34. As to the *time of expiration* of the notice: A demise 'not for one year only, but from year to year,' has been held to constitute a tenancy for two years at least, and not determinable by a notice to quit at the expiration of the first year. Adams, 125. 4 East, 31. *et supra.* — 35. The same interpretation has also been given to a demise 'for a year, and afterwards from year to year.' Adams, *ibid.* 1 T. R. 378. 380. *et supra.* — 36. Though where the demise was 'for twelve months certain, and six months' notice afterwards,' it was held at *nisi prius*, that the tenancy might be determined at the expiration of the first twelve months. Adams, *ibid.* 2 Camp. 573. — 37. Where the demise was to hold for three, six, or nine years, generally, without any stipulation as to the manner in which, or the party by whom, the tenancy might be determined, at the end of the third or sixth year, the tenancy was held to be determinable, at the two earlier periods, at the will of the tenant only, and by a regular notice to quit; and that as against the landlord, the demise operated as an indefeasible one for nine years. Adams, 126. 3 B. & P. 399. 7 Ves. 231. — 38. If the produce of the demised lands take two years to come to perfection, as if it be liquorice, madder, &c., the tenancy will enure from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year. Adams, *ibid.* 2 Blk. 1171. — 39. It has before been stated generally, that by the common law, the notice necessary to be given to a tenant, is a notice for half a year expiring at the end of his tenancy; and that a notice expiring at any other period will not be sufficient. This notice is frequently spoken of in the books as a six months' notice, and the distinction seems to be, that when the tenancy expires at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer, the notice must be given prior to the corresponding feast, in the middle of the year of the tenancy; whilst if it expire at any other period of the year, the notice must be given six calendar months previous to such expiration. Adams, 127. — 40. And though in a report of a MS. case in Esp. N. P. 460., it is said, that a notice given on the 30th day of September, being the day after Michaelmas-day, to quit at Lady-day following, was ruled by Heath J. to be a sufficient notice; yet, says Mr. Adams, some particular circumstances, not noticed by the reporter, must, it is conceived, have occasioned the judge's decision, since the principle laid down in the report is in opposition to every authority upon the subject: probably the tenant entered at *old* Lady-day. Adams, 126. n. — 41. It was once contended, that the principle that a notice to quit must expire at the end of the year of the tenancy, did not extend to houses as well as lands, and that in cases where houses alone were concerned, six months' notice, at any period of the year, would be sufficient, but the court considered that the same inconvenience might arise in the one case, as in the other, since the value of houses varies considerably at different periods of the year; and therefore held, that the tenant of a house was entitled to the same privileges, with respect to the notice to quit, as the occupier of land. Adams, 127. 1 T. R. 159. — 42. It should however be observed, that this rule extends, with respect to houses, to those cases only in which the tenancy enures as a tenancy from year to year, and that the notice required will refer to the original letting, and be regulated by the local custom of the district in which the house is situated, whenever it happens that a shorter term than twelve months is intended to be created by the letting; although no particular period be mentioned. This chiefly happens in the case of lodgings; and the custom, for the most part, requires the same space of time for the notice, as the period for which the lodgings were originally taken; as a week's notice when taken by the week, a month's notice when taken by the month, and so forth. Adams, 128. 1 Esp. c. 94. — 43. A quarterly reservation of rent will not dispense with the necessity of a six months' notice; though it seems that if the tenant accept in such case, a three months' notice, without expressing either his assent or dissent to it, it will be presumptive evidence of an agreement, that a notice for three months should be sufficient. Adams, *ibid.* 1 Esp. c. 365. — 44. When a special agreement is made between the parties, empowering them to determine the tenancy by a shorter notice than the one required by the common law, or obliging them to give one for a longer period, the notice must, nevertheless, expire at the end of the year of the tenancy, unless some express agreement to the contrary be made; though

it seems that if it be not a tenancy from year to year, determinable at a quarter's notice; but a demise 'for one year only, and then to continue tenant and quit at a quarter's notice,' the notice may expire at the end, though not in the middle of any quarter. 1 Taunt. 555. — 45. When the custom of the country, where the premises are situated, requires a notice for a different period than half a year, as for instance, a tenant under the yearly rent of 40s. is entitled by the custom of London, to only a quarter's notice, the custom will be allowed by the court; but it must be strictly proved, and the witnesses must not speak to opinion, but facts. Adams, 129. Skin. 649. Peake's C. 5 Co. Litt. 270. b. n. (1). — 46. Difficulties will sometimes arise as to the period of the commencement of the tenancy, and when a regular notice to quit on any particular day is given, and the time when that term began is unknown, the effect of such notice, as to its being evidence or not of the time of the commencement of the tenancy, will depend upon the particular circumstances attending its delivery. Adams, 130. — 47. If the tenant having been applied to by his landlord respecting the time of the commencement of his tenancy, has informed him that it began on a certain day, and in consequence of such information a notice to quit on that day is given at a subsequent period, the tenant is concluded by his own act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design, or ignorance, as the landlord is in both instances equally led into an error. Adams, 130. 2 Esp. C. 635. — 48. In like manner if the tenant at the time of the delivery of the notice, assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved; thus the words, 'I pay rent enough already, and it is hard to use me thus,' have been held not to amount to an acceptance of the notice, but to be merely the words of an angry man. Adams, *ibid.* 4 T. R. 361. — 49. It was formerly held, that a notice to quit on any particular day, was always *prima facie* evidence of a holding from that day; but this doctrine is now exploded, and no such presumption will arise unless the delivery be to the tenant personally, and he then read the contents, or they be explained to him, without any objection being made on his part as to the time of the expiration of the notice; though if the delivery be attended with these circumstances, the proof of the time of the commencement of the tenancy, will still be thrown upon the tenant. Adams, 131. 1 T. R. 161. 2 Camp. 387. 647. 13 East, 405. — 50. When the landlord is ignorant of the time when the term of his tenant commenced, a notice to quit is sometimes given, not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises 'at the end and expiration of the current year of his tenancy thereof, which shall expire next after the end of one half year from the date of the notice.' Adams, *ibid.* 2 Esp. C. 589. — 51. And since the overruling of the doctrine, that a notice to quit on any particular day, is *prima facie* evidence of a holding from that day, it is, perhaps, the most prudent plan to give such general notice, whenever any doubts exist as to the time of the commencement of the tenancy; or, as will hereafter appear, the substantial time of the entry upon the lands. Adams, 132. — 52. The *onus* of proving the time when the tenancy commenced, will still, however, be thrown upon the landlord, unless any special circumstances attending the delivery of the notice take the case out of the general rule. Thus, where a general notice was delivered on the 22d of March, to quit at the expiration of the current year, &c. and on the 16th of January following, a declaration in ejectment was delivered to the tenant, laying the demise on the 1st of November, and the tenant on the receipt of this declaration made no objection to the notice to quit, nor set up any right to the possession of the premises, but said that he should go out as soon as he could suit himself with another house; it was ruled at *nisi prius*, that these circumstances were *prima facie* evidence of a holding from Michaelmas. Adams, 132. 2 Camp. 559. — 53. When a remainder-man receives rent from a person in possession under a lease granted by the tenant for life; but void against the remainder-man, and thereby creates a tenancy from year to year, the time at which a notice to quit, given by such remainder-man must expire, will be regulated by the terms of the lease, and not by the time of the death of the tenant for life. Adams, 133. 7 T. R. 478. 1 T. R. 159. 1 H. Bl. 97. — 54. And the principle is the same if the tenant hold under a parol lease void by the statute of frauds. 5 T. R. 471. — 55. From which cases it seems, that if there be a lease for years, commencing on one day and terminating on another, a tenancy created by the landlord's receipt of rent, after the expiration of the lease, will be held to commence at the latter day. Adams, 134. — 56. It seems also that this principle extends to persons coming into possession after the expiration of the lease, as assignees of the lessee or his assigns. Adams, 134. 5 Esp. 173. — 57. And where a tenant, who held over after the expiration of a lease, had been a tenant from year to year, previously to the commencement of the lease, and the time of the expiration of such prior tenancy, was different from the time of the expiration of the tenancy under the lease,



(G 12.) What shall not be a good determination.

But it shall not be a good limitation of the determination of a lease, if the reference be to a thing possible, or casual, which has not express certainty: as, for so many years as an infant *en ventre sa mere* shall live. Semb. 6 Co. 35. b.

Or, for so many years as till issue *en ventre sa mere* shall come to full age. 6 Co. 35. b. (q)

So,

he was nevertheless considered as holding on according to the tenancy created by the lease. Adams, *ibid.* 11 East, 312. — 58. When the demise is by parol, and in general terms, as to hold from Michaelmas to Michaelmas, it will be *prima facie* considered as a holding from *New Michaelmas* to *New Michaelmas*; but if a notice to quit at Old Michaelmas be given, evidence is admissible to shew, that by the custom of the country where the lands lie, such tenancies commence at Old Michaelmas, and the notice will then be sufficient; but such evidence will not be admitted if the original demise be by deed to hold 'from the feast of St. Michael, &c.' though the tenancy be created by a holding over, after the expiration of the term, and the original entry was at Old Michaelmas. Adams, 135. 1 Esp. C. 197. 2 Camp. 256. 11 East, 312. — 59. A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise, and the notice to quit must then be given with reference to the substantial time of entry; that is to say, with reference to the time of entry on the substantial part of the premises demised; no notice being taken of the time of entry on the other parts which are auxiliaries only, though the tenant will be obliged to quit them at the respective times of entry thereon. Adams, *ibid.* 6 East, 120. — 60. This substantial time of entry, it has been contended, must be determined by the times when the rent is payable, &c.; but it is holden to depend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of the jury to determine. Adams, 136. 2 Blk. 1224. 6 East, 120. 7 East, 551. 11 East, 498. — 61. As to the *waiver* of a notice to quit: The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is produced, but the acceptance of such rent is open to explanation, and it is the province of the jury to determine with what views, and under what circumstances, the rent is paid and received. Adams, 139. — 62. If the money be taken *nomine parson*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance; the rent must be paid and received *as rent*, or the notice will remain in force. *Ibid.* Cowp. 243. 2 Camp. 387. 6 T. R. 219. — 63. The notice may also be waived by other acts of the landlord; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Adams, 140. 2 East, 236. Doe, d. Digby v. Steele, Adams, 141. n. 1 T. R. 53. 10 East, 13. — 64. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice will of course be waived. Adams, 142—144. 1 H. Blk. 311. — 65. But it seems that a pending action for such use and occupation will not be sufficient to invalidate the notice. Adams, *ibid.* 1 T. R. 378. — 66. By 8 Ann. c. 14. s. 6. & 7., a landlord is allowed to distrain within six calendar months after the determination of a lease for life, for years, or at will, provided his own title or interest, and the possession of the tenant, from whom such rent became due, be continuing.

(q) 1. If, says Lord Coke, 1 Inst. 45. b. the parson of D. make a lease of his glebe for so many years as he shall be parson there, this cannot be made certain by any means, for nothing is more uncertain than the time of death. — 2. To which the Annotator subjoins, but if livery is made on such a lease, perhaps it may be sufficient to pass a freehold to the lessee during the life or incumbency of the lessor. See New Abr. tit. *Leases*. — 3. But, continues Lord Coke, if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, first for three years, and after that for three years; and for the residue uncertain. — 4. To which the Annotator from Hal. MSS. subjoins — But vid. Noy, fol. 143. n. 635. Lease from three years to three years till the expir-

So, if a lease be till 20*l.* be received out of the profits of land, which is 20*s.* a year. 6 Co. 35. b.

(G 13.) When a lease shall be void.

But a lease, (*r*) which cannot take effect in interest except by possibility, if it be not an estoppel, shall be void (*s*): as, if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. Pl. Com. 432. (*t*)

But a lease by a bishop, &c. confirmed by dean and chapter, shall not be void by his death, though it be not pursuant to the st. 32 H. 8.

Nor, a lease by a parson, or vicar, if it be confirmed by patron and ordinary. R. 2 Lev. 61.

expiration of ten years shall be a lease for nine years, and the law rejects the last year because not computed by three. — 5. He adds, see New Abr. tit. Leases. L. 3. p. 433.

(*r*) 1. A lease for years reserving rent after the rate of 18*l.* a-year, is void for uncertainty. 4 Mod. 78. — 2. And if A. seised of land in fee, lease it to B. for ten years, and it is agreed between them that B. shall pay to A. 100*l.* at the end of the said ten years, and that if he do so, and shall pay the said 100*l.*, and 100*l.* at the end of every ten years, that then the said B. shall have a perpetual demise and grant of the premises from ten years to ten years continually, following *extra memorium hominum*, &c. this, although it be a good lease for the first ten years, is void as to all the rest for uncertainty. Shep. Touch. 273. — 3. So if the lessor grant the land to another to have and to hold to him for and during all the residue of the term of one hundred years that shall be to come at the time of the death of the grantor, this is void for uncertainty; though had he granted all his estate, or term, or interest, it had been otherwise. Ibid. 274. — 4. So it is said if a lease be made to A. for eighty years, if he live so long, and if he die within the said term or alien the premises, that then his estate shall cease; and then he doth further by the same deed grant and let the premises for so many years as shall remain unexpired after the death of A. or alienation, to B. for the residue of the said term of eighty years, if he shall live so long; in this case the lease to B. is void; for after the death of A. the term is at an end; but if he say for the residue of the eighty years, it is otherwise. Ibid. — 5. So a lease made to another until a child in its mother's belly shall come to the age of twenty-one years, is not good. Ibid. — 6. So if A. make a lease to B. for so many years as A., and B., or either of them shall live, not naming any certain number of years, this cannot be a good lease for years. Shep. Touch. 275. — 7. So if the parson of Dale make a lease of his glebe for so many years as he shall be parson there; this is not, neither are there any means to make it, certain; and yet if a parson shall make a lease from three years to three years so long as he shall be parson, this is a good lease for six years, if he continue parson so long, and for the residue void for uncertainty. Ibid. — 8. So if I make another a lease of land, until he be promoted to a benefice, this is no good lease for years, but void for uncertainty. Ibid. — 9. So if I have a piece of land of the value of 20*l.* *per annum*, and I make a lease of it to another, until he shall levy out of the profits thereof 100*l.*, this is no good lease for years, but void for uncertainty; though if I have a rent charge of 20*l.* *per annum*, and let it to another until he shall have levied 100*l.*, this is a good lease for five years. Ibid. — 10. And note, that in all these cases of uncertain leases made with limitations as aforesaid, as until such a thing be done, or so long as such a thing continue, &c., if livery of seisin be made upon them, they may be good leases for life, determinable upon these contingencies, albeit they be no good leases for years. Ibid.

(*s*) If lands be leased under an entire rent, parcel of which the lessor has no title to demise, as where, being demiseable under a power, he has neglected to pursue it; the lease is void *pro tanto* only, and the rent, being rent-service, is apportionable. 2 M. & S. 276.

(*t*) Semble, that if pending a lease, a new lease not under seal, to commence before the first has expired, but to continue beyond the day of its expiration, be made, it not only passes no present interest (for the only present interest it can pass is a reversion, and for that a deed is requisite) but it will not take effect from the expiration of the first. 4 M. & S. 30.

So



So, a lease to A. for three lives, if the lessor demises to B. for life, which term shall commence after the death, surrender, or forfeiture of the three lives, it shall be good, and the words, which term, &c. rejected. R. Cro. EL. 269. (u)

(G 14.) What interest the lessee has before entry.

If a lease be made to commence immediately, the lessee has in him *interesse termini* before his entry, and may grant it to another. Co. L. 46. b. 270. b. R. Jon. 8.

So, if it be made to commence at a future day.

And if the lessee dies before entry, his executor or administrator may enter. Co. L. 46. b.

So the lessee or his executor may enter, though the lessor dies before. Co. L. 46. b.

So, if a lease be to be several persons, and one of them dies, his interest survives. Co. L. 46. b.

So a release by the lessor to the lessee, before his entry, or before his term commenced, extinguishes the rent reserved. Co. L. 270. a.

So, if the lessor grants the reversion, and the lessee, before entry, attorns: the grant of the reversion will be good. R. Jon. 8.

What interest a lessee for years has by a limitation in perpetuity, or upon trust. Vide in Chancery, (4 G 2. 5. — 4 W 21.)

What estate of a lessee determines by forfeiture. Vide in Forfeiture, (A 1.)

When he shall be punished for waste. Vide in Waste, (A 2. — C. 4. 5. — F 2.)

(G 15.) What interest the lessee has after entry. (x)

As to reservation of rent upon a lease. Vide Rent, (B 1, &c.)

How

(u) An agreement, not under seal, that the lessor shall not turn out the tenant so long as he paid the rent, is invalid, since the tenancy created by it would not be determinable so long as the tenant complied with the term of the agreement, and would therefore operate as an estate for life, which can only pass by deed. 8 East, 165.

(x) 1. Leases for a determinate period of time and at will stood formerly upon a very different footing to what they stand at present; and an agreement between the proprietor of land, and another, that the latter should enjoy it for years, or at will, together with his entry thereon, did not then, as now it does, pass to him any interest whatever in the land, but the agreement was considered as a mere executory contract, for the breach whereof the party might, if it was under seal, recover a compensation in damages. If any other proof than the assertions of authority, as they are met with in the books, was necessary to establish this position, the following circumstances might be adduced in aid. — 2. First, the ceremony of delivering seisin, which, till the modern forms of conveyancing were invented, was performed by the owner upon the grant of a freehold estate, did not obtain in creating these interests. Now as there exists precisely the same reason that solemnity should accompany the gift of exclusive possession, whether it be for a certain or an uncertain period, the question occurs, whence then arose this difference? And it seems plainly from this; possession, or an estate in the land, was not conferred by a lease for years or at will. — 3. Secondly, the term 'freehold' signifies the possession of a freeman, in contradistinction to that occupancy of land, which was permitted to a villain by his lord. Now the grant of exclusive possession to a villain for any duration of time, enfranchised him, so that if leases for years and at will in former times, conferred upon the lessee exclusive possession, such interests would have been as deserving the characteristic 'the possession or property of a freeman' as any others which may be mentioned. But the well-known fact is, that

How rent shall be recovered by action. Vide Dett, (A 5. 7. — B — C — D — E — F) — Rent, (D 1. &c.)

How, by distress, or re-entry. Vide Distress, per totum. — Condition, (O 3, &c.) — Rent, (D 3. &c.)

that no estates, but those for life or of inheritance, have ever been characterised by that appellation. The regular consequence therefore is, that grants of land for these last-mentioned kinds of interest, alone gave the grantee the privilege of exclusive occupation. — 4. Thirdly, the rule formerly was, that a freeholder who had leased the land for years could not in contemplation of law enter forcibly upon the lessee, and for this reason, because the freeholder was regarded as in possession of the land notwithstanding the lease. 48 Edw. 3. Hil. 12. p. 6. — 5. And in pleading a reversion upon a lease for years, the form is to allege that the reversioner (having a fee-simple) was seised in *his demesne* as of fee, that is, that he is actually possessed. 9 H. 6. M. 21. p. 43. — 6. Fourthly, in former times, if a lessee for years had been disseised, or, to speak with greater accuracy, dispossessed, (Long Quinto, 35.) the lord might immediately have had an assize, or other possessory action, to recover the land. 9 Rep. 105. — 7. Fifthly, if one seised of an estate in fee-simple leased it for years, and died, the rent being arrear and the term continuing, the personal representative of the deceased landlord was at common law entitled to recover the arrears by action; whereas had the lease been for a freehold estate, he could not have claimed the rent due so long as the tenure lasted, because during that time the arrears were accounted things *real*, and therefore, constituted no part of the *personal* estate. — 8. Sixthly, leases for years and at will are termed chattels, and falling under that description are forfeited upon outlawry in a personal action. (9 H. 6. Trin. 15. p. 2. Vide Hetl. 164.) But even arrears of rent due upon a freehold tenure are not. (Winch 58. Hutt. 54.) And again, a term of years may be sold under a writ of *fi. fa.* — 9. Seventhly, it is in one case made a question, whether rent reserved upon a lease for years be rent service, (9 Edw. 4. Easter, 1. p. 1.) though the question has been long ago settled in the affirmative. (13 Rep. 57.) In another, whether tenant for years shall do fealty. (9 H. 6. M. 21. p. 43. Vide 20 H. 6. East, 27. p. 30., et vide 10 H. 6. M. 44. p. 13. that neither lessee for years, nor lessee at will shall do fealty; but see 40 Edw. 3 Trin. 17. p. 34. the reporter's note; vide 5 H. 5. Hil. 30. p. 12.; and in Keilw. 128. ca. 94. they speak of *bailing* land for years.) In a third whether tenant for years can accept a release. (Vide etiam 21 H. 6. Easter, 4. p. 37. 7 Edw. 4. Hel. 7. p. 27. In 48 Edw. 3. M. 8. p. 25, it is said, tenant at will has no *interest* in the land, nor can any *rent* be reserved upon such a tenancy.) In a fourth whether rent upon a lease for years can be apportioned. — 10. And lastly, recourse might always have been had to an action of debt to recover arrears of a duty reserved upon a lease for years, but not for rent due upon a freehold tenure whilst such tenure lasted; and again the remedies for recovering arrears of the latter description could not be resorted to in order to compel payment of those of the former kind. An action of debt is instituted to recover a *personal* chattel, namely, goods or a sum of money; now rent is a thing *real*, and cannot be obtained in a personal suit; therefore to permit the arrears of a duty reserved upon a lease for years, to be recovered in action of debt, is to decide that they are personal chattels, and consequently that by such a lease, exclusive possession was not in former times conferred; for if it had been, then the remuneration to be yielded must have ensued the nature of the thing granted, and like that have been real. It may be observed further, that at the expiration of a freehold tenure the arrears of rent lose their property *qua* rent, become personalty, and might at common law be recovered by action of debt; and if the party entitled to them died, they went to his personal representative, but had the tenure continued, the case would have been otherwise. 19 H. 6. M. 49. p. 29. Keilw. 112. — 11. Which considerations may, perhaps, serve to remove the difficulty suggested by the learned Annotator on Co. Litt., who observes, that the common law did not allow debt for rent on freehold leases whilst they continued, is certain, though the reason is not quite 'so clear.' (Co. Litt. 47. n. 267.) If it is assumed, that arrears of rent reserved upon freehold and chattel interests are of the same nature, so that as well in the former as in the latter instance they are things *real*, the difficulty, it should seem, would be to discover, how the law ever came to allow debt for arrears of the latter description.

(H) Tenant

(H) Tenant at will.

(H 1.) Who shall be.

Tenant at will is, when a man lets (y) lands to another, without limiting any certain or determinate estate. Litt. S. 68. (z)

And it may be by express words; as, if A. lets land to another, *quandiu ambabus partibus placuerit*.

Or, *quandiu* the lessor pleases: for by implication of law it shall be at the will of both; for it cannot be at the will of the lessor only. Co. L. 55. a. R. Mo. 775.

So, if it be, *quandiu* the lessee pleases: for it shall be at the will of both. Co. L. 55. a.

If it be, *de anno in annum quandiu ambabus partibus placuerit*; after two years it shall be at will. 6 Co. 35. b.

So, if lessee for years of a house grants all his house to B. without more; B. shall have it at will. R. 2 Leo. 78.

If a man grants the rents and profits of land to B. the grantee shall be tenant at will. Cart. 60.

So, if a man enters and enjoys land by consent of the owner; he shall be tenant at will to him, (a) though, there be not any express lease at will: as, if A. makes a charter of feoffment to B., and delivers the deed to him, but does not make livery, B. shall be tenant at will: for he entered, and had the land by consent of A. Lit. S. 70. 1 Rol. 859. l. 21. Ray. 147.

So, if A. leases for life to B. and does not make livery; B. shall be tenant at will. 1 Rol. 859. l. 17.

So, if tenant in tail covenants upon the marriage of his son, to suffer a common recovery, to the use of the son in tail, and the son enters, though the common recovery was not suffered; he shall be tenant at will. R. Cro. Car. 305.

So, if a mortgagee covenants that the mortgagor shall take the profits till default of payment; he shall be tenant at will to the mortgagee. 2 Cro. 660.

Or, that the mortgagor and his heirs shall take the profits; the heir, after the death of his ancestor, shall be tenant at will.

(y) In tenancies at will the rent becomes due in consideration of the occupation; which, it is said, must therefore be averred. *Ld. Raym.* 171. *Salk.* 209.

(z) 1. Tenant at will, says Littleton, is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor. — 2. Lord Coke commenting upon this, says, it is regularly true, that every lease at will, must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also. — 3. The Annotator subjoins from Hal, MSS. 21 H. 6. 37. Lease for years with proviso that lessor may enter at his will, is a lease at will. *Per Past.* — 4. 21 H. 6. 37. A. grants to B. that he may sow A.'s land, which is done accordingly; yet A. shall have the emblements, because B. hath not an interest. *Per Past.* — 5. He adds, see accord. as to the former case, 14 H. 8. 12. And by Yelverton J. in *Litt. Rep.* 235. & *Hetl.* 128. — 6. In *Burr. Rep.* 1609. it is said, that in the country, leases at will, in the strict legal notion, being found extremely inconvenient, exist only *notionally*. — 7. But, says the Annotator, this observation I presume, means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. — 8. He adds, see 2 *Blk. Com.* 147.

(a) *Bac. Abr. Leases*, L. 3.

(b) 1. 3 *Salk.* 223. — 2. So if one demises a tenement to another, excepting the new house for his habitation, when he pleases to stay there, and at other times for the use of the lessee, the lessee has the new house as tenant at will. 4 *Mod.* 9.

So, if the mortgagor demises to A., his executors and assigns, he shall be tenant at will to the assignee. Skin. 424.

So, if he demises to A. without more, who assigns to B. he shall be tenant at sufferance to B. Skin. 424.

So, if tenant in fee makes a lease to attend the inheritance, and afterwards enters and takes the profits; he shall be tenant at will to his lessee. R. 1 Sid. 349. 458. 1 Vent. 80.

So, if he makes a feoffment to the intent of performing his will, and afterwards takes the profits; he shall be tenant at will to his feoffee. Lit. S. 462.

If he makes a feoffment upon trust for A., who enters; A. shall be tenant at will to the trustee. Cart. 60.

Though A. be not a party to the deed. Cart. 60.

So, if a mortgagor or other who enters by consent, makes a lease for years, and the lessee enters, claiming nothing but his lease; he is not a disseisor: but, if his rent is paid and accepted, he shall be a tenant at will. 2 Cro. 660. R. Cro. Car. 306.

And if the mortgagor enters after the lease determined, he shall be tenant at will again to the mortgagee. R. 2 Cro. 660. Bridg. 13.

So, if tenant for years continues after his term, and his rent is paid and accepted as before, he shall be tenant at will. Per Roll, Al. 4.

So, if A. demises a tenement to another for years, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will. R. 4 Mod. 9. 12.

So, if A. gives licence to B. to take the profits of his land: it shall be a lease at will. Sal. 588.

Or, to trade upon his dock; it shall be a lease of the dock: for it is all the profit there. Sal. 588.

If A. enters into lands of B. claiming to hold them at his will, though he enters of his own head, and afterwards B. demands rent of him; he shall be tenant at will. R. 4 Leo. 35.

### (H 2.) Who not.

But if a man enters by colour of a grant or conveyance, which was void, and did not stand with the rule of law; he shall be a disseisor, and not a tenant at will. R. 2 Co. 55. b. Cro. El. 451. 585.

As, if a feoffment be to A. to the use of B. and no livery, and A. enters; he shall not be tenant at will: for it was not intended to his use. 1 Rol. 859. l. 25.

So, if B. enters, he is not tenant at will. 1 Rol. 859. l. 30.

So, if a feoffment be upon condition to re-enfeoff A., and he enters without assent, he is not a tenant at will. R. 2 Co. 59.

So, if before the st. 27 H. 10. A. had made a feoffment to the use of himself, and had entered; he was not tenant at will. 1 Rol. 859. l. 35.

So, if a man makes a lease for life, and makes livery, which is void by reason of a commencement *in futuro*; though the lessee enters and pays his rent, he shall not be tenant at will: for he claims a freehold. R. 1 Rol. 662. l. 10. Cro. Car. 388.

So, if a conveyance be of land in the parish of D. where it lies in the parish of B. and the vendee enters; he is not tenant at will. R. 3 Co. 10. a.

So,

So, if there be a covenant only to make a lease, and before the lease made he enters without assent; he shall not be tenant at will.

So, if a mortgagee covenants, that he will not take the profits till default of payment, and the mortgagor enters immediately; he shall not be tenant at will, but only at sufferance: for it was not agreed that he should take, but that the mortgagee should not take. R. 1 Rol. 859. l. 40. 2 Cro. 660. 2 Rol. 242. Bridg. 12.

So, if the mortgagee makes an assignment (which amounts to a determination of the will,) and afterwards the mortgagor continues in possession; he shall be only tenant by sufferance. 3 Lev. 388. 1 Sal. 246.

So if the mortgagee enters upon the mortgagor, who afterwards re-enters; the mortgagor is not a tenant at will, but a disseisor: for the entry of the mortgagee was a determination of his will, and the re-entry was wrongful. 1 Sal. 246.

So, if the heir of the mortgagor enters, (where the agreement does not extend to the heir) his entry is wrongful. 1 Sal. 246.

So the king cannot be tenant at will of another. Mod. Ca. 248.

### (H 3.) What things a lessee at will may do.

A lessee at will may take a release of the inheritance, and thereby his estate is enlarged.

Or, a confirmation for his life, upon which a remainder may be dependant. R. 3 Leo. 15.

### (H 4.) What he ought to do.

A lessee at will ought to pay the rent reserved. Lit. S. 72.

And if he does not, the lessor may distrain, or have debt, (b) for it. Lit. S. 72.

### (H 5.) What he need not do.

But a lessee at will need not sustain, or repair the houses demised to him. Lit. S. 71.

And therefore, if his house decays he shall not be punished for waste. Vide Waste, (C 5.)

So, if the house be burnt by negligent keeping of his fire, an action upon the case does not lie against him (c). R. 5 Co. 13. b. Cro. El. 777. 784. 4 Mod. 12. 1 Sal. 19. Vide Action upon the Case, (B 3.) Action upon the case for negligence, (A 6.)

But if a lessee at will voluntarily burns his house, trespass lies against him. Cro. El. 784.

So, if he cuts down trees. Co. L. 57. a. Vide Trespass, (B 2.)

(b) The Annotator subjoins from Hal. MSS. But in his count in debt against lessee at will, he ought to shew that he entered; but otherwise it is as to lessee for years. 18 H. 8. 1 Dy. 14.

(c) The 6 Ann. c. 31, which was at first temporary, but is now made perpetual, enacts, that no action shall be prosecuted against *any person*, in whose house any fire shall accidentally begin; with a proviso that the act shall not defeat any agreement between landlord and tenant.



## (H 6.) What shall be a determination of the will. — Express.

Tenant at will may be ousted by express words, or by implication. Co. L. 55. b.

As, if the lessor comes upon the land, and says that the lessee shall not continue over. Co. L. 55. b.

If the lessor comes upon the land, he may determine his will in the absence of the lessee. Co. L. 55. b.

But words off the land do not determine the will, till notice to the lessee. Co. L. 55. b. (*d*) Vide post, (H 9.)

## (H 7.) Implied.

So, if the lessor does a wrongful act it amounts to a determination of the will: as, if without consent of the lessee, he enters and cuts down the trees demised. Co. L. 55. b.

Or, puts his cattle into the land.

Or, into a common appendant to a manor demised. Co. L. 55. b. 1 Rol. 860. l. 45.

So, if the lessor grants a rent-charge out of the land, it shall be a determination of the will; otherwise the grantee cannot distrain. Semb. 1 Rol. 860. l. 35. Vide post, (H 8.)

If he makes a feoffment of the land. 1 Rol. 860. l. 37.

Or, a lease for years, to commence immediately. R. Ray. 224. 1 Vent. 247. 2 Lev. 88.

Though it be agreed, that the lease for years shall not take effect till after the rent upon the lease at will was due; yet the lease at will shall be so determined, that debt does not lie for the rent at the day agreed that the lease for years shall have effect. R. 2 Lev. 88.

So, if the lessee cuts down trees, pulls down houses, or does voluntary waste; it amounts to a determination of his will. Co. L. 57. a 1 Rol. 860. l. 50.

So, if he grants or assigns his lease to another. Co. L. 57. a. 1 Rol. 860. l. ult. 4 Leo. 35. Jon. 316.

And if tenant at will makes a lease for years and the lessee enters, he only shall be the disseisor. R. Cro. El. 830. (*e*)

So, if the lessor or lessee be outlawed, it amounts to a determination of the will. 1 Rol. 861. l. 5. 8. 5 Co. 116. b.

So, if the lessor or lessee dies.

Or, if A. having an estate devised to B. at his age of 24 years, till B. attains such age, lets it at will, and B. dies. R. Mo. 775.

(*d*) The Annotator from Hal. MSS. subjoins. — So if lessee says, that he will not hold any longer it is not a determination of the will, unless he waives the possession. 20 H. 7. Keilw. 65.

(*e*) 1. Lord Coke in Co. Lit. 57. a. observes, that if tenant at will granteth over his estates to another, and the grantee entereth, he is a disseisor. — 2. To which the Annotator subjoins from Hal. MSS. Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument, 1<sup>o</sup>. That it is only a disseisin at election, and not *prima facie*. 2<sup>o</sup>. That admitting it to be a disseisin, the lessee at will is the disseisor, and has gained the freehold, and not the lessee for years. Pasch. 9 Car. B. R. Blunden and Baugh. — 3. He adds, see S. C. in W. Jones, 315. Cro. Car. 302. Litt. 297. 372. and 1 Ro. Abr. 661. — 4. See also W. Atkins's case, in 1 Burr. 60., in which the curious doctrine of disseisin by election is most elaborately explained.



So, if the lessor dies, and his heir afterwards enters. R. Mo. 775. (f)

(H 8.) What not.

But a lawful act upon the land by the lessor, does not amount to a determination of the will: as, if he cuts down trees excepted out of the demise. Co. L. 55. b.

So, if the lessor covenants to make a feoffment, it does not amount to a determination of the will, till the feoffment be made. 1 Rol. 860. l. 37.

So, if he makes a lease to commence at a future day, it does not amount to a determination, till the lease commences in point of interest. R. 1 Vent. 247. Raym. 224.

So an extent does not determine the will, till the *liberate*. 1 Vent. 248.

Nor outlawry, till seisure. D. 1 Vent. 248.

So an act by the lessor, which does not disturb the possession, does not amount to a determination: as, a grant of a rent-charge. Q. 1 Rol. 860. l. 30. 852. l. 15. Vide ante, (H 7.)

So a grant by the king of an office, after the surrender or forfeiture of B. who has the same office *durante bene placito* of the king; does not determine the will of the king. R. Skin. 446. 580.

Nor an act by a stranger; as, if he enters and takes the profits. 2 Cro. 660. Per. 2 J. 1 Rol. 861. A. (g)

So, if he enters with the privity of the lessor, or lessee. 2 Cro. 660. Per 3 J. Yel. 74.

So, if a woman lessor or lessee at will takes husband; that does not amount to a determination of the will. Co. L. 55. b. R. 5 Co. 10.

Or, if husband and wife demise land of the wife at will, and the husband dies. Co. L. 55. b. 5 Co. 10. b.

So, if a lease at will be made by several, and one of the lessors dies. Co. L. 55. b. 5 Co. 10. b.

Or, if one of the lessees dies. Co. L. 55. b. Dub. Dy. 269. b. Acc. 5 Co. 10.

So, if a woman lessor at will takes husband, the wife cannot afterwards determine the will without her husband. 5 Co. 10. a.

So, if husband wife lease at will, or are lessees at will; the wife cannot determine the will: for she has submitted her will to her husband. 5 Co. 10.

(H 9.) At what time the ouster shall be.

A lessee at will may be ousted when the lessor pleases. (h)

Or

(f) 1. Before which entry, the lessee, holding on, is tenant at sufferance. Co. Litt. 57. b. — 2. To which the Annotator subjoins from Hal. MSS. If the heir accepts rent from him, he is tenant at will to the heir. 10 E. 4. 18. — 3. Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election. Dy. 62.

(g) Lord Hale subjoins to Co. Litt. 55. b. *Nota*, if lessee at will is ousted by a stranger, he may re-enter and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not revert the estate in the antient lessor.

(h) 1. The Annotator subjoins from Hal. MSS. to Co. Litt. 55. b. If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before

Or his estate may be determined when the lessee pleases.

But if the lessor determines his will by words off the land, it is not a determination till the lessee has notice. Co. L. 55. b. 1 Vent. 248. Vide ante, (H 6.)

So, if he does an act inconsistent with the estate of the lessee. Per Hale, 1 Vent. 247.

So a lessee paying rent at Michaelmas and Lady-day, cannot determine his will after the commencement of the half-year, without paying the rent to the next feast: for that would be a wrong to the lessor. D. Kel. 65. b. Per 2 J. Yel. 74. Dub. 1 Rol. 861. B. R. 1 Sid. 339. Per Holt, Sal. 413. (i)

Or, if rent be payable quarterly, after the commencement of the quarter. Per Roll. Al. 4.

Or, if it be a lease *de anno in annum quamdiu ambabus partibus placuerit*, after the commencement of the year: for it is not merely at will; for after a year commenced, the lessee ought to have it for the whole year. R. 2 Jon. 5. R. inter Simmons and Pashly. B. R. T. 2 Jac. 2. Sal. 413, 414.

So, if the lessor determines his will after the land is sown, the lessee shall have free ingress and egress to cut and carry away the corn when it is ripe. Lit. S. 68. Sal. 413. Vide Biens, (G 2.)

So, if the corn be cut, and not carried off the land. Co. L. 55. b.

So he shall have free ingress and egress for a reasonable time to remove his goods and utensils out of his house. Lit. S. 69.

So, by the custom of London, a will shall not be determined without half a year's warning if the house be above 40s. a-year, and, if under such rent, without a quarter's warning. Skin. 649.

And till that time elapses, the lessee cannot be ousted by ejectment, &c. Dub. Skin. 649.

## (I) Tenant by sufferance.

### (I 1.) Who shall be.

Tenant by sufferance is he, who enters by lawful demise or title, and afterwards wrongfully continues in possession: as, if tenant *pur auter vie* continues in possession after the death of the *cestuy que vie*. Co. L. 57. b. 2 Leo. 46. 3 Leo. 153.

Or, if tenant for years continues after the term is expired or determined. Co. L. 57. b. 2 Leo. 46.

So, if a devisee for life, upon condition that if he do, &c. his estate shall cease, continues in possession after the condition broken; he shall be a tenant by sufferance. Per Gawdy, 3 Leo. 153. 2 Leo. 142.

So any, who continues in possession, after a particular estate is ended, without agreement. Cart. 64.

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the rent day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will. Per Fenner and Williams; Yelverton contra, M. 3 Jac. Carpenter and Collins, Yelv. 73. 20 H. 7 Keilw. 65. is accord. if lessor doth not enter before the rent day.—2. He adds, see All. 4., in which book there is an opinion by Rolle conformable to that of Fenner and Williams.—3. Also in 1 Sid. 339. it is said to have been agreed by the court, that if land be leased at will, and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent day, because that would be a fraudulent determination.

(i) 4 Mod. 79. Ld. Raym. 702, 1008.

(I 2.)

(I 2.) Who not.

But none shall be tenant by sufferance against the king. Co. L. 57. b. 2 Leo. 142., for if his tenant holds over, he shall be an intruder. Hard. 25.

So, if a guardian continues in possession after the full age of the heir; he is not a tenant by sufferance, but an abator. Co. L. 57. b. (k) 271. a.

So, if a custom is alleged, that a lessee for years shall continue half a year after his term; it will not be a good custom. Mo. 8.

So now, by the st. 4 Geo. 2. 28. If tenant for life, or years, or in possession under, or by collusion with him, hold over after demand and notice in writing for delivering possession by the lessor, &c. or his agent he shall pay at the rate of double his rent for the time he so continues possession; to be recovered by action of debt on which special bail shall be required, and no relief in equity. (l)

(K) Estates undivided.

(K 1.) Joint-tenants. — Who are. Vide Chancery, (3 V. 3.)

Estates are several, or undivided.

Estates undivided are by descent only, as estates in coparcenary; *de quo*, vide Parceners, (A 1. &c.)

Or by purchase only upon a joint title, as estates in joint-tenancy. Co. L. 188. b.

Or estates in common; which may be by descent, purchase, or prescription. Co. L. 188. b.

Joint-tenants are, when a man enfeoffs or otherwise conveys lands or tenements to two or more jointly. Vide Lit. S. 277.

And if the conveyance be to them and their heirs; they are joint-tenants in fee. Co. L. 180. a.

So, if several make a disseisin, to the use of themselves; they are joint-tenants. Lit. S. 278.

So, if several abate, intrude, or usurp upon another; they are joint-tenants. Co. L. 181. a.

So, if A. disseises another to the use of several persons, who agree to it. Co. L. 180. b.

If an estate be to A. and the heirs of his body, remainder to the right heirs of B. who has two daughters, and dies; the daughters take jointly, and not as parceners: for they take by purchase. R. 3 Leo. 14.

If a conveyance be to several for life, or *pur auter vie*; they are joint-tenants for life. Co. L. 180. a.

And though there be several determinations of their estates, yet they may be joint-tenants: as, if a rent be granted to A. and B. till A. marries, and B. be advanced to a benefice.

Or, *habendum* to them, viz. (m) to A. till marriage, and to B. till advancement;

(k) The Annotator subjoins from Hal. MSS. And if guardian in such case dies seized, the entry of the heir tolls. 7 H. 4. 42. per Cul.

(l) By the st. 11 Geo. 2. 19., tenants giving notice to quit, and not delivering possession at the time contained in such notice, shall pay double rent.

(m) 1. The Annotator subjoins, see Hob. 171. and Sheph. Common Ass. 389. — 2. In the two latter books, especially in Hobart, there is a variety of curious matter expounding the

vancement; they are joint-tenants in the mean-time: and if A. dies before marriage, the rent survives; if after, it ceases for a moiety. Co. L. 180. b.

So, though there be a severance by the viz. or *habendum*; for that will be repugnant: as, if two acres be granted to A. and B. *habendum* the one to A. and the other to B. Hob. 172. 1 Sal. 391. Vide post, (K 2.)

So, if a rent of 40l. be granted to A. and B. equally to be divided, viz. 20l. to each for life. R. 1 Sal. 390.

So they may be joint-tenants, though there be not an equal benefit of survivorship: as, a grant to A. and B. for the life of B.; If A. dies, the estate survives; not if B. dies; for it is determined. Co. L. 181. b.

So, though the estates commence at several times: as, if A. dis-seises another to the use of several, who agree to it, one at one time, another at another. Co. L. 188. a. Pol. 373.

If a feoffment be to the use of himself and such wife as he shall afterwards marry, for life; they are joint-tenants. Co. L. 188. a.

So though there be several inheritances; as, if a conveyance be to two men and the heirs of their bodies; they have a joint estate for life, for the words, to them, are joint; though the inheritance of necessity shall be several, because they cannot have one, but several heirs of their bodies. Lit. S. 283. Vide post, (K 2.)

Or, to two women and the heirs of their bodies. Lit. S. 284. (n)

Or, to two men and a woman and the heirs of their bodies; or *e contra*. Co. L. 184. a.

So, if it be to a man and a woman who cannot intermarry: as, to A. and his mother, or sister, or aunt, &c. Co. L. 184. a.

So, if land be conveyed to A. and B. and the heirs of B. they are joint-tenants for life. Lit. S. 285. R. Cro. El. 470. 2 Co. 60. b.

Though it be to A. and B. *habendum successive*. R. 1 Leo. 318. 11.

So there may be joint-tenants of the inheritance, though the estates in possession are several: as, if joint tenants make several leases, or gifts in tail, and afterwards grant the reversion to two and their heirs; they are joint-tenants of the reversion in fee. Co. L. 183. b.

So, if a man conveys to A. and B. and the heirs of their bodies, remainder to them and their heirs; they are joint-tenants of the fee: for they take the remainder as a new purchase. Co. L. 184. a.

So there may be joint-tenants of a chattel; as, if a man leases to several persons for years. Lit. S. 281.

So, if a man gives an horse, or other goods and chattels to divers

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the nature and use of a *scilicet*, and how far it may qualify the premises or *habendum* in a conveyance. — 3. See also 1 P. Wms. 18., and the case of a bond to two with a *scilicet* severing the money between them, in Dy. 350. — 4. Lord Hobart seems to consider the *scilicet* as a sort of ancillary clause, which may explain but cannot operate in absolute contradiction of the premises or *habendum*. — 5. In a Coke upon Littleton, he continues, which I have, the learned Annotator considers the *scilicet* as less potent than the *habendum*, observing upon the case here stated by Lord Coke, that though the *scilicet* cannot sever the joint estate given in the premises and the *habendum*, yet that the *habendum* might so controul the premises. He therefore holds, that if the grant of ten pounds (see in Co. Litt.) had been to A. and B. *habendum* to A. till he be married, and to B. till he be advanced to a benefice, that they would be tenants in common.

(n) Vide 2 Ver. 545. 2 P. Wms. 530.

persons;

persons; they are joint-tenants of them, and the survivor shall have the whole. Lit. S. 281.

Though they are choses in action: as, if a man makes an obligation, covenant, or other contract to divers; they are joint-tenants of the debt, or duty. Lit. S. 282.

Though a chattel real or personal be given to a man in a natural capacity, and to another who has a politick capacity, as a bishop, abbot, &c. for he takes chattels in his natural, and not his politick capacity. Co. L. 190. a. (o) Vide post, (K 2.)

Or, if a chattel real be given to a feme covert and another. R. Pl. Com. 418. b. Vide post, (K 2.)

So there may be joint-tenants of a right: as, if joint-tenants are disseised, they remain joint-tenants of the right. Co. L. 188. a.

If two women take husbands, who alien in fee, and die, the women are joint-tenants of the right. Co. L. 188. a.

If two joint-tenants within age make a feoffment, and one dies; the survivor may enter, or have a *dum fuit infra ætatem* for the whole. Co. L. 337. b.

And a right of entry and of action may stand in jointure: as, if husband and wife and A. are joint-tenants, and the husband aliens the whole, and dies; this was a discontinuance to the wife, and she had only a right of action, and a disseisin to A. who may enter: yet the wife and A. are joint-tenants of the right. Co. L. 188. a. Vide post, (K 2.)

And joint-tenants of a right shall be joint-tenants again, if they recover. Co. L. 188. a.

Though they recover by several actions: as, if women, joint-tenants of a right, recover by several writs of *cui in vita*. Co. L. 188. a.

If joint-tenants, being disseised, one of them (his companion being summoned and severed) recovers a moiety by one assize, and the other by another assize. Co. L. 188. a.

If joint-tenants and to the heirs of one of them, being disseised, one of them recovers by writ.

If they lose by default, and one of them recovers by writ of right, the other by *quod ei deforceat*. Co. L. 188. a.

(K 2.) Who are not. Vide post, (K 8.) Chancery, (3 V 4.) Devise, (N 8.)

But if any have lands or tenements by several titles they are tenants in common, and not joint-tenants; or if they are seised in several rights: as, if lands be given to two corporations and their successors.

Or, to two corporations sole, regular or secular, as two abbots bishops, &c. for each is seised in right of his abbey, bishoprick, &c. Lit. S. 296.

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(o) 1. The Annotator subjoins, Lord Coke in Co. Litt. 46. b. explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for years to one and his heirs, can go to the heirs. — 2. But there are exceptions to this rule; the king is mentioned as one by Lord Coke, Co. Litt. 90. a.; another is where there is a special custom, as the case of the chamberlain of London, for orphanage monies. Fullwood's case, 4 Rep. 65. a. to which add Arundel's case, Hob. 64, and Co. Litt. 9. a. n. (1). 90. a., and the case of a bond to a lay person by an abbot, in F. N. B. 120. B.



Or, to two parsons and their successors; and each is seised in right of his several church.

So, if they be given to a man in his natural, and to another in his political capacity: as to A. and such an abbot, bishop, parson. &c. Lit. S. 297. Vide ante, (K 1.)

To the king and a subject. Co. L. 190. a.

So, if an obligation, &c. be made to A. and a corporation; it does not survive if A. dies. Ley, 82.

If a chattel personal be given to A. and a *feme covert*. Pl. Com. 418. b. Vide ante, (K 1.) (p)

So, if lands be given to two and the heirs of their bodies; the inheritance in tail is several, and not joint: for of necessity (q) they must have several heirs. Lit. S. 283, 284. Vide ante, (K 1.)

So, if land be given for life, remainder to the right heirs of A. and B.; their heirs are not joint-tenants. Co. L. 188. a.

So, if a remainder be to the heirs males of A. and B. they have several estates tail. R. Cro. El. 220. 1. Leo. 212.

So, if a corody be granted to two and their heirs: this being uncertain in its nature, shall amount to a grant of a several corody to each. Co. L. 190. a. (r)

So, if a man enfeoffs another of a moiety, third part, &c. of his land, without limiting any part in certain; the feoffee shall have it with him in common. Lit. S. 299.

So, if lands given by joint words, are afterwards severed in the *habendum*; as, a gift to A. and B. *habendum* a moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common. Lit. S. 298. Vide ante, (K 1.)

So, a lease for life, or years, to two, *habendum* a moiety to one, and the other moiety to the other. Co. L. 188. b.

Or, *habendum* to the use of one for life, and afterwards to the use of the other. Semb. 1. Leo. 318.

So, if a man covenants to stand seised to A. and B. equally to be divided, and their heirs; they are tenants in common of the inheritance, as well as of the estate for life. 2 Vent. 365, 366.

If an estate be limited to A. and B. equally divided, or, equally to be divided, it is all one; for they are tenants in common. 2 Vent. 366.

(p) As to husband and wife. Vide Litt. S. 291. 1 Inst. 187. a. 2 Vern. 120. Prec. in Ch. 1. 2 Blk. 1211. 5 T. R. 652.

(q) As the right of survivorship is often attended with hardship and injustice, courts of equity have taken a latitude in construing against joint-tenancies on the ground of intent. Vide 1 Eq. Abr. 294. 3 P. Wms. 158. 2 Ves. 258.

(r) The Annotator subjoins, Lord Coke cites no authority for this. But in 8 E. 4. 17. there is a case which tends to confirm and explain his doctrine as to a corody's not being grantable to more than one. The case arose on grant of a corody by Hen. 6. to two and the longer liver, where one was dead, the question being, whether during the life of the survivor, this was sufficient to justify the prior of Friswith, on whom the corody was chargeable, in refusing a new grantee sent by Edward the fourth. Upon this case Nele, serjeant, argued for the king, that corody which is for one man cannot be given to two, for two men cannot have the maintenance of one man; and thence he inferred that the grant to the two was void. But the judges distinguished; for they all said, that if the corody be to have certain head and certain service, this may be granted to twenty men, &c., as to have twenty heads or six gallons of ale, &c.; but that a corody to sit every day in the hall of the prior, and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.

If a copyhold be surrendered to five to be equally divided, and their respective heirs; they are tenants in common. R. per 2 J. Holt. cont. H. 12 W. 3. inter Fisher and Wigg, 1 Sal. 391. (s)

If a devise be to his younger children share and share alike. R. Ca. Parl. 210.

If a copyhold be granted to three *habendum successive*. Semb. 1 Leo. 318.

So, if a parcener or joint-tenant conveys his part to A.; he and the other parcener or joint-tenant are tenants in common: for they claim by several titles. Lit. S. 292. 294, 295. 309.

Be the conveyance in fee, in tail, or for life. Lit. S. 300, 301, 302.

So, if both parceners, or joint-tenants convey, &c. the feoffees, or grantees are tenants in common. Lit. S. 295. 300.

So, if there be divers joint-tenants, and one of them releases his part to one of his companions; he is tenant in common for that part with his other companions. Lit. S. 304.

So a man may prescribe for him and his ancestors, to hold in common with B. and his ancestors. Lit. S. 310.

So an estate of freehold or inheritance cannot stand in jointure with a term for years: and therefore, if lands are given to A. and B. *habendum* to one for life, to the other for years; they are not joint-tenants. Co. L. 188. a.

If a devise be to A. till B. attains full age, and then to A. and B. there cannot be a term for years in A. and a freehold to B. and therefore the term shall be merged, and they are joint-tenants immediately. Semb. Cro. El. 532.

So a right of action, or entry, cannot stand in jointure with a freehold, or inheritance, in possession: and therefore, if husband and wife and A. are joint-tenants, and the husband aliens, and dies; the wife and A. are not joint-tenants. Co. L. 188. a. Vide ante, (K 1.)

So, by the custom of merchants, if they, as joint-merchants, have chattels personal or choses in action; they are not joint-tenants of them. Co. L. 182. a. 2 Brownl. 99.

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(s) 1. Lord Coke in Co. Litt. 190. b. says, if a verdict find that a man hath *duas partes numerii*, &c. in *tres partes divisas*, this shall not be intended to be in common; but if the verdict be in *tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict. — 2. To which the Annotator subjoins; in a case in the King's Bench during Lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters, equally to be divided, and their respective heirs ought to be construed; and this passage of the Coke upon Littleton was much relied on by two of the judges as an authority to shew, that the words 'equally to be divided' imply a tenancy in common. But Lord Holt, who was for a joint tenancy, observed, that no such matter appears in the case of 21 E. 4. here cited by Lord Coke in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. 1 P. Wms. 19, in the case of Fisher v. Wigg, which is also reported in Salk. 391. Com. 88. 92. 12 Mod. 296. and 1 L. R. 622. — 3. In the two latter books and in P. Wms. this case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to, wherever the doubt is, whether there shall be a tenancy in common or joint-tenancy. — 4. See also the case of Earl of Anglesea v. Ram, in Dom. Proc. Sept. 1727. Barker v. Gyles, 2 P. Wms. 280, and 3 Bro. P. C. 297. Hall v. Digby, and others 4 Bro. P. C. 224. Hawes, v. Hawes, 1 Wils. 165., and Gaskin v. Gaskin, Cowp. In this last case the word 'equally' was deemed sufficient to create a tenancy in common in a will; and Lord Mansfield declared the opinion of the two judges who differed from Holt, to be the better and more liberal one; and Mr. Justice Aston noticed, that equally to be divided had been adjudged a tenancy in common, even in a deed.

And this extends to shopkeepers, as well as other merchants; for there are four species of merchants, and all within this custom; viz. merchant adventurers, dormant, travelling, and resident. 2 Brownl. 99.

(K 3.) Where a joint estate survives.

If there are joint-tenants in fee and one dies; the survivor shall have the whole in fee: for it is the nature of joint-tenancy, that the survivor shall take the whole if the jointure continues. Litt. S. 280.

So, if there are joint-tenants for life, and one dies; the other shall have the whole by survivorship. (t)

Though there are several inheritances limited upon the estate for life. Lit. S. 283.

So, if one joint-tenant enters into religion, which is a civil death: the other shall have the whole by survivorship. Co. L. 181. b.

And the survivor shall take, though the other devises his part; for the devise does not take effect till the death of the testator; and immediately upon his death, the land survives. Lit. S. 287. Vide Devise, (N 8. 21.)

If a woman joint-tenant takes husband, and dies; her estate survives, and does not go to the husband. Co. L. 185. b. Vide Baron and Feme, (E 2.)

So the survivor shall take, though the jointure was severed by a discontinuance, a lease for life, &c. if it be afterwards recontinued, &c. before the death of any of the joint-tenants. Co. L. 193. a.

(K 4.) When not.

But survivorship is the peculiar privilege of joint-tenants. Co. L. 181. a.

And therefore, an estate in parcenary, or in common does not survive.

Though a lease was express to A. and B. and the survivor of them; and afterwards A. grants his part to D. who is thereby tenant in common with B. for *expressio eorum, quæ tacite insunt, nihil operatur*. Co. L. 191. a. (u)

So a bare trust, or authority, does not survive. Vide Co. L. 181. b.

(t) The trust of a term in joint-tenancy shall go to the survivor, in equity as well as at law. 2 Vern. 556. 2 P. Wms. 530. Bunb. 342.

(u) 1. Lord Coke, in Co. Litt. 191. a., observes, if lands be letten to two for term of their lives, *et eorum alterius diutius viventi*, and one of them granteth his part to a stranger, whereby the jointure is severed and dyeth, here shall be no survivor, but the lessor shall enter into the moiety, and the survivor shall have no advantage of these words '*et eorum alterius diutius viventi*,' for two causes,—First, For that the jointure is severed.—Secondly, For that those words are no more than the common law would have implied without them, *et expressio eorum quæ tacite insunt, nihil operatur*.—2. Mr. Butler subjoins; here Lord Coke speaks only of a joint-tenancy for life; in which case the words 'and the survivor of them' are merely words of surplusage; as without them the lands upon the death of one joint-tenant go to the survivor. But in the creation of a joint-tenancy in fee care must be taken not to insert these words. For the grant of an estate to two and the survivor of them, and the heirs of the survivor, does not make them joint-tenants in fee; but gives them an estate of freehold, during their joint lives, with a contingent remainder in fee to the survivor.

(K 5.) If the jointure does not continue. — What shall be a severance ; what not. Vide Chancery, (3 V 5.)

So there never shall be a survivorship, if the estate does not continue in jointure, at the death of him who dies first. Co. L. 188. a. 193. a.

And therefore, if one joint-tenant conveys his part to a stranger, or releases to his companion ; the jointure is severed, and the estate does not survive. (x)

Though they are joint-tenants in fee, and one of them conveys only for life : for the freehold being severed, the reversion upon it is also severed. Lit. S. 302. (y)

Though his conveyance was only for his own life, which determines at his death, when the survivor ought to take. Semb. Co. L. 193. a.

So, if joint-tenants in fee join in a lease to A. and a corporation sole for life : for now the reversion, depending upon several freeholds, is several. Co. L. 191. b. Vide ante, (K 2.)

So if a wife joint-tenant takes husband, who makes a feoffment, &c. the jointure is severed during the continuance of the discontinuance : for a right of action cannot stand in jointure with a freehold, or inheritance in possession. Vide ante, (K 2.)

So, if joint-tenant for life makes a feoffment, or grant in tail, or lease *per auter vie*, which amounts to disseisin, and divests the reversion ; the jointure is severed. Co. L. 191. b. And this shall be a forfeiture. Vide Forfeiture, (A 1.)

So, if a joint-tenant within age makes a feoffment : the jointure is severed, though the feoffment was voidable. Co. L. 337.

So, if one joint-tenant levies a fine of the whole ; though it be to the old uses. Mod. Ca. 45.

So, if there be two joint-tenants for life, and the one levies a fine *sur concessit* to A. and dies ; his moiety does not survive, but goes to him in reversion. R. Jon. 55.

So, if a lease be to two for their lives ; and by another conveyance, the lessor grants the reversion to them and the heirs of their bodies ; the jointure is severed ; for the estate is executed, and they are tenants in common in tail in possession. Co. L. 182. b. (z) Vide ante, (B 18.)

(x) 11 East, 288.

(y) 1. If, says Lord Coke, in Co. Litt. 192. a., two joint-tenants be, and one maketh a lease for life, this is a severance of the jointure, as Littleton here taketh it, and the lord shall make several avowries upon them. — 2. And Mr. Butler subjoins ; upon the death of either of the lessees, one moiety of the estate goes to the surviving lessee or his assignee, and the reversioner may enter upon the other moiety. See Dy. 67. W. Jon. 55. 2 P. Wms. 740. — 3. But this is to be understood where the joint-tenants are for life ; for if the joint-tenants are in fee, and the jointure is severed, the right of survivorship is wholly taken away, and their shares go to their respective heirs. So if there be joint-tenants of a term of years, and the joint-tenancy is severed, their shares go to their respective personal representatives. See 1 Salk. 158. — 4. It should also be observed, that the case put by Littleton supposes the joint-tenant to let his estate for his own life only ; for if he let it for a longer term than for his own life, or if he let it for the life of any other person, it is a forfeiture. See 4 Leon. 236.

(z) 1. The Annotator subjoins from Hal. MSS. Vid. Hil. 35 Eliz. B. R. rot. no. 96. Perkins and Peeke, Dy. 12. 41 Ed. 3. 21. 21 H. 6. 40. 40 Ass. 45 Ed. 3. 2. Hil. 37 Eliz. Dickson v. Marsh, B. R. rot. no. 103. Devise to eldest son and another for life. Held that they are joint-tenants though the fee descends ; but male. — 2. He adds, see as to the latter case, Cro. Jac. 260.

So, if a reversion be granted to one of the lessees, in fee, or in tail; for, the reversion is executed for a moiety. Co. L. 182. b.

So, if a reversion be granted to a lessee and stranger, and their heirs. Co. L. 182. b.

So, if a reversion descends to a joint-tenant. R. 2 And. 202. Cro. El. 743. R. Cro. El. 470. 481. 2 Co. 60. b.

So, if there be a lease for life, and the lessor grants the reversion to two in fee, and the lessee grants his estate to one of them; the jointure is severed, and the estate executed for a moiety. Co. L. 183. a. (a)

Or, if the lessee grants to one of them and a stranger. Co. L. 182. b.

So, if there be joint-lessees of a term, and one of them assigns part of his term to the other; it shall be a severance of the jointure for the whole. Cro. El. 33.

So, if one of them mortgages his part. R. 1 Sal. 158. (b)

So, if there be two joint-tenants of an advowson, and they agree to present by turn, and that one shall have one moiety, and the other the other moiety, and this is executed by a presentation by each; the jointure is severed. R. Carth. 506.

So, if there be joint-tenants for life, and one leases for years; it shall be a good severance during the term. Dy. 187. 2 Cro. 417.

So, if he leases his part to commence at a future day. 2 Cro. 91.

Or, to commence after his death, during the life of his companion. R. 2 Cro. 91. Mo. 776. 2 Rol. 89. l. 5.

So, if he leases for years, if he or his companion live so long. R. 2 Cro. 377. Bridg. 43.

If husband and wife and A. be joint-tenants, and the husband and wife make a lease for years, if they or A. live so long; though the lease is voidable by the wife, yet if the husband and wife die without avoiding it, it shall be good against A. surviving: for the severance continues. R. Bridg. 43.

But if one joint-tenant makes a lease for years, this does not sever the jointure as to the freehold. Co. L. 185. a.

So, if two joint-tenants in fee make a lease for life, and the lessee surrenders to one of them; for this enures to both. Co. L. 192. a.

If a woman joint-tenant takes husband, it is not a severance of the jointure. R. Pl. Com. 418. b.

Otherwise where a woman joint-tenant of a personal thing takes husband. Pl. Com. 418. b.

Yet if a joint-tenant for years makes a lease for a less term; that severs the jointure, and the term does not survive. Co. Lit. 192. a.

### (K 6.) Joint tenants how seised.

Joint-tenants are seised *per my et per tout*. Lit. S. 288.

(a) The Annotator subjoins; but it is otherwise on a *surrender*; for that enures to both joint-tenants of the reversion. Co. Litt. 192. a. See further Perk. s. 80.

(b) 1. Eq. Abr. 293. — 2. Alienations of this kind must however be valid and good in law, to have this effect; and therefore a conveyance by a joint-tenant to his wife, being void at law, will not operate as a severance of a joint-tenancy. Prec. in Ch. 124. — 3. Articles of agreement by an infant, though made in consideration of marriage, will not operate as a severance of a joint-tenancy. 1 Inst. 246. a. n. (1). 1 B. C. C. 112. — 4. See as to the effect of an agreement to alien. 2 Vern. 631. 2 Ves. 634. 2 Vea. J. 257.



When husband and wife are seised by moieties, or by entierties. Vide Baron and Feme, (D 2. 3.)

But joint-tenants have a right only to a moiety. Vide Co. L. 186. a.

And therefore, if one makes a feoffment, gift, or demise of his part; only a moiety passes. Co. L. 186. a.

So, if one bargains and sells his lands, and before enrolment the other dies; yet only a moiety passes. Co. L. 186. a. 2 Cro. 53. Cro. Car. 217. Mo. 776.

If a lease be by all, rendering rent to them, and one does not seal it; only a moiety passes. 1 Vent. 136. (c)

If all join in a feoffment, each gives but his part. Co. L. 186. a.

And therefore, if a feoffment be upon condition, that upon breach one shall enter into the whole; yet he shall enter only into his part. Co. L. 186. a. (d)

And if one feoffor dies, the feoffee cannot plead the feoffment of the survivor: for each gave only his part. Co. L. 186.

So every joint-tenant loses, or forfeits only his part. If one be an alien, the king, upon office, shall have only a moiety. Co. L. 186. a.

If one be a villein, the lord shall enter but into a moiety. Co. L. 186. a.

So the one may demise his part for years, or at will, to his companion. Co. L. 186. a.

Or make his companion his bailiff of his part. Co. L. 186. a.

And maintain account against him in such case. Co. L. 186. a. Vide post, (K 8)

### (K 7.) What charges bind the survivor.

So, if one joint-tenant does a thing which gives to another an estate, or right in the land, it binds the survivor: as, if a joint-tenant in fee, or for life, makes a lease for forty years. Lit. S. 289. (e) Vide Chancery, (3 V 7, &c.)

So, if he leases to commence *in futuro*, (f) and dies before the commencement. Lit. S. 289.

So, if he leases for years the vesture or herbage of the land (g); for such lessee has a right to the land. Co. L. 186. b.

And the survivor (h) shall not have the rent upon a lease for years, though he has the reversion. Co. L. 185. a. (i)

So,

(c) If joint-tenants join in a lease, this shall be but one lease, for they have but one freehold. But if tenants in common join in a lease, this shall be the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively, and that includes the necessity of an estoppel, which is never admitted, if by any construction it can be avoided. Bac. Abr. Joint-tenants, H. 4.

(d) And though joint-tenants join in demising, the tenancy may be determined as to the separate share of one by his separate notice to quit. 3 Taunt. 120.

(e) 1 Inst. 185. a. 2 Rol. Abr. 89. 2 Vern. 523.

(f) Thus to begin after his death. Bac. Abr. Joint-tenants, H. 1.

(g) So if two joint-tenants are of a water; and one grants a separate piscary for years, and dies, this shall bind the survivor. For in this and like cases, the grant of the one joint-tenant gives an immediate interest in the thing itself whereof they are joint-tenants. Bac. Abr. Joint-tenants, H. 1.

(h) But the personal representatives of the deceased may have debt or covenant; this

So, if he acknowledges a statute, recognisance, or judgment, and execution be sued in his life-time; that binds his companion who survives. Co. L. 184. b.

So, if there be a recovery against him, though execution be not sued in his life-time. Co. L. 185. a.

But if a joint-tenant grants a rent-charge, and dies; this does not bind the survivor: for he claims *paramount* the charge, and may plead a feoffment to him, without naming his companion. Lit. S. 286.

So, if he grants common, estovers, a corody, &c. Co. L. 185. a.

So, if he acknowledges a statute, recognisance, or judgment, and dies before execution. Co. L. 184. b.

Or, be indebted to the king. Co. L. 185. a.

So, if he contracts to make a lease for years; that does not bind the survivor.

Or grants, that if A. pays so much at Michaelmas, he shall have it for years. Co. L. 185. a.

So, if he takes a lease, by indenture, of his own land, from a stranger; the survivor is not bound by this estoppel. Co. L. 185. a.

So, if a joint-tenant grants the part of his companion, it shall be void, though he survives: for it was in contingency. R. 2 Cro. 91. (*k*) Mo. 776. (*l*)

But if a joint-tenant grants a rent charge, &c. and afterwards releases to his companion; he shall hold subject to the charge, though he survives: for he does not claim by survivorship, but under the grant. Co. L. 185. a.

How a conveyance enures by one joint-tenant to another. Vide Release, (B 4. — D 1, &c.)

### (K 8.) Tenants in common.

Tenants in common are those, who claim by several titles, or in several rights though by one title, and have their possession in common. Co. L. 189. Vide ante, (K 2.)

this remedy being now given to the representatives of such a lessor; for by 11 G. 2. c. 19. s. 15., the executors or administrators of tenant for life shall on his death, recover of the lessee a rateable proportion of the rent from the last day of payment to the death of such lessor.

(*i*) 1. If there be two joint-tenants, and they make a lease by parol or deed poll, reserving rent to one only, it shall enure to both; yet had the lease been by deed indented, the reservation should have been cod to him only to whom it was made, and the other should have taken nothing. Bac. Abr. Joint-tenants, H. 1. Cro. Jac. 91. — 2. The reason of which difference is this: where the lease is by deed or parol, the rent will follow the reversion, which is jointly in both lessors, and the rather because the rent being something in retribution for the land given, the joint-tenant for whom it is reserved ought to be seised of it in the same manner as he was of the land demised, which was equally for the benefit of his companion and himself; but where the lease is by deed indented, they are estopped to claim the rent in any other manner than is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from or vary his own solemn act. Bac. Abr. Joint-tenants, H. 1.

(*k*) 377.

(*l*) If one joint-tenant make a lease for years 'if he and his companion live so long, and afterwards surrender his moiety, and take back another estate, the lease determined by the death of either of them; for it hath no continuance longer than the jointure continues, which is severed by the surrender, a new estate being taken. Cro. Jac. 377.

And

And they may be by descent, purchase, or prescription. Co. L. 188. b.

If tenant in tail to him and the heirs of the body of his wife, has issue a daughter, and afterwards another daughter by another venter, discontinues, and disseises the discontinuee, and dies; his daughters are tenants in common by descent: for the eldest is remitted to a moiety; and therefore they are not parceners: for they claim by several titles. Co. L. 349. b.

Tenants in common have a several right to the freehold, and inheritance.

And therefore, (m) in an action real, or which concerns the title, they ought not to join, except it be for an intire thing. Vide Abatement, (E 10.)

So they have a several right and title to a moiety of the things which they hold in common: and therefore, if one dies, his moiety does not survive, but goes to his heir; or if it be a chattel, to his executor or administrator.

And one of them may enfeoff his companion of his part. Co. L. 200. b.

If one levies a fine, makes a feoffment, &c. of the whole; his moiety passes.

If one actually ousts (n) his companion of the possession, the other may maintain an ejectment against him. Lit. S. 322.

So, if one ousts the other of his ward, or other chattel real, the other shall have ejectment of ward against him. Lit. S. 323.

So, if one tenant in common destroys the flight of a dovecote, the other shall have trespass. Co. L. 200. a.

Or destroys all the deer in their park, &c. Co. L. 200. b.

Or removes the merestones *pro metis et bundis terrarum suarum*. Co. L. 200. b.

If one disturbs the other in the setting up of hurdles for their foldage. Co. L. 200. b.

So, if one tenant in common of a wood, turbary, piscary, &c. does waste against the will of the other; he shall have waste against him. Co. L. 200. b.

(m) They cannot join in a lease. 2 Wils. 232.

(n) 1. An actual ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to the jury. Cowp. 217. — 2. Thus thirty-six years sole and uninterrupted possession by one tenant in common, without any account to, demand made, or claim set up by his companion, was held to be sufficient ground for the jury to presume an actual ouster of the co-tenant. Ibid. — 3. If upon demand by the co-tenant of his moiety, the other refuse to pay, and deny his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough. Ibid. 11 East, 49. — 4. And in like manner where there were two joint-tenants of a lease for years, and one bade the other go out of the house, and he went out accordingly, this was held to be an actual ouster. Vin. Abr. V. 14. 512. — 5. Upon the same principle although the entry of one is, generally speaking, the entry of both, yet if he enter *claiming the whole* to himself, it will be an entry adverse to his companion. Ibid. — 6. But where there was no circumstance to induce a supposition of an actual ouster, but a bare perception of the profits by one tenant in common for twenty-six years, the possession was held not to be adverse. 5 Burr. 2604. — 7. And where a tenant in common levied a fine of the whole premises, and afterwards took all the rents and profits for four or five years, but it did not appear that he held adversely at the time of the levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster by his companion. 1 East, 556. 568. 574. Sed vide 2 Atk. 630. 632. Adam's Eject. 61, 62. — 8. And after recovery by one in ejectment against the other, he may have trespass for mesne profits. 3 Wils. 118.

If one corrupts the water, the other shall have an action upon the case. Co. L. 200. b.

If one will not repair their house, mill, &c. the other shall have a writ *de reparatione faciendâ*. Co. L. 200. b. F. N. B. 127.

If one makes the other his bailiff of his part, as he may, he shall have account against him. Co. L. 200. b. Vide ante, (K 6.)

But their occupation is in common *per my et per tout* : and therefore, (o) the one shall not have ejectment against the other, without an actual ouster. Co. L. 199. b. R. Cro. El. 220. 1 Leo. 312. D. 1 Sal. 391, 392.

So the one cannot disseise the other, without an actual ouster. R. 1 Sal. 392.

So, if the one takes (p) an intire chattel real, as the body of his ward, villein, &c. the other may take him back, but shall not have remedy by action. Co. L. 200. a. (q)

So, if the one takes a chattel personal intire, or not intire; the other may retake it when he has an opportunity, but has no remedy by action. Co. L. 200. a. (r)

So, if an estray, or other thing belonging to a manor, which they have in common, happens.

So, if A. has a ship in common with B. and disposes the whole to another; no remedy lies by action against A. R. 1 Lev. 29. (s)

When partition shall be made between joint-tenants, and tenants in common, and how. Vide Parceners, (C 1, &c.)—Pleader, (3 F 1, &c.)

When they shall join in a suit, or be jointly sued, and when not. Vide in Abatement, (E 9. 10. — F 5. 6.)—Chancery, (3 V 1, &c.)

What words in a devise, &c. make an estate in common. Vide ante, K 2.)—Devise, (N 8.)—Chancery, (3 V 4.)

## ESTATES, BY DEVISE.

(A) Devise by the common law. p. 118.

(B) Devise by statute. p. 119.

(o) One tenant in common shall not bar the other by the statute of limitation, where there has been no adverse possession. 5 Burr. 2604. 2 Blk. 690. Lofft. 768.

(p) 1. One tenant in common of a chattel may apply it to its proper purpose, and to this end, may change its form, if necessary; when the tenancy in common will continue as before. 1 Taunt. 241. — 2. And may fell trees upon the land held in common, of a growth fit to be cut, though against the others' consent, who, however, may claim a moiety of what they produce. 8 T. R. 145. — 3. But in all cases, where one tenant in common misuses that which he has in common with another, he answerable to the other in an action as for misfeazance. 8 T. R. 145.

(q) Payment to one of two tenants in common of whom premises are holden, is no discharge of the other's share, if he previously warned the tenant not to pay it. 5 T. R. 246.

(r) And, therefore, one tenant in common cannot maintain a possessory action, trover for instance, against his companion, even though he has the custody of the property, and has given to his companion a bond to be answerable for it. 1 T. R. 658.

(s) 1. *Semble accord*. 4 East, 110. — 2. Yet if he destroy it the other may have trover. 4 East, 121.

(C) Test:

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### (A) Devise by the common law.

A devise is a disposition of a real or personal estate, to take effect after the death of the devisor. Co. L. 111. a.

By the common law, every person might devise his goods and chattels. (a)

Though they were chattels real. 1 Rol. 609. l. 5.

As, a term for years, 1 Rol. 609. l. 5.

An interest which he had as guardian in chivalry, or socage. 1 Rol. 609. l. 7.

So, emblements upon the land; and this before the st. of Mert. 20 H. 3. 2. as it seems. 2 Inst. 81. Vide Biens, (G 2.)

So, by the common law, a man might devise the use of lands. 1 Leo. 257. Vide Uses, (A). (b)

Though the use was suspended. 1 Leo. 257. Vide Uses, (A).

So, at common law, by the custom of some cities and boroughs, a man may devise his lands within the same city or borough, as chattels. Co. L. 111. a.

And, by the same custom, may devise a rent out of land. Co. L. 111. a.

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(a) 1. *Potest enim quilibet homo, majoribus debitis non involutus, de rebus suis, in infirmitate sua rationabilem devisam facere.* Glanville, lib. 7. c. 5. — 2. *De hereditate vero nihil in ultimâ voluntate disponere potest.* Ibid.

(b) Whence by the invention of uses a power of devising lands was indirectly acquired.

So, if there be a rent *in esse* issuing out of such land, it may be devised; for the rent follows the nature of the land. Cont. per 2 J. Dy. 5. b. Q. Dy. 140. a. Acc. Dy. 5. b. in marg. 1 Rol. 609. l. 20. Cro. El. 637. 651.

So, if land devisable be given to a man for life, remainder to another in fee, he in remainder may devise it. 1 Rol. 609. l. 30.

So, if land devisable escheats to the king, who grants it to A. the grantee may devise the whole. R. Dal. 75.

Though the king grants it to hold by knight-service. R. Mo. 70.

And therefore, by custom, lands in London, Oxford, &c. may be devised. Bend. pl. 145.

And a custom to devise is incident to lands of the nature of gavelkind. (c)

So a custom will be good, that by a devise, without saying, what estate, the devisee shall have a fee. R. Win. 1.

By custom, lands were devisable without writing. Co. L. 111. a.

And this custom was not taken away by the st. 32 & 34 H. 8. Co. L. 111. b.

But now, by the st. 29 Car. 2. §. No bequest of lands devisable by custom is good, unless in writing signed by the devisor, or some other in his presence and by his express direction, and attested and subscribed in his presence by three or four credible witnesses. Vide post, (E 1.)

A devise of lands devisable by custom would not be void by the st. Marl. 52 H. 3. 6. upon pretence, that it was by collusion. 2 Inst. 112.

And, by custom, a will of lands in London, ought to be inrolled in the hustings. Dal. 117.

And it ought to be proved by citizens. Dal. 117.

And it shall be proved before the ordinary, and then before the mayor in the hustings. Cro. Car. 396.

But lands were not devisable, if the devisor had only an estate-tail. Co. L. 111. a.

So, if a man had a fee expectant upon an estate-tail, the fee was not devisable; for at common law, it was but a possibility, and though the stat. *de donis* makes it a remainder, the custom does not extend to it. 1 Rol. 609. l. 27. Dub. Sti. 409.

So, without a custom, no lands or tenements were devisable by the common law. Co. L. 111. b. 1 Rol. 608. l. 45. (d)

## (B) Devise by statute.

By the st. 32 H. 8. 1. and 34 & 35 H. 8. 5. (e) All persons having any lands, tenements, rents, or hereditaments holden in socage, and thereof seised in fee, either sole, or in common, or in coparcenary, in possession, reversion, or remainder, may by their last wills and testa-

(b) Rob. Gav. 234.

(c) 3 Rep. 35. a.

(d) It is generally agreed, that the power of devising lands existed in the time of the Saxons, but upon the establishment of the Normans, it was taken away, because it was inconsistent with the principles of the feudal law. 1 Inst. 111. b. n. (1). 2 Inst. 7. Wright's Ten. 173. 6 Cruise's Dig. 3.

(e) Previous to which, the st. 7 Hen. 7. c. 3., and 14 & 15 Hen. 8. c. 14. allowed persons who were in the king's service in the wars to alien their lands for the performance of their wills, without licence or fine for alienation.

ments in writing, devise the same to any person (not bodies politic) at their will and pleasure. (*f*)

And now, (*g*) by the st. 12 Car. 2. 24. All lands are holden in free and common socage.

### (C) Testament nuncupative, when good.

All testaments are nuncupative, or in writing. Co. L. 111. a.

A nuncupative testament, is sufficient for goods and chattels; but not for land.

And will be good, though reduced into writing after the death of the testator.

Yet before the st. 29 Car. 2. 3. it ought to be proved.

And, before probate, was not pleadable against an administrator. R. Ca. Ch. 192.

But by the st. 29 Car. 2. 3. No nuncupative will shall be good, which gives above the value of 30*l*. unless proved by three witnesses present at the making, and that the testator, at the time of pronouncing, bid the persons present, or some of them, bear witness that such was his will, or to that effect.

Nor, unless such will was made in the last sickness of the testator, and at his dwelling-house, or where he had been resident ten days next before; except where he was taken sick from home, and died before his return.

Provided, soldiers in actual service, mariners, or seamen at sea may dispose of any personal estate, as before.

And, by the same statute, no testimony shall be received to prove a nuncupative will six months after making; unless such testimony, or the substance of it, was put in writing within six days after making the said will.

Nor shall any probate of such will pass the seal of the court till fourteen days after the testator's death expired.

(*f*) 1. The idea of a devise of land was evidently taken from the testament of the Roman law, which was at all times allowed in England; with respect to personal property. But the power of devising lands being given by positive statutes, is only co-extensive with the words of these statutes. 6 Cruise 7. — 2. A devise, therefore, is founded upon different principles, and governed by different rules, from a testament; which is only an instrument to convey personal property; for a devise is considered not so much in the nature of a testament, as of a conveyance, declaring the uses to which the land shall be subject, after the death of the deviser. Ibid. — 3. The word testament in the Roman law, was applied only to dispositions which contained the institution or appointment of an heir, who was to take all the property of the testator; and the Roman lawyers observe, that a testament might be made in five words; "*Quinque verbis potest quis facere testamentum, ut dicat; Lucius Titius mihi hæres esto.*" Ibid. — 4. All other dispositions in which there was no heir named, were called codicils, or donations in contemplation of death. Ibid. — 5. But the English law does not admit of these distinctions; for a devise does not necessarily imply the appointment of a general heir, or a disposition of all the testator's lands; but only of those which are particularly mentioned; and the residue descends to the heir as if no such devise had been made. Ibid.

(*g*) With respect to lands held by knight-service, either of the king or of a subject, no more than two-thirds thereof could be devised under the authority of the above statutes; but in consequence of the abolition of military tenures, and the connection of knight's service into common socage, the operation of these statutes now extends to all estates in fee simple. 6 Cruise, 6.

Nor,

Nor, unless process first issue to call in the widow or next of kin to the deceased, to contest it, if they please.

By the st. 5 & 5 (or 4) An. 16. Witnesses allowable in trials at law, are good witnesses to prove a nuncupative will, or any thing relating to it.

By the st. 29 Car. 2. 3. No will in writing of personal estate, nor any clause therein shall be repealed or altered by parol or will *nuncupative*, unless the same be put in writing in the testator's life, and afterwards read to him and allowed by him, and proved so to be by three witnesses.

But a man having disposed of part of his estate by his will in writing, may dispose of the residue by a nuncupative codicil. Ray. 334.

So, if a residuary legatee, named by a will in writing, dies in the life of the testator, whereby the devise, as to that, is void; he may dispose of it by a nuncupative will, if he does not alter his executor nor any thing else. R. Ray. 334.

So, if any thing be inserted in a will in writing, by covin; for, as to that, it is void. Ray. 334.

## (D) Testament in writing.

### (D 1.) What shall be.

A will in writing is not confined to any certain form. Ch. R. 195. (4) And therefore, if a man, being out of the kingdom, writes a letter in which he shows how he will dispose of his land; if it be well executed, it is a good will. R. Mo. 177.

So, if it be written by way of articles of agreement between A. and B. and concludes and be sealed and delivered as a deed. 1 Mod. 117. 3 Keb. 310. R. Ca. Ch. 248.

So notes or memorandums written from the testator's mouth by a physician or scrivener, &c. if they are afterwards executed.

Though they were intended to be reduced into form, but are not.

Though they were never read to the testator after the writing. R. Dy. 72. a. Bend. 61. 1 And. 34.

So, if the testator declares his will, and wishes B. was present to write it, whereupon B. is sent for by his wife without other direction, and he writes the will in the life of the testator from the mouths of the witnesses present, but the testator was senseless before the writing was finished. R. Al. 55.

And it shall be good for so much as the witnesses agree in, though they disagree as to another part. R. Al. 55.

So an indenture, by which he gives legacies and makes executors, shall be a will. R. Ch. R. 195. (i)

So notes in writing prepared by A. which he declares to be the effect of his will, and which he delivers to counsel with the deeds of his estate, as instructions for his will in form; though he dies before the will drawn by counsel is executed. R. Ch. R. 273. Dy. 72. pl. 2.

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(4) As to what instruments shall operate as wills, what not, see 1 Ves. 189. 1 Wils. 243. 1 Eden, 469. 4 B. C. C. 353. 2 Ves. J. 204. 4 Ves. 197. 200. 565. 6 Ves. 397. 9 Ves. 249. 1 Cox, 241. 354. 2 Cox, 16. 1 Mer. 503. 652.

(i) 1. 1 Blk. 345. — 2. And a deed poll, intended to operate after the death of the person who made it, and who had already published his will, to which it referred, was held to be a codicil. 2 Ves. J. 204.

So, if a will in writing be gnawn in pieces by rats ; if by collecting of the pieces the particular bequest can be known, it will be good. R. Al. 2.

And also, if it cannot be known to a stranger, if the jury finds the gnawing to be after the death of the testator. Al. 2.

So, if a will in writing be burnt or destroyed after the death of the testator, it is not avoided. R. Al. 55.

Otherwise, if it was destroyed or lost before his death. R. Al. 2. 55. (k)

### (D 2.) What not.

But if a man speaks his will, and another, without his direction or privity, reduces it into writing in the life-time of the testator ; this is not a will in writing. Dy. 72. in marg. R. Al. 54. Cont. 4 Leo. 104.

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(k) 1. By 2 & 3 Ann. c. 4. s. 20., all memorials of wills that shall be registered, of any lands in the West Riding of the county of York, within the space of six months after the death of every respective devisor, dying in England or Wales, or within the space of three years after the death of every devisor dying abroad, shall be as valid and effectual against subsequent purchasers, as if the same had been registered immediately after the death of such devisor. — 2. By s. 21., in case the devisees, by reason of the contesting of such wills, shall be disabled to exhibit a memorial for the registry thereof within the times before limited ; then and in such case the registry of the memorial within the space of six months next after the attainment of the will, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act. — 3. By 6 Ann. c. 35. s. 14., the same provision is made for registering wills of lands in the East Riding of Yorkshire, as in the above act. — 4. And by s. 15., in case the devisee, by reason of the contesting of such will, or other inevitable difficulty, without his wilful neglect or default, shall be disabled to exhibit a memorial for a registry thereof within the times limited, and that a memorial shall be entered in the office, of such contest or other impediment, within six months after the decease of the devisor who shall die within the kingdom of Great Britain, or within three years after the decease of such person who shall die beyond sea ; then and in such case the registry of the memorial of such will, within six months after the attainment of such will, or a probate thereof, or removal of the impediment shall be a sufficient registry within the meaning of this act. — 5. By 7 Ann. c. 20. s. 8., the same provision is made for registering wills of lands in the county of Middlesex, as in 2 & 3 Ann. — 6. And by s. 9., if the devisee by reason of the concealment or suppression, or contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial for the registry thereof, within the times limited, and that a memorial shall be entered in the office of such contest or other impediment, within two years after the death of such devisor, dying in Great Britain, or four years after the death of such person dying beyond sea ; then and in such case the registry of the memorial of such will, within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act ; provided that in case of any concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within five years after the death of the devisor. — 7. By 8 G. 2. c. 6. s. 15., the same provision is made for registering wills of lands in the North Riding of Yorkshire, as in the st. 2 & 3 Ann. — 8. And by s. 16., in case the devisee, by reason of the contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial within the times limited and that a memorial shall be entered in the office, of such contest or impediment, within six months after the decease of such devisor, dying in Great Britain, or three years after the death of such person dying beyond sea ; then and in such case, the registry of the memorial of such will within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act. — 9. And by s. 17., in case of any concealment or suppression of any will or devise, no purchaser or purchasers for valuable consideration, shall be defeated or disturbed in his or their purchase, nor any judgment or statute creditor shall be defeated of their debts, by any title made or devised by such will, unless the will be actually registered within three years after the devisor.

Though



Though the effect of it be afterwards shown to him, and he does not disallow it. R. Dy. 72. a in marg. (l)

Though he at another time sends for B. to write his will, but does not then give him any directions; but he writes that which he is informed the testator before declared for his will. Al. 54.

So, if a man writes his will, but says that he will alter it, and dies before alteration or any publication; it shall not be his will. R. Mo. 874. 5.

So, if a man makes his will, and thereby devises to A. and his heirs, and afterwards, upon the death of A. says to his heir, that he shall have all the land devised to A.; without a new publication it is not a good devise, because it is not in writing. R. Pl. Com. 345. b.

So a letter or other paper cannot be used to explain the testator's intent. 1 Sal. 232.

So, if the instruction be to give for life, and the devise written is in fee; it shall be void for the whole. R. per 3 J. Fenner cont. that it shall be good for life. Mo. 356.

So, if the instruction was, to devise to A. upon condition, and the devise be written to A. but before the condition written, the testator dies; the devise shall be void. 3 Co. 31. b.

So, by the st. 9 & 10 W. 3. 41. No will of a seaman contained in the same instrument with a letter of attorney shall be good.

### (D 3.) Codicil, what.

A codicil is that which contains any addition to, or explanation of a will.

The codicil is part of the will.

And may be made before, or after (m) the will.

And there may be several codicils to the same will. Sho. 549.

### (E 1.) How a testament shall be executed.

After the st. 32 & 34 H. 8. It it was sufficient that a will was put in writing by the testator, or by another with his privity and direction, without any other execution. Dy. 53. b.

So, if notes or instructions were taken of the testator for his will, and it was reduced into form pursuant to such instructions in the life of the testator, though it was never read or shown to him, it was sufficient. R. Dy. 72. a.

If it was published, though in loose sheets. 1 Sid. 315.

So, if notes were written for the disposition of part of his estate, it was good for so much. Dy. 72. a. in marg.

But if a disposition for life was written in the life-time of the testator, but not of the remainder, &c. it was void for the whole. Dy. 72. a. in marg.

But now, by the st. (n) 29 Car. 2. 3. All devises of (o) any lands or tenements

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(l) See that a devise bad in the original, cannot be made good by subsequent events. Loft. 161.

(m) 1. As to the respect in which it differs from a second will, see 1 Ves. 187. —  
2. That it is to be taken as part of the will, see 1 Ves. J. 407. 497. 3 Ves. 110.  
4 Ves. 610. 1 T.R. 201.

(n) The construction of this statute is the same in equity as at law. 1 Ves. J. 16.

(o) 1. All devises by which terms for years, or other interests arising out of lands are

tenements shall be in writing signed by the party so devising, or by some other in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses. (*p*)

And therefore, every will, not (*q*) signed and attested (*r*) as the statute directs, is void.

So, every devise and bequest, not so signed and attested.

As, if a testator, after the execution of his will, adds a new clause or bequest, and does not execute his will *de novo*.

So, if a man by a will well executed, devises to B. and his heirs, and then A. dies, and the testator afterwards makes a new publication of his will and declares that B. son and heir of the first devisee (being of the same name with his father, and having a legacy by the

are created, or by which powers to sell or charge lands are given, are within the statute. — 2. And therefore where an estate is devised for a term of years, or a sum of money is given originally and primarily out of land, a will containing such a charge, must be executed in the manner prescribed by the statute; because it is the same as a devise of the land, since the term of years is an interest in the land; and money thus given can only be raised by a sale of the land 2 Atk. 272. 2 Ves. 179. 6 Cruise, 82. — 3. To which rule, however, there is one exception; for where a will duly executed according to the statute, contains a general charge on lands in aid of the personal estate, it will extend to legacies given by a subsequent will or codicil, not duly attested. 1 Eq. Abr. 409. 2 Atk. 268. 6 Cruise 83. Vide 3 Ves. 327. 6 Ves. 560. 1 V. & B. 446. — 4. Which exception is founded upon the principle, that a charge of debts or legacies amounts to no more than making the real estate auxiliary to the personal; or in other words directing it to be converted into and applied as part of the testator's personal estate, and in aid thereof. Fearne's Op. 434. 8 Ves. 495. — 5. And all cases within it, are not cases of a primary substantive and independent charge upon the real estate, but a charge upon it in aid of the personal, which was primarily charged; and the stat. of frauds does not prevent a man from creating by will a fluctuating charge upon real in aid of personal. 2 Ves. J. 231. — 6. If however a person, by a will duly attested, charges his real estate with such legacies and annuities, as he shall afterwards give and charge upon that estate, whether attested or not; a charge by an unattested codicil will not be good. 6 Ves. 560. 12 Ves. 29. — 7. Trust estates are within the statute of frauds. 2 P. Wms. 258. 3 Atk. 151. — 8. As are mortgages and equities of redemption. 6 Cruise, 87. — 9. Terms for years already created, are not comprehended within the statute. 6 Cruise, 89. — 10. But a term cannot be created by will, unless such will be executed according to the statute of frauds. Ibid. 90. — 11. And if a term for years become attendant upon the inheritance, it is then considered as part of the inheritance, and not a chattel real; and can only be devised by such a will as would pass the inheritance. 2 P. Wms. 236. — 12. A will made in a foreign country of lands in England, is within the statute. 2 P. Wms. 293. — 13. As to devises of real estate in Bermuda, see 8 Ves. 481. — 14. Saint Christopher's, 4 M. & S. 1. — 15. Of a rent, 2 Ves. J. 232.

(*p*) Whence to the validity of a devise three requisites are essential; 1°. That it be written; 2°. That it be signed by the party himself, or by some other in his presence, and by his express directions; 3°. That it be attested by three or more witnesses, in the presence of the testator.

(*q*) 1. Written. — 2. But it is immaterial whether it be written at large, or by notes usual or unusual; or whether sums of money given be expressed at full length or by figures; provided it be free from all doubts and ambiguity. 1 P. Wms. 425. 6 Cruise, 60. — 3. And it may be written at several times, and on several sheets of paper, unconnected with each other, although the proper mode, where a will is written on several sheets of paper, is to join them together by means of a piece of tape sealed. 1 Show. 66. 6 Cruise, 61.

(*r*) The statute of frauds, in this instance, adopts the mode prescribed by the civil law, in *testamentis solemnibus*; not as laid down in Justinian's Institutes, but as reformed by the code in the Novels; and the evil meant to be remedied by the framers of the statute was, the secret and private manner in which wills were formerly executed. Gilb. Rep. 261. 6 Cruise, 63.

same

same will) shall take the land which his father would have had; it is not a good devise to the son, for this declaration was not in writing. Cont. per 3 J. in C. B. but judgment was reversed in B. R. 2 Mod. 313. 1 Vent. 341. 2 Jon. 135. Ray. 408.

So, if a will be not signed (s) by the deviser, or by his direction, it is void.

So, if it be signed, and afterwards before witnesses he declares it to be his hand. Dub. per Cowper, Pr. Ch. 185.

Yet if the testator writes his name at the top (t) or side of the paper, it is sufficient; for the statute only requires that it be signed, and not that it be subscribed. 3 Lev. 87.

So, if the testator writes his will with his own hand, which begins, I, A. B. &c. and does not put his name otherwise, but it is sealed, and well executed in other respects, it is good; for it suffices that it was signed in the text of the will. R. per tot. Cur. 3 Lev. 1. Per Jeffreys, Skin. 227. (u)

So, if written with his own hand, though it be not subscribed or sealed by him. Per. L. Cowper, Pr. Ch. 185.

So, if it be sealed by the testator, and he does not write his name at all, it is good; for the seal is a signing. Per 3 J. Levinz. dub, 3 Lev. 1. D. per Holt, Sho. 69. Semb. 1 Sid. 362. (x)

So, if it be signed by the testator, and afterwards attested by witnesses, though the testator did not sign it in their presence. Adm. per Trevor C. J. at Guildhall, 8 Ann. in ejectment, Peate on the demise of Oliver St. John v. Ougly, (reported Comyns's Rep. 197.) D. per Dolben, Sho. 69. Adm. per C. B. P. 11 Ann. inter Ld. Nappier and Sir Theophilus Nappier. Semb. Skin. 227. (y)

So, if a will for land is not attested (z) and subscribed (a) by three witnesses in the presence of the deviser, it is void. Eq. Ca. 130.

And

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(s) A will was prepared and written upon five sheets of paper, and a seal affixed to the last, and also the form of attestation written upon it. The will was then read over to the testator in the presence of three witnesses, who afterwards subscribed, and the testator set his mark to the two first sheets in their presence, and attempted to set it to the third; but being unable, from the weakness of his hand, he said 'I cannot do it, but it is my will.' After this the three witnesses went away, *being desired to come again*; the testator died without setting his mark to the three last sheets. Adjudged that the will was not well executed. Dougl. 241.

(t) 1. Or at the commencement. 18 Ves. 183. et infra, next pl. — 2. Or in the attestation part. 2 B. & B. 104.

(u) 1 Ves. J. 12. 18 Ves. 183.

(x) 1. Signing was chosen rather than sealing and delivery (which are the solemnities required in deeds,) because seals, which formerly were a great mark of distinction in families, were much disused when the statute was made, and people sealed with any seal, so that signing as used in the civil law was preferred. Gilb. Rep. 261. — 2. And notwithstanding the authority of the principal position, it seems doubtful whether sealing is equivalent to signing. Vide 2 Str. 764. 1 Wils. 313. 2 Ves. 459. 1 Ves. J. 12. 17 Ves. 459.

(y) 3 P. Wms. 254. 2 Ves. 454. 1 Ves. J. 10. 8 Ves. 504. 1 V. & B. 362.

(z) Although the witnesses must subscribe in the presence of the testator, yet the statute does not require that this circumstance should be taken notice of in the attestation; and whether inserted or not, the fact, if denied, must be left to the jury; for neither the insertion nor omission of this circumstance is conclusive. Com. Rep. 530. Willes 1. 2 Str. 1109.

(a) 1. An attestation of a devise, by the witnesses setting their marks to the will, is sufficient. 8 Ves. 184. 504. 17 Ves. 459. — 2. The attestation must be when the testator

And therefore, if a devise be by a will subscribed by two witnesses, and afterwards a codicil is made, which confirms all the devises in the will, and is subscribed by two witnesses, one of which was not a witness to the will, the devise is void: for all the three witnesses ought to attest the execution of the will by which the devise was made. R. per tot. Cur. in B. R. Hill, 1 and 2 W. and M. inter Lee and Libb. Sho. 69. 88. 3 Mod. 262. Carth. 35. (b)

So, if a will was executed in the presence of three witnesses, one of which was a devisee, and therefore it was afterwards executed *de novo* in the presence of two others; the devise is void, if the first execution was not sufficient. Per Powel inter — ex dimiss. Went. Dilke and —. R. Carth. 514. Vide infra.

So, if a will be executed without witnesses, and afterwards a codicil is executed in presence of three witnesses, the will without witnesses shall not be good. R. 2 Ver. 598. (c)

So, if a will be executed and attested by three witnesses, and afterwards revoked by a feoffment, and after that the testator republishes his will in the presence of one or two witnesses, it is not good. Q. Skin. 227. (d)

So, if a will be subscribed by three witnesses together in a room where the testator cannot see them, it is void; for it ought to be attested in the presence of the testator. R. P. 2 W. and M. inter Edleston and Speak. Sho. 89. Carth. 80. (e)

But if the witnesses subscribe within the testator's view it is sufficient, though it be not in the same room. R. Carth. 81.

Or, where the testator may see, though he does not. R. Sal. 688. (f)

Or, if the will was executed before the statute, though the testator died after. Dub. Pr. Ch. 77.

So, if a will be subscribed by three witnesses, of which one is a devisee, it is void as to the devise to him; for, there are not three credible witnesses to it. R. per B. R. T. 10 W. 3. inter Jennings and Hillier. (Reported Comyns's Rep. 90. 94.) Per Powel, T. 10 Ann. inter — dimiss. ex Went. Dilke and —. (g)

But

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testator is in a testable state. Dougl. 241. — 3. Though if he be blind, the will need not be read over to him in the presence of the attesting witnesses. 2 N. R. 415. — 4. As to an attestation by a vice-consul abroad, operating as a private attestation, see 11 Ves. 240.

(b) Rep. temp. Holt, 742.; but see 2 Ves. J. 228. et infra.

(c) 1. Gilb. Rep. 5. Prec. Ch. 270.; but see 2 Ves. J. 228. — 2. Where a codicil is written on the same sheet of paper with a will, the attestation of the codicil by three witnesses establishes the will, though such will be not duly attested. 16 Ves. 167. — 3. And if a will be made at several times, though the parts be distinct, and separately signed by the testator, yet if it appear from circumstances to have been the intention of the testator that both instruments should constitute but one will, and not a will and a codicil, an attestation of the last part by three witnesses will amount to an attestation of the whole. 1 Burr. 549.

(d) A person cannot empower himself to give lands by a will not duly attested. 5 T. R. 92. 2 Ves. J. 204.

(e) So where a person subscribed his will in the presence of three witnesses, who for the ease of the testator, went down into another room, and subscribed it there, it was held to be void. 1 P. Wms. 239.

(f) L. R. 507. 1 P. Wms. 740. 1 B. C. C. 99. Dick. 158. 225. 586. 1 M. and S. 294.

(g) 1. The 25 G. 2. c. 6. s. 1. enacts, that if any person attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment,

But if one denies his hand, or is not a credible person, if it be found by other evidence to be well executed, it will be good. R. Skin. 79. 413.

So, if it be subscribed by three witnesses, who severally subscribe in the presence of the testator but not together, it will be good. R. 2 Ca. Ch. 109. Cont. per Holt; but Dolben acc. Vide Carth. 37. R. acc. Eq. Ca. 263. (h)

Or, if one witness subscribes in one sheet of paper in which the will is written, and the others to another sheet. Per Dolben, Carth. 37. (i)

So, if it be published before three witnesses at several times, who all attest in his presence. R. Pr. Ch. 185.

Or, all the witnesses subscribe to a paper in which the will is inclosed. D. Carth. 37.

So a devise of copyhold without three witnesses will be good: for it passes by the surrender. R. 2 Ver. 598. (k)

## (E 2.) Publication of a will; what shall be.

If a man seals and delivers his will in the presence of witnesses; this amounts to a publication (l) though the witnesses know not any thing in it.

So,

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ment, except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made; such devise, legacy, estate, interest, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such persons shall be admitted as a witness to the execution of such will or codicil. Vide 17 Ves. 508. — 2. By s. 2. in case by any will or codicil, any lands, tenements, or hereditaments, shall be charged with any debt or debts; and any creditor, whose debt is so charged, shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. — 3. By s. 3. the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes, as the credit of witnesses in all other cases ought to be considered and determined. — 4. The credibility of witnesses to a will, must be regulated by the established laws of evidence. 4 Burn. Ecc. L. 95. — 5. And therefore a legatee may be a witness against a will, because he is swearing against his own interest. Salk. 691.

(k) Prec. Ch. 184. 2 Atk. 176. n.

(i) The witnesses ought to see the whole will; for if they only see the last sheet, on which they subscribe their names, it is doubtful whether that be sufficient. But the presumption is, that all the sheets on which a will is written are in the room where the witnesses attest, unless the contrary is proved. 3 Mod. 263. 3 Burr. 1773. 1 Blk. 407.

(k) 1. 2 Ves. J. 204. Dick. 76. 2 B. C. C. 58. 4 B. C. C. 353. 7 East 299. — 2. So the trust of a copyhold. 2 Atk. 37. vide 2 P. Wms. 261. — 3. And if the surrender of a copyhold to the uses of a will, require that the will should be attested by three witnesses, a devise of such copyhold must be so attested, or it will be void. Amb. 684. — 4. And a devise of customary freeholds, where there is no custom to surrender them to the use of a will, must be executed according to the statute of frauds; and a trust estate in them must be devised in the same manner. Amb. 299.

(l) 1. A will must be published, that is, the testator must do some act from which it can be concluded, that he intended the instrument to operate as his will. 6 Cruise, 79. — 2. And Lord Hardwicke has mentioned a case where upon a trial at bar, in K. B., the question was, whether the testator had published his will; for there was no doubt of his having executed it in the presence of three witnesses, or of their having  
attested



So, before the st. 29 C. 2. if he had wrote with his own hand, sealed, and delivered, and published as last will in the presence of, though no witness subscribed it. (Vide Peate and Ougly, Comyns's Rep. 199.)

So, now, if it be written, published as last will, &c. and the witnesses subscribe it in his presence, though he did not say to them that it was his will, and they saw nothing of it. Adm. per Trevor Ch. J. at Guildhall in ejectment. Peate and Ougly ex dimiss. Ol. St. John. (reported Comyns's Rep.) (m)

So, if a man executes and delivers his will *de novo*, this amounts to a republication. (n)

So, if he delivers it *de novo*, and says that it shall be his will. 1 Rol. 618. l. 12. Off. Exr. 35.

So, if upon his bed *in extremis* a man, having several wills, be desired to deliver to another that which he will have to stand, and both are put into his hand, and he delivers the former; this will be a new publication of it. Off. Exr. 36.

attested it in his presence; which showed that publicatory was, in the eye of the law, an essential part of the execution of the will, and not a mere matter of form. 3 Atk. 161. 6 Cruise, 79.

(m) So where a will was delivered by a testator as his act and deed, and the words sealed and delivered were put above the place where the witnesses were to subscribe, it was held a sufficient publication. 4 Burn's Ecc. L. 119.

(n) 1. As a will is ambulatory during the life of the testator, and may be revoked by him at any time before his death, so it may be *republished*; which republication has a twofold effect; first, to give it all the effect of a will made at the time of its republication, and secondly, to set up and re-establish a will that has been revoked. 6 Cruise, 144. — 2. The first mode of republishing a will is by a re-execution of it; and although it was held, before the statute of frauds, that any words importing an intention to republish a will, amounted to a republication; yet now it is settled, that an express republication of a will must be attended with the same circumstances that are necessary to its first publication; for otherwise the statute of frauds would be evaded. Ibid. 1 Ves. 440. — 3. So formerly it was held, that since the statute of frauds there could be no devise of lands by an implied republication, for the paper in which the devise was contained, ought to be re-executed. But afterwards it was determined, that a codicil duly attested and annexed to a will, or referring to a will, should operate as a republication of such will, so as to make it take effect from the execution of the codicil; by which means lands purchased after the execution of the will, and before the execution of the codicil, pass by the will. Ibid. 3 Ch. Rep. 90. 10 Mod. 96. Com. R. 381. 3 Bro. P. C. 85. 1 Ves. 437. Amb. 93. 1 Ves. 492. 2 M. and S. 5. Cowp. 158. Lofft. 749. — 4. And therefore where a person by a codicil executed according to the statute of frauds, reciting that he had made his will, added 'I hereby ratify and confirm my said will, except in the alterations after-mentioned; 'it was denied that the testator's signing and publishing this codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will, and therefore that lands purchased after the execution of the will and before that of the codicil, passed by the will; which decree was affirmed by Dom. Pro. Com. Rep. 381. 3 Bro. P. C. 85. — 5. A testator by a codicil written on the back of his will, gave additional legacies and annuities, ratifying and confirming his will; and it was attested by three witnesses in these words; 'this will with the several additions and alterations above was signed, sealed, and republished by the testator, as his last will and testament, in the presence of us the subscribing witnesses;' he afterwards made another codicil, which though not dated, was agreed to have been made about four or five days before his death, in the presence of three witnesses, reciting that having in his will appointed several limitations and remainders of his estate, some of which were not agreeable to his present intent, he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith the attestation of which paper was 'signed, sealed, published, and declared by the testator as a codicil to the last will and testament,' and held that each codicil amounted to a republication. 1 Ves. 437. — 6. A devise of an estate tail, lapsed by the death of the devisee in the devisor's life-time, is not revived in favour of the issue by republication by a subsequent codicil. 4 T. R. 601.

So,

So, if a man makes a feoffment to the use of his will; though this be a revocation of the will, yet it amounts to a new publication of it. R. 1 Rol. 617. l. 42.

So, if a man adds, executors, and interlines a legacy with his own hand; this amounts to a new publication. Dub. 1 Rol. 617. l. 50. Dub. Mo. 429. D. Off. Exr. 35.

So, if a man makes a codicil and annexes it to his will; this amounts to a new publication. R. 1 Rol. 618. l. 25. Mo. 404. Cro. El. 493. Off. Exr. 35. (o)

If he says, that his will lies in a box in his study, 2 Ver. 209.

But it does not amount to a new publication, if the codicil is not annexed to the will, though both lie upon a table when the codicil is executed, and they are laid up together. Eq. Ca. 116. (p)

(E 3.) When a new publication is necessary.

If a man makes a will when he has not a capacity to make it, and afterwards the incapacity is removed, yet the will is not good without a new publication; as, if an infant makes a will, he ought to make a new publication after his full age. R. 1 Sid. 162. Vide post, (H 2. — M.)

If a man made his will before the st. 27 H. 8. 10. of uses, he ought to have made a new publication after the st. 32 H. 8. 1. Dy. 143. 1 Rol. 617. l. 35.

If a man after his will makes an alienation, or does any other act, which amounts to a revocation; the land devised does not pass without a new publication. 1 Rol. 617. l. 30.

So, if a man devises all his lands in B., lands afterwards purchased does not pass without a new publication. R. Pl. Com. 344. a.

So, if a devise be to B. and his heirs, and B. dies in the life of the testator; his heir cannot take without a new publication.

Or, to B. and the heirs of his body. Vide post, (K).

But if he devises to his eldest son and the heirs of his body, and afterwards to his second and third son, &c. and the eldest dies in the life of his father, having issue; the issue takes without a new publication. Per Poph. Cro. El. 424. Adm. 4 Mod. 283.

(E 4.) When it shall be sufficient.

If a man devises all his lands in A., and afterwards purchases other lands there; if he makes a new publication of his will, and uses words which show his intent that the lands newly purchased shall pass by it, it is sufficient to pass them; for the words in the will were apt for that purpose. R. Cro. El. 493. 2 Jon. 136. Pl. Com. 344. a.

So, if he says nothing at the time of the new publication, but before upon another occasion says, that he intends the land newly purchased for his executor, (who was the devisee of all his lands in A.) it is sufficient. R. Cro. El. 493. Mo. 404. 1 Rol. 618. l. 20. Dy. 143. in marg.

(o) 1. Vide infra. — 2. Unless an opposite intention is manifested. 2 M. & S. 5. — 3. And therefore where the effect of the codicil is expressly confined to the lands devised by the will, to which it is annexed, it does not operate as a republication of such will, so as to make it pass after purchased lands. 7 T. R. 482. 2 B. & P. 500. 7 Ver. 124.

(p) Sed vide infra, (E 5.) in notis.

So, if after the new purchase he newly executes his will, without more. Dub. 1 Rol. 618. l. 12.

Or, executes and annexes to his will a codicil as to goods; for this shows his intent, that his will at that time shall stand. Per Fenner, but the other J. dub. Cro. El. 493. R. cont. 2 Ver. 625. 722. Vide post. (E 5.)

So, if he devises to Robert his son, lands in A. who dies, having a son and heir named Robert, and the testator by parol makes a republication, and says, my grandson Robert shall have the land in A.; it is sufficient to pass those lands to the grandson Robert; for a devise to a son is sufficient to give to a grandson, if there be not a son of the name. R. per 3 J. Scroggs cont. and that judgment was reversed per Scroggs and others, as it seems, 2 Lev. 243. (Vide 1 Vent. 341. Ray. 408. 2 Jon. 135. Pol. 546.) (q)

#### (E 5.) When not.

But a new publication for another purpose is not sufficient: as, if a testator, after a new purchase, annexes a codicil for legacies; this is not sufficient to pass the land, without words for such purpose.

Or, if he inserts a legacy and executor with his own hand. Dub. 1 Rol. 617. l. 50. Per Poph. 1 Roll. 618. l. 10.

If he annexes a codicil concerning personal estate, it shall not be a republication as to lands devised by his will. R. 2 Ver. 722. Vide ante, (E 4.)

Or, if it be not annexed to the will, though deposited with it in the same place. R. Pr. Ch. 441. 452. 2 Ver. 722. Eq. Ca. 116. (r)

So a new publication with words declaring his intent, is not sufficient, if the words in the will are not apt for it: as, if a man devises to A. and the heirs of his body, and A. dies, and afterwards the testator says, that the son of A. shall have it; the son shall not take: for he is named only by way of limitation, and a new publication is, as it were, a new devise. Dub. Cro. El. 423. R. 1 Vent. 341. Ray. 408. 2 Jon. 135. 1 Mod. 267. 2 Mod. 313. Pol. 546. R. Pl. Com. 345. b. 2 Ver. 722.

### (F) Revocation.

#### (F 1.) What shall be.

A testament is ambulatory and revocable (s) till the death of the testator. Co. L. 112. b. (t)

So,

(q) 1. If a subsequent will, either virtually or expressly revoking a former, be destroyed, the former, if subsisting, is revived, Cowp. 92. Lofft. 575. 4 Burr. 2512. — 2. But a will once cancelled must be re-executed. Cowp. 49. 13 Ves. 290. — 3. A surrender of a copyhold, to the use of a will, may be so worded as to operate as a republication of a former will, and make the copyhold pass by such will. Cowp. 130. — 4. So a will revoked by implication, may be republished by reference to it in an instrument attested according to the statute of frauds. Dougl. 31. — 5. And *semble* that any alteration is a republication of the will as to the parts not altered. Lofft. 604.

(r) And though Amb. 571. accords with this doctrine, yet 1 Ves. J. 486. 4 B. C. C. 2. 7 Ves. 98. Cowp. Rep. 381. 3 Bro. P. C. 85., and 2 M. & S. 5., are contra; and from Lord Hardwicke's opinion in Amb. 93. 1 Ves. 492. and the cases subsequent to Amb. the text seems not to be law.

(s) 1. Generally speaking, the rules as to revocation of wills, are the same in law and in equity. 2 Ves. J. 417. — 2. Hence as at law a recovery by tenant in tail with reversion in fee, is a revocation; so is it in equity, of an equitable estate. Id. 599. — 3. For

So, if a feoffment or recovery be to the intent to perform his will; the uses are revocable during his life. R. Dy. 314. b. Per 2 J. Mont, cont. Hob. 349. though the uses are declared by a deed.

And therefore, if a testator, after his will executed, makes a feoffment to the use of another; this will be a revocation. (u)

Though he afterwards repurchases the same land. 1 Rol. 616. l. 15. Cont. per Welch. Dy. 143. b. in marg.

Though the feoffment be to the use of himself in fee. 1 Rol. 615. l. 50. (x)

Or.

3. For the rules as to revocation applied to legal estates, are in equity applied to equitable estates. Id. 598. — 4. Nor does equity ever controul the law upon revocation. except, 1°. Where the beneficial interest being distinct from the legal estate, is devised, and the devisor afterwards takes the legal estate without any new modification or alteration; 2°. Where having the complete legal and beneficial estate at the date of the will, he divests himself of the legal estate, but remains owner of the equitable interest, as in the case of a mortgage or conveyance for payment of debts. 6 Ves. 323. — 5. And there is no instance of a revocation at law being held not a revocation in equity, where the partial particular purpose was not for charges, or incumbrances, or to pay debts. 8 Ves. 126. — 6. But not *vice versâ*; thus articles (unless for partition) to sell a devised estate, are a revocation in equity, but not at law. 2 Ves. J. 601. 2 V. & B. 387. 19 Ves. 178. — 7. And where the deed clearly revoking the will at law, is only for the partial purpose of introducing a particular charge or incumbrance, and does not affect the interest of the testator beyond that purpose, it is only a partial revocation in equity; and though, after that purpose is answered, the use is declared for the testator and his heirs, a court of equity will hold the party a trustee for the devisees; so likewise upon a devise of an equitable estate, and a subsequent conveyance of the legal estate to the devisor and his heirs. 6 Ves. 219. — 8. Hence mortgages in fee and conveyances in fee for payment of debts, revoke a will *pro tanto* only in equity. 3 Ves. 654. 685. 17 Ves. 134. — 9. The question in a court of law as to the revocation of a will is only, whether the legal devise is revoked by the deed: all other questions as to partial purpose, are merely equitable questions. 6 Ves. 219.

(f) Bac. Max. 19. 8 Rep. 82. a.

(u) It was established as a rule, long before the statute of wills, that any alteration of the estate in lands devised, by the act of the devisor, after the publication of his will, operated as an implied revocation of such will; which doctrine is founded upon three reasons; 1°. On the favour which the law shews, in every instance, to the heir; 2°. On the principle, that a devisor must not only be actually seised of the land; at the time when he makes his will, but must also continue to be so seised thereof, till the time of his death; 3°. Because any alteration of the estate devised, is held to be evidence of an alteration in the intention of the devisor. 6 Cruise, 118.

(x) 1. Serjeant Hill subjoins this note; "But the plac. concludes, '*contra per Popham*,' and no authority is cited, and the reason there is absurd." — 2. Mr. Cruise gives the rule, that an alienation to a trustee, without any intention of parting with the estate, and though the alienor take back the old use, has been held to operate as a revocation of a prior devise; because in such cases there is an interruption of the *reversion*; and also because a presumption in favour of the heir at law arises from the alienation, that there was an alteration in the intention of the testator; and he cites, the following cases, the first of which is probably that whereon the principal position is founded. — 3. Where a man seised in fee of lands devisable by custom made his will, he having then two sons, and upon their death aliened the land in fee and took back an estate in fee, the will it was decided, was thereby revoked. Dyer, 143. a. — 4. Lord Lincoln made his will, by which he devised all his estates to the person to whom his title was to descend; and afterwards conceiving that he should marry a certain lady, though the lady never had any such intention, he conveyed his estate and lease and release to trustees, in consideration of his intended marriage, to the use of himself and his heirs until the marriage should take effect, and then, as to part, for his intended wife, &c.; no marriage ever took effect; his lordship died; and it was decreed that this conveyance operated as a revocation of the will, and the decree was affirmed in the house of lords. It is said, that the judges were equally divided in this case, and that all the lords voted. Lord Mansfield has said of it, "the absurdity of Lord Lincoln's case is shocking;" however it is now law. 3 Atk. 803. 4 Burr. 1940. Dougl.

Or, to the use of himself for life, and afterwards to his wife for life, and afterwards to his right heirs. 1 Rol. 616. l. 5. 50.

So, if the feoffment be to the use of his will. 1 Rol. 614. l. 32.

So, if he had made it before his will before the st. 27 H. 8., and then the statute executes the possession to the use; this will be a revocation. Cont. 1 Rol. 616. l. 10. Acc. 1 Rol. 616. l. 20.

So, if tenant in tail devises, and afterwards suffers a recovery to the use of himself: it is a revocation. R. 3 Lev. 108. (y)

So, if the devisor, after his will, makes any conveyance of the land, it will be a revocation. (z) 2 Ca. Ch. 116. (a)

So, if a man covenants to levy a fine, and afterwards levies the fine; though he makes his will between the time of the covenant and the fine levied, it will be a revocation. 1 Rol. 614. l. 40. (b)

So, if he covenants to make a feoffment, and makes a feoffment with livery, but by some defect in the livery the feoffment is void; yet it will be a revocation. R. 1 Rol. 615. l. 25. (c)

So, if he devises a reversion, and afterwards grants the reversion by deed, but the grant is void for want of attornment; yet it will be a revocation, for he has fully shown his intent (d) to revoke. Per 2 J. 1 Rol. 615. l. 30.

695.— 5. A. by his will, dated in 1708, gave several pecuniary and specific legacies, and then gave all his real and personal estate to B., on condition that he took the name of A.; and afterwards A. together with J. S. his trustee, by lease and release, conveyed several manors to trustees and their heirs, to the use of himself for life, and that the trustees and their heirs should execute such conveyances thereof, as A. by writing under his hand and seal, or by his last will, should appoint; the testator died without altering or revoking his said will, or making any appointment touching his real estate; and it was decreed that the lease and release was a revocation of the will, which decree was affirmed by the house of lords. 1 Eq. Abr. 412. 7 Bro. P. C. 433.

— 6. See further 6 Ves. 199. 16 Ves. 519. 2 V. & B. 382.

(y) 1. 3 P. Wms. 163. 3 Atk. 741. Amb. 653. 3 Wils. 6. 3 Bro. P. C. 359. — 2. So where a testator levied a fine to such uses as he should, by deed or will, appoint, a prior will was held to be thereby revoked. 2 N. R. 401. — 3. But a fine for the mere purpose of a partition, is no revocation, even at law. 2 Ves. J. 600.

(z) 7 T. R. 399. 1 B. & P. 576. 7 T. R. 416.

(a) 1. A person devised all his manors, messuages, and hereditaments to trustees, in trust for his nephew and his issue, in strict settlement. The testator afterwards conveyed an advowson whereof he was seised at the time of making his will, to trustees and their heirs, and by another deed declared the trust of that conveyance to be to present the son of R. J.; and held that the conveyance of the advowson was a complete revocation of the devise of it. Amb. 224. 3 Atk. 799. — 2. And where A. devised a house to her sister for life, and after her decease devised the same to trustees, in trust to sell; and afterwards sold the estate herself; it was decreed that the sale was a revocation not only of the house, but also of the devise of the money to arise from the sale. — 3. And even an agreement or covenant to convey lands, which have been previously devised, will operate in equity, though not at law, as a revocation of such devise. 2 P. Wms. 328. 5 Ves. 654. 7 Ves. 558. 16 Ves. 519. — 4. Though the contract be rescinded after the devisor's death. 19 Ves. 170. — 5. And though mere partition whether by compulsion or agreement, is not a revocation of a will; yet the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient. 2 Ves. J. 429. 7 Ves. 564. 8 Ves. 281. 10 Ves. 256. 284. vide 5 Ves. 648.

(b) 2 N. R. 401.

(c) 1. So if he makes a feoffment without livery, 3 Atk. 73. 803. 7 Ves. 370. — 2. For an instrument, though inadequate to the purpose for which it was intended, operates as a revocation of a will, if an intention to revoke is apparent. 5 T. R. 124. 310.

(d) In the case of a revocation, by the execution of a conveyance of lands, subsequent to a devise of them, parol evidence is not admissible to prove that the testator meant his will should remain in force and unrevoked by the subsequent conveyance. 2 Ves. J. 606. 2 H. Blk. 516.

So,



So, if he devises land, and afterwards sells by bargain and sale, and acknowledges it in order to be inrolled, but it is never inrolled. Per 2 J. 1 Rol. 615. l. 40.

So, if he makes a charter of feoffment for the whole, and livery only for part; it will be a revocation for the whole. R. Mo. 429.

So, if he devises, and afterwards, in consideration of an intended marriage, makes a settlement by lease and release; it will be a revocation, though the marriage does not take effect. R. Ca. Parl. 157. (e)

So, if a man devises land, and afterwards devises the same land to another; though the second devise is void for the incapacity of the devisee. R. 1 Rol. 614. l. 45. 50. (f)

Or, devises to another by parol. Per Poph. 1 Rol. 615. l. 42. Vide infra. (g)

So, if he devises to A. in fee, and afterwards leases to A. for years, to commence after his death; for it is inconsistent. R. 2 Cro. 49. (h)

Though the lease be delivered to a stranger, without the privity of A. R. 2 Cro. 49.

So, if he devises a lease *pur autre vie*, and afterwards renews the lease. Dub. 2 Ver. 209. (i)

So,

(e) 1. Supra, Lord Lincoln's case. — 2. The doctrine of presumptive revocations appears to have been carried much too far, and has been disapproved of by the ablest judges of modern times. 6 Cruise, 125. — 3. Thus Lord Mansfield has observed, that 'constructive revocations, contrary to the intention of the testator, ought not to be indulged; and that some overstrained resolutions of that sort had brought a scandal on the law.' 3 Burr. 1491. — 4. So "that all revocations which are not agreeable to the intention of the testator, are founded upon artificial and absurd reasoning." Dougl. 722. vide 2 H. Bl. 525. — 5. It is, however, now fully settled, that wherever a person who has devised an estate, afterwards makes any alteration in it, by any mode of conveyance whatever, inconsistent with the preceding devise, or by which the estate becomes in any respect different from what it was before; such an alienation will operate as a revocation of the prior devise. 6 Cruise, 126. 2 Ves. J. 417. 7 Bro. P. C. 505. 7 T. R. 399. 1 B. & P. 576. 3 Ves. 682. 16 Ves. 519. 7 Bro. P. C. 593. — 6. And the same conveyance which would be a revocation of a devise of a legal estate, would be equally a revocation of a devise of an equitable estate. 3 Atk. 748. — 7. And a devise is revoked by an exchange, though the land after the death of the devisor, is restored to the heir under an arrangement, in consequence of a defect discovered in the title of the other party to the exchange. 8 Ves. 256. 2 V. & B. 382.

(f) So a devise to one incapable of taking by devise, is a revocation. 10 Mod. 233.

(g) Where a will duly attested, charges the real estate with the payment of debts and legacies, a subsequent unattested will or codicil revokes the legacies given by the first. 1 Eq. Abr. 409. 2 Atk. 268. 6 Cruise, 101.

(h) But the revocation is only partial, for the duration of the leases. Infra, (F 2.)

(i) 1. The surrender of a lease for lives, and taking a new lease, will operate as the revocation of a former devise. 3 P. Wms. 163. — 2. And where a person has an estate *pur autre vie* at the time of making his will, and afterwards purchases the inheritance, it is a revocation of any devise of the estate *pur autre vie*. 2 Atk. 430. — 3. And although a term for years, acquired after the making of a will, passes by it, yet if a testator bequeaths a term for years, of which he is then possessed, and afterwards surrenders it, and takes a new term, this will operate as a revocation, or redemption of the bequest; and the new term will be considered as part of the personal estate. 6 Cruise, 142. 2 Atk. 593. 2 Ves. 418. 1 B. C. C. 261. — 4. If, however, the words of the will show the testator's intention to dispose of all terms for years, whereof, he may be possessed, a renewed term will pass. 6 Cruise, 143. 3 Atk. 199. 174. — 5. Where a person devised to S. S. her leasehold garden, &c. for the term of his life, and after his decease to his children, and after the publication of the will, the testator surrendered the lease and took a new one; upon the question arising whether the bequest was revoked, the master of the rolls (Sir William Grant) said the question was, whether a specific devise of a leasehold estate was affected by a renewal of the lease, subsequent to

So, if a man devises, but is afterwards disseised, and does not re-enter (*k*) before his death; it will be a revocation. 1 Rol. 616. l. 25.

So, if a man devises land to one, and by the same will afterwards gives an estate, inconsistent with the first, to another; this will be a revocation. Co. L. 112. b.

So, if a woman makes a will, and afterwards marries with the devisee, and dies; it will be a revocation. R. 4 Co. 61. Vide (F 2.)

So, if a man by parol says, I revoke my will, and desires the witnesses present to witness it, and adds, that he will alter it when he comes to D. It will be a revocation, though he dies before he comes to D. R. Dy. 310. b. 1 Rol. 614. l. 30. Per Rol. Sti. 343. 418. Vide post, (F. 2.)

So, if the testator, says, *animo testandi*, A. (who was his heir at law) shall be my heir. Per Cur. 1 Sid. 73.

So, if he says, I do revoke, and desires those present to witness it, without more. 2 Cro. 497.

Or, my will shall not stand: for though the words are in the future tense, they show a present resolution. R. Cro. El. 306. Ow. 76.

So, if a man makes a will, and devises his personal estate to A. and afterwards marries, and has several children, and dies a long time after the will made; it shall be presumed a revocation by the alteration of his circumstances. R. Sal. 592. (*l*)

If

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to the will; that the ground upon which in many cases it had been held that renewed leases did not pass to the specific devisee was, that the thing given no longer existed; but that as a testator might undoubtedly dispose of the future as well as his present interest in a chattel real, it was a question of intention, what the subject of disposition was; whether only the interest which he had at the time of executing the will, or all the interest, though subsequently acquired, which he might have at his death, in the leasehold premises; that intention was to be collected from the words used by the testator to express it; there were no words prospective or future to take in any interest which the testator might subsequently acquire in the leasehold; and therefore that the renewal operated as a revocation of the bequest. 16 Ves. 197. — 6. Where the testator devised a term for years, in trust that the same might go unto and be enjoyed by the owner and possessor of his freehold estate thereby devised, Dom. Proc. (reversing the decree of the court of chancery,) held that the bequest of the leasehold was revoked by the revocation of the devise of the freehold. 3 Bro. P. C. 365. — 7. A settlement of leasehold estates was held not to be revoked by a subsequent assignment by the trustee to the settlor, entitled for life, or by the will of the latter; no indenture to revoke appearing, and the terms of a power of revocation, not being complied with. 6 Ves. 656.

(*k*) *Secus* if he enters. Vide (F 2.) in notis.

(*l*) 1. It is now fully established that marriage and the birth of a child operate as an implied revocation of a will. 4 Burr. 2182. Dougl. 35. Amb. 721. — 2. Thus a posthumous child. 5 T. R. 49. — 3. But since this doctrine proceeds upon the principle of presumed intention, the presumption may be rebutted by other circumstances. 1 Eq. Abr. 413. Dougl. 31. — 4. But a second marriage and the birth of children, the wife and children being provided for by settlement, and there being children by a former marriage, is a case of exception from the rule, that marriage and the birth of a child revoke a will. 7 Ves. 348. — 5. And where a widower having a son and two daughters, made his will, by which he gave all his real estate in trust for those children, and afterwards married, and had other children, the will, it was held, was not thereby revoked. 1 V. & B. 390. — 6. Where A. bequeathed all his personal estate to B., and devised an annuity of 150*l.* to her for her life out of the rents of his freehold and copyhold estates, or by mortgage, &c., and in case he should have any child or children by her who should be living at his decease, he gave 60*l.* a-year out of the rents of his said estates, or by mortgage, for the maintenance and education of each such child until twenty-one, and then 3000*l.* to be divided among them if more than one, and if

but

If he devises his real and personal estate to his brother, and makes him executor, and afterwards marries, and by a codicil makes his wife executrix; she shall have the personal estate, for it was intended for the brother only as he was executor. 1 Ver. 28.

If he devises his lands to charitable uses, and afterwards devises the same estate to others to such uses as he shall afterwards declare, and dies before any declaration of the uses; the subsequent will shall be a revocation, though no estate passes thereby, the uses not being declared. Eq. Ca. 8. (l)

So, if he devises a real estate to a stranger, and afterwards marries and has issue; it will be a revocation as to the real as well as the personal estate. R. Eq. Ca. Abr. 413.

But if the devise was to a stranger, whom he afterwards marries, and the disposition appears reasonable, chancery will establish it. R. Tr. 1702. Eq. Ca. Abr. 413.

Vide post, (F 2.)

### (F 2.) What not.

But if a testator makes an estate by act executed, it is a revocation only so far as that estate is inconsistent with the devise: (m) as, if after a devise in fee, he leases the same land for years; it is a revocation only during the term. R. 1 Rol. 616. l. 37.

So, if he leases for life, it is a revocation only for the life of the lessee. 1 Rol. 616. l. 40.

So, if he leases to a stranger for years to commence after his death; it is a revocation only for the years. 2 Cro. 49. R. Cro. Car. 23. (n)

So, if he leases to the devisee himself, to commence immediately, or at a future day in the life of the testator, (o) for ten or twelve years. 2 Cro. 49.

So, if a termor of a term for forty years devises it, and afterwards leases for twenty years; it is a revocation only for twenty years. 1 Rol. 616. l. 45.

So, if a termor devises his term, and afterwards mortgages and redeems it, the devisee shall have it. Dy. 143. b. in marg.

So, if a man devises, and afterwards mortgages the same land, the

but one, to be paid to such only child, to be raised out of his said estates, and devised the estates over to others subject to the said annuities and payment; and the testator afterwards married said B., and had children by her, and died without expressly revoking his will; it was held that this subsequent marriage and birth of children did not amount to a revocation. 2 East, 530. — 7. And where a married man having then no children devised to his niece and dies leaving his wife *enchant*, but which fact was at the time of his death unknown to either of them; it was held, that the birth of the child was no implied revocation. 4 M. & S. 10. — 8. For though marriage and the birth of a child are a revocation, yet neither alone is. Ambl. 487. 2 East, 530. 1 V. & B. 465. 4 M. & S. 10. — 9. Marriage with and a settlement on the devisee is a revocation of the devise. Eden's B. C. C. 61. n. — 10. Mutual wills by two unmarried sisters, under twenty-one; the marriage of one does not revoke the will of the other. 4 Ves. 160.

(l) 2d part of 2 Mod. Ca.

(m) So an obliteration or alteration of part of a will, does not operate as a revocation of the whole will, but only of the parts obliterated. 2 Vern. 498. Cowp. 812. 3 R. & P. 16. 4 East, 419.

(n) 1 Vern. 97.

(o) But a lease to the devisee to begin after the devisor's death, would be a revocation, since then the estates would be inconsistent with each other. 3 Bro. P. C. 12.

devisee shall have it subject to the mortgage. Per Moreton, Ca. Ch. 193. 1 Sal. 158. 1 Ver. 97. Cont. 1 Ch. R. 153, 154.

Though the mortgage be in fee; for it is but a security. Ca. Parl. 155, 156. R. 1 Ver. 329. 342.

So, if a man makes a feoffment, and when he seals the deed asks, if it will not prejudice his devise of the same land? for then he will not seal it, and livery is made by attorney in part; it will be no revocation of the part whereof livery is not made. R. Ow. 76. Goldsb. 32. (p)

If he devises a lease for three lives, and afterwards makes a lease for three other lives; it will be a revocation only for the lease; for the lives in the lease may determine before those in the will. R. 2 Ver. 496.

So, if a devisor devises an estate to one, and afterwards devises by the same will to another, it is no revocation if they are consistent: as, if he devises land to A. and afterwards rent out of it to B. Pl. Com. 523. a. 541. a.

If he devises a term to Thomas, and afterwards to his mother during his minority. R. Pl. Com. 541. a.

So, if he devises all his lands to A. and afterwards land in D. to another; A. shall have all, except the land in D. R. Yel. 210. 2 Cro. 49. Acc. 2 Rol. 276. R. Dal. 3. 4 East, 428.

So, if he devises all to A. and afterwards all to B. they shall be joint-tenants. R. Yel. 210. Dy. 4. a. in marg. Vide post, (N 8.)

Or, to A. and his heirs, and if he dies without issue, to B. and his heirs; A. shall have an estate-tail, remainder in fee to B. R. Yel. 209. 2 Cro. 290.

So, if a verdict finds, that A. made his will, and afterwards made another will, but the jurors do not know the contents; it is no revocation, for they may be consistent. (q) R. 3 Mod. 204. Sho. 537, &c. R. Sal. 592. Ca. Parl. 146. R. Hard. 375. (r)

(p) A conveyance obtained by fraud will not operate as a revocation of a prior devise; because when such a conveyance is set aside, it is considered as a mere nullity. 3 B. C. C. 156. Vide 6 Ves 1. 8 Ves. 283. 2 Cox, 263. 3 Burr. 1244.

(q) 1. By the Roman law, a subsequent will operated in all cases as a revocation of a former one. *Posteriori quoque testamento, quod jure perfectum est, superius rumpitur.* And the reason was, because the essence of a Roman testament consisted in the institution of an heir, who took the whole property of the testator; so that two wills could never subsist at the same time, as there could not be two distinct owners of the same thing. *Quicumque testamentum facit, censetur de omnibus bonis disponere, ut non magis duo testamenta simul consistere possint, quam duo domini ejusdem rei in solidum constitui.* Just. Inst. lib. 2. tit. 17. s. 2. Vinn. Com. 6 Cruise, 94. — 2. But although the law of England has adopted the principles of the Roman law, respecting wills of personal property, yet Lord Mansfield has declared, (Cowp. 90.) that a devise of lands is looked upon in a very different light, being considered as an appointment of lands to a particular person; from which it followed, that a man might as well dispose of part of his lands by his will as of the whole. 6 Cruise, 95. — 3. And in consequence of this principle it has been determined, that where a second will has not a clause of revocation of all former wills, and does not make any disposition inconsistent with a former will, it does not operate as a revocation of such former will, but both are good. Cro. Eliz. 721.

(r) 1. And where a jury found that a testator had made a second will different from the first, but without finding in what that difference consisted, Dom. Proc., determined that such second will did not revoke the former one. 3 Wils. 497. 2 Blk. 937. Cowp. 87. 7 Bro. P. C. 344. — 2. But two inconsistent wills of the same date, neither of which could be proved to have been last executed, are void for uncertainty. 7 Bro. P. C. 443.

So,

So, if a woman makes a will, and marries; it is not a revocation, if she survives her husband. Pl. Com. 343. a. (s)

If tenant in common makes a will, by which he devises his part, and afterwards makes partition; this will not be a revocation. R. Ray. 240. 1 Sid. 90. (t)

So, if a testator revokes part of a devise, it is no revocation as to the residue. 1 Rol. 617. l. 25.

If he devises for forty-nine years, and afterwards leases for twenty, it shall be a revocation only for twenty years. Vide supra.

If he devises in fee, and afterwards makes a mortgage, the devisee has the equity of redemption. (u)

If,

(s) 4 Rep. 61. 2 P. Wms. 625. 2 B. C. C. 534.

(t) 1. 1 Freem, 542. 8 Vin. Abr. 148. 3 P. Wms. 169. — 2. But where a partition is made, and a fine is levied, not merely to establish the partition, but also for another purpose, and the estate in the land is altered, it will then operate as a revocation of a former devise. 3 Atk. 572. Vide supra, (F 1.) the first note. — 3. A mere alteration of the quality of an estate, without any intention of varying the quantity of the interest, or the disposing power of the owner, will not operate as a revocation. 6 Cruise, 134. — 4. And, therefore where a man having feoffees to his use before the statute, 27 Hen. 8., devised the lands to another, and afterwards the feoffees made a feoffment of the land to the devisor, it was agreed that this feoffment did not operate as a revocation of the devise; for after the feoffment, the devisor had the same use as before. 1 Rol. Abr. 616. pl. 3. — 5. Whence it follows, that the acquisition of the legal estate alone, will not operate as a revocation of a devise; so that where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate, to the same uses, this is no revocation. 6 Cruise, 134. 3 Atk. 749. 2 Ves. J. 595. 2 V. & B. 385. — 6. And upon the same principle, where a person devises a copyhold, and is afterwards admitted to it, this is no revocation. 4 Burr. 1952. — 7. Nor does the mere change of a trustee operate as a revocation. Dougl. 718. — 8. And therefore where A. having mortgaged his estates in fee, made his will, by which he devised them, and afterwards paid off the mortgage and took a conveyance of the estate to a trustee for himself, it was held, that this being no more than a bare change of a trustee, was no revocation. Dougl. 709. — 9. Bankruptcy is not a revocation. 14 Ves. 580. — 10. And in cases of contracts for land before, but executed after the will, the subsequent execution is not a revocation. 1 Ves. J. 255. Vide Dick, 563. — 11. Nor is disseisin and remitter by entry. 8 Ves. 282. Vide 14 Ves. 580.

(u) 1. Though a mortgage in fee, made after the publication of a will, is a revocation of such will at law; yet in equity it is only a revocation *pro tanto*, and the equity of redemption shall go to the devisee. 1 Vern. 329. 3 Atk. 805. 2 P. Wms. 334. — 2. Thus in the case of a mortgage in fee for payment of debts; though after the debts are paid, the devisor takes a conveyance to him and his heirs. 6 Ves. 221. — 3. Or in the case of a mortgage in fee to the devisee. Dick. 538. 5 Ves. J. 656. (and Prec. Chan. 514. to the contrary, is misreported.) — 4. So a conveyance in fee to trustees, for raising money to pay debts, being made for a particular purpose, will only operate as a revocation *pro tanto* of a prior devise, so far as relates to the payment of the debts, and no farther. Prec. Ch. 52. 2 B. C. C. 592. — 5. In these cases, the whole fee-simple being limited to the use of the mortgagee or trustee, the grantor parted with his whole estate at law, without taking back any legal estate or use to himself; and therefore at law nothing remained upon which the will could operate, or which could descend to the heir. In these cases, therefore, nothing being left to descend at law, the question has been to whom the equitable interest should belong; and equity has held these cases to be exceptions to the general rule of law, which they ordinarily follow, on this ground, that although the conveyance is of the fee-simple of the land; yet in the consideration of a court of equity, the interest conveyed is merely a personal interest, having no quality of a real estate; and that therefore the testator is to be deemed, in equity, to have created only a chattel interest, as if he had created a term for years, which would have been a revocation *pro tanto* only at law: all that remained to the grantor was a right of redemption, and that right of redemption did not pass by the conveyance. 6 Cruise, 140. 7 Bro. Parl. C. 517. 3 Atk. 805. 3 Ves. 625. — 6. But where a person, after having made his will, executed a conveyance in trust



If he disallows a condition annexed to the devise, it is no revocation of the devise. 1 Rol. 617. l. 15.

If he devises land for payment of debts, and then to pay 200*l.* per ann. to his wife, and afterwards sells part for payment of debts; the wife in equity shall have 200*l.* per ann. out of the surplus. 2 Ver. 241.

If he devises land to trustees, to be settled upon a daughter, if she marries with consent; she marries with consent in the life of her father, who settles part upon her and her husband; it shall be no revocation of the devise as to the residue. R. 2 Ver. 721.

If he devises to A. B., C., and D. as trustees, upon trust, &c. and afterwards revokes that part of his will by which A. and B. are named trustees, and appoints that E. and F. shall be his trustees, without more; this revokes nothing but the two trustees, and constitutes two others in their stead. R. Eq. Ca. 68. 77. (x)

If a stranger cancels or tears a will after the death of the testator; it shall not be thereby destroyed, if the pieces can be collected. 2 Ver. 441.

If a testator says, he will revoke; this does not amount to a revocation. R. 2 Cro. 497. Cro. El. 306. 1 Rol. 615. l. 5. Mo. 874.

So, if he does not revoke of himself, but in answer to questions. 2 Cro. 497. Cro. Car. 52.

So, if upon a question, whether he will make a will? he says, that he will not make any. Ow. 76. Goldsb. 33.

So words, not spoken *animo testandi*, do not amount to a revocation: as, A. shall be my heir; though he be his heir at law. 1 Sid. 73.

Or, if A. be not his heir at law, though spoken *animo testandi*; for they denote his intention only. 1 Sid. 73.

So accidental words do not amount to a revocation: as, A. (who was devisee, and did not visit the testator) shall have no part of my lands and goods, without speaking of his will. R. 2 Cro. 115.

So, if A. before his death being asked, if he will give legacies to his brothers, says, *animo testandi*, I will give them nothing; this does not revoke a former will which gave legacies to them. R. Cro. Car. 52.

So, if he be not *compos mentis* at the time, the revocation is not good. 2 Cro. 497.

And now by the st. 29 Car. 2. 3. No devise of lands, &c. nor any clause thereof, shall be revocable, but by will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator, or in his presence, and by his direction: (y) but all devises of lands, &c. shall remain in force till the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, or altered by some other will or codicil in writing, or other

trust for payment of debts in a schedule, and instead of declaring the uses to himself in fee, after payment of the debts, he declared that the trustees should convey to such uses and purposes as he by deed or will should appoint, and for default of appointment, to himself in fee; this was held to be a revocation. 2 Ves. J. 600.

(x) Second part of 2 Mod. Ca.

(y) But cancelling, &c. is no revocation, unless done *animo cancellandi*. Cowp. 52. 1 Eq. Abr. 409. 1 P. Wms. 344 n. (1). 4 East, 419. — 2. Though any act of the testator, by which he shows his intention to cancel his will, though the will be not actually cancelled, operates as a revocation. 2 Blk. 1043. — 3. Vide 3 V. & B. 122.

writing

writing of the devisor, signed in the presence of three or four witnesses, declaring the same.

By the same statute, no will in writing of personal estate shall be altered by any words, or will by word of mouth only, unless put in writing in the testator's life, and afterwards read to and allowed by him and proved so to be by three witnesses. *Vide ante*, (C).

If a will be attested by three witnesses, but not in the presence of the devisor, whereby it is a void will; it shall not be a revocation of a former will, within the words, (or other writing signed in the presence of three witnesses, &c.) *R. P. 2 W. & M. Edleston and Speak, Sho. 89. 3 Mod. 259. Carth. 80. Cont. per 2 J. Lut. acc. 3 Mod. 218. (z)*

Though there be words in it which revoke all former wills. *R. inter Edleston and Speak; though it is reported cont. 3 Mod. 259. yet Sho. 89. acc. R. Eq. Ca. 130. Pr. Ch. 460. (a)*

So, if another will be prepared, and the draught signed by the testator, and directed to be ingrossed, who then cancels all the sheets of the former will, except one, (which was left upon information, that the other will was not sufficient for the land until duly executed,) and he dies before the execution of the latter will, the former shall not be revoked. *R. per Ld. Chan. 27 Jan. 6 An. inter Hide and Hide, Eq. Ca. Abr. 409. Pr. Ch. 460.*

So, if another will was executed, but the witnesses did not subscribe in the presence of the testator; the former, though cancelled, shall not be revoked. *R. 2 Ver. 742. Eq. Ca. 130. (b)*

If he devises copyhold, and afterwards obliterates other legacies, and writes that he approves it so obliterated, but dies before publication in the presence of three witnesses: it is no revocation as to the devise of the copyhold. *R. 4 Ver. 498. 499.*

But if, under the name of the testator in any will executed, it be written A. B. revokes his will as to, &c. in the presence and by the direction of the testator, and this be subscribed by three witnesses; though it be not subscribed by the testator himself, it shall be a revocation. *Semb. 3 Lev. 87.*

So, if a man devises the residuum of his personal estate to A. who dies in the life of the testator; he may, by a nuncupative codicil, make B. residuary legatee: for this is not an alteration of the former will, but a disposition of that which became void by the death of the former legatee. *R. Ray. 334. Vide ante*, (C).

If a man has duplicates of his will, and cancels one: it will be a revocation, though the other be not cancelled. *R. 2 Ver. 742. Eq. Ca. 131. (c)*

(z) N. B. The second will in 3 Mod. 218. was published and attested by three witnesses, in the presence of the devisor, but not signed by him in their presence.

(a) The fifth section of the statute of frauds, requires that in devises of lands, the three witnesses shall subscribe the will in the presence of the testator; but the sixth section relating to revocations only, requires, that the devisor should sign in the presence of three witnesses, without requiring that the witnesses should subscribe in the testator's presence. And upon the construction of this clause it is held, that although a will may be revoked by a written declaration, without being attested by three witnesses in the presence of the testator, yet that a second will, though containing a clause revoking all former wills, shall not operate as a revocation, unless it is executed in such a manner as to operate as a devise. 6 Cruise, 103.

(b) 1 P. Wms. 343.

(c) 1 P. Wms. 346.

If a man makes a writing with intent to revoke a former will; it may be a revocation, though not executed in such manner as is sufficient for a new will. Eq. Ca. 131.

So a revocation by act in law is good, since the st. 29 Car. 2. 8. Carth. 81.

### (G) Who may devise.

All persons, generally, who may grant, may make a devise.

The king may make a will, and devise his lands or goods. 4 Inst. 335. And this was affirmed by parliament. 16 R. 2. No. 10. (d)

So the queen, the king's wife, may make an executor. 1 Rol. 912. l. 12.

So an alien, or a person outlawed, or attainted, may make a will and executor for some purposes. Off. Exr. 22, 23. Cont. of a person attainted. 1 Rol. 912. l. 25.

A man outlawed in a personal action may make an executor, or have an administrator. 1 Rol. 912. l. 32.

So a man against whom an exigent is awarded for felony. 5 Co. 111.

So an ecclesiastical person may devise his goods and lands temporal: as, a bishop, dean, archdeacon, parson, &c. 1 Rol. 608. l. 13, &c.

### (H) Who not.

#### (H 1.) *Non compos.*

But one *non compos mentis* cannot devise. 6 Co. 23. Off. Exr. 21. Dy. 204. a. St. 34 & 35 H. 8. 5. (e)

And it is not sufficient that he can answer to familiar questions, if he has not power and discretion to dispose. 6 Co. 23. a. Dy. 72. a. in marg. Mo. 760.

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(d) 1. This act only authorised our kings to dispose of their personal property; for it is stated in Brookes's Abridgement, Prerogative, pl. 5. to have been laid down by Fortescue, in 35 Hen. 6., that the king could not devise land by his testament: but it appears from the rolls of parliament, that the kings of England were in the practice of conveying lands to trustees to the use of their last wills. 6 Cruise, 16. — 2. By 39 and 40 G. 3. c. 88. s. 4. his majesty, his heirs and successors, may, by will, devise any manors, messuages, lands, tenements, and hereditaments, purchased by, or which shall come to his majesty, his heirs or successors, out of any monies issued and applied for the use of his or their privy purse, or with any other monies not appropriated to any public service; or any manors, &c., which have come to his majesty, or shall come to him, his heirs, or successors, by gift, devise, descent, or otherwise, from any of his or their ancestors, or any other person or persons, not being kings or queens of this realm. — 3. And by s. 8., after reciting that by the law of England the queen-consort, wife of the king, was capable of taking, granting, or disposing of property, as if she were a *feme sole*; but that doubts might arise, how far this capacity of granting or disposing of property, extended, and especially whether during the life of the king her husband, it included the power of devising and bequeathing by last will and testament; and reciting that his majesty was desirous that her majesty, during the king's life, should have full power, by her last will and testament, to dispose of any manors, messuages, lands, tenements, and hereditaments, purchased by, or in trust for her majesty, or which should thereafter vest in her majesty, or in any person in trust for her, as fully as if she were sole and unmarried; it is enacted that it shall be lawful for her majesty by her last will and testament in writing, attested by three or more witnesses, to dispose of such estates, as she is authorised by that statute to grant by deed. — 4. And by s. 9., the like power is given to all future queens.

(e) And a will made when not in a testable state, and not confirmed on becoming testable, is a nullity. 11 Mod. 157. 2 East, 552. Vide infra, (H 2.)

So a custom, that an idiot or *non compos* shall devise, is void. 2 And. 12.

But a will shall not be avoided, if made by the importunity of others. Cont. per Rol. Sti. 427.

Or, by artifice; for if it be well executed, that shall not be examined. R. 3 Ca. Ch. 103. Vide Chancery, (3 A 1. &c.) (f)

Or, if the disposition be imprudent. 2 Mod. Ca. 59.

### (H 2.) Infant.

So an infant under the age of twenty-one years cannot devise his lands. 1 Sid. 162. St. 34 & 35 H. 8. 5. (g)

Nor goods or chattels, under the age of discretion, viz. a female under twelve, and a male under fourteen. Cont. Perk. that he may devise at fourteen. Perk. Devise, 503. Off. Exr. 305. But Co. L. seems that he cannot till seventeen. Co. L. 89. b. Agreed, that a female after twelve, and a male at seventeen, or at fifteen if he be then of discretion, may devise. 2 Ver. 469. Eq. R. 74.

And it belongs to the spiritual court to determine, at what age he may make a will as to goods and chattels. R. 2 Jon. 210. 2 Mod. 315.

And if the spiritual court determines, that he may devise them before the age of twenty-one, a prohibition does not go. 2 Jon. 210. 2 Mod. 315.

But the same day on which he attains full age, he may make a will of lands: as, if he be born the 15th May 1660, he may make it the 14th May 1681. D. 1 Sid. 162.

And if he makes a will under age, and publishes it *de novo* after full age, it is good. R. 1 Sid. 162. (h) Vide ante, (E 3.) — post, (M).

So, by custom, (i) after fourteen an infant may devise; but to devise at eight, or nine, is a void custom. 2 And. 12.

(f) 1. Where any fraud or circumvention has been practised on a testator, or where he was incapable of disposing of his lands from any weakness of mind, his will is void. But where the validity of a will of lands is impeached on these grounds, a court of equity will not set it aside, but will direct a trial at law on the issue of *devisavit vel non*; for if the will be obtained by fraud, or be made by a person incapable of devising, it is not in point of law the testator's will; and therefore these points are proper to be tried before a jury. 6 Cruise, 163. 7 Bro. P. C. 437. 2 Atk. 424. — 2. And in order to set aside a will for fraud, parol evidence may be given of questions asked by the testator, at the time of executing his will, whether the contents were the same as those of a former will. 8 T. R. 147. And although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making of his will, he cannot be considered as having such a disposing mind as will give effect to his will. 1 Cox, 354.

(g) An infant may devise the guardianship of his child, by virtue of the st. 12 Car. 2. c. 24.; and it has been contended, that such a disposition will draw after it the land as incident to the guardianship. Vaugh. 177.

(h) 1. Where a devisor is under a disability at the time when the will is made, it is absolutely void, although the disability be removed before the death of the devisor. — 2. A man of full age declared, in the presence of several witnesses, that his will made when he was under age should stand; it was adjudged, however, that the will was void on account of the infancy of the devisor at the time of the first publication. Comb. 84. — 3. But if the will had been republished, after the devisor had attained his full age, it would have been good. 1 Salk. 238.

(i) If there be a local custom, that lands and tenements within a certain district, shall be devisable by all persons of the age of fifteen or upwards, a devise of such lands by an infant of fifteen will be good. Perk s. 504.

(H 3.)

(H 3.) *Feme covert.*

So a *feme covert* cannot make a will during her coverture. (k) Co. L. 112. 1 Rol. 608. l. 35. 609. l. 40. 912. l. 20. (l)

By the st. 34 & 35 H. 8. 5. she cannot devise lands. (m)

Nor can she make a will to dispose of her choses in action. 1 Rol. 608. l. 30. Semb. Cont. 1 Sal. 313.

Or, things which she has as executrix. 1 Rol. 608. l. 25. Cont. per Holt, 1 Sal. 313. Per North, 1 Mod. 211.

Yet she may make an executor for such choses in action. 1 Rol. 912. l. 17. Cont. Off. Exr. 285. 289.

If she be an executrix, she may make an executor for things which she has as executrix. 1 Rol. 608. l. 30. 912. l. 14. Off. Exr. 289. She may, with (n) the assent of her husband. 1 Mod. 211. R. Mo. 339. 2 And. 92.

But if an husband covenants or agrees before marriage, that his wife shall make a will; though it be a void will, the disposition by it shall be good. R. Cro. Car. 219. 376. 597. R. Cro. El. 27.

But it is not properly a will, nor proveable by the ordinary. Per Holt, 1 Sal. 313. Semb. Cont. 2 Mod. 172. Pr. Ch. 84. Acc. 1 Mod. 211.

So, if a wife devises by will, and the husband assent to it after her death, it will be good. Semb. 1 Rol. 608. l. 23. R. 1 Mod. 211.

And any approbation amounts to an assent. R. 2 Mod. 172.

An assent given before marriage shall be understood to be continuing, if a dissent does not appear. 2 Mod. 172.

And if an assent be once given after the death of the wife, he cannot afterwards dissent. 2 Mod. 172.

So by the custom of London, a *feme covert* may devise to her husband.

Or to another, with the assent of her husband.

So, where the husband is banished for his life, by act of parliament, his wife may make a will: for she may in all things act as a *feme sole*. 2 Ver. 104, 105. (o)

Vide post, (M).

## (H 4.) Person dead in law.

So a person dead in law cannot make a devise: as, an abbot, prior, &c. 1 Rol. 608. l. 16.

(k) And therefore a wife's will made during coverture, with her husband's consent, will not pass property acquired by her after his death. 2 East, 552.— 2. For it was a nullity in its inception. 11 Mod. 157.— 3. And it has been said by lord keeper Wright, that if a will is made by a *feme covert* of lands of inheritance to J. S., and the baron dies, and then the wife dies; though her intention be plain, and though after the decease of the baron, when she became *sui juris*, she might have devised the lands to J. S., or by a republication have made the former will good, yet it was not relievable in equity. 2 Vern. 475.— 4. And where a married woman surrendered a copyhold to the use of her will, and afterwards married, it was held, that the surrender was suspended during the marriage, and that a devise by the wife of the copyhold so surrendered was void, notwithstanding that by articles previous to the marriage, her husband agreed that she should have power to devise. Amb. 627.

(l) Vide 7 T. R. 478.

(m) But a married woman may frequently dispose of lands by will, operating as an appointment under a power. Vide 4 Cruise, 181.

(n) Or without. 2 East, 552.

(o) 1 Inst. 133. a.



(H 5.) Corporation aggregate.

So a body politic aggregate cannot devise the lands or goods of the corporation.

(H 6.) Corporation sole.

So a sole corporation cannot devise lands, &c. which it has in its corporate capacity : as, a master or warden of an hospital cannot devise the lands or goods of his house. 1 Rol. 608. l. 20.

(H 7.) Joint-tenant.

So a joint-tenant cannot devise lands which he holds jointly: (p) for the st. 32 & 34 H. 8. enables only persons seised solely, or in common, or in parcenary.

So joint-tenants and to the heirs of one of them, he who has the fee cannot devise during the life of his companion. Per Windh., but Twisd. said, that there are opinions both ways. Ray. 40.

But, by the custom of London, a joint-tenant may devise.

(H 8.) Tenant in tail.

So tenant in tail cannot devise the lands intailed.

And, though he afterwards suffers a common recovery, it does not enure to the benefit of the devisee. R. 3 Lev. 108.

(H 9.) Tenant *pur auter vie*.

So, if tenant in tail, by indenture inrolled bargains and sells to A. and his heirs, by which he has an estate *pur auter vie*; A. cannot devise it: for an estate *pur auter vie* was not devisable by the st. 32 & 34 H. 8. R. 1 Sand. 261. D. 1 Leo. 252. (q)

And, if A. had devised, and afterwards the tenant in tail levies a fine; this does not enure to the benefit of the devisee, but to the benefit of the heir of A. who takes the estate as special occupant. R. 1 Sand. 261.

Yet by the st. 29 Car. 2. 3. an estate *pur auter vie* is devisable by will in writing signed by the party devising the same, or by some other in his presence and by his express direction, attested and subscribed in the devisor's presence by three or more witnesses.

(I) Who may take by devise. Vide infra, (N 2.) Vide post, (K).

All persons may take by devise, who can take by grant. (r)

So a *feme covert* may take by the devise of her husband. 1 Rol. 610. l. 3. (s)

So a person attainted, though the devise be to the next of blood. Per 2 J. 2 Rol. 256, 257. (t)

So

(p) And a devise by a joint-tenant who afterwards severs the joint-tenancy is void. 3 Burr. 1488. 1 Blk. 476.

(q) Cro. Eliz. 804.

(r) A bastard may be a devisee, but he must have gained a name by reputation; and therefore a devise to a bastard *in ventre matris* is void, for he cannot have a name by reputation till he is born. 1 Inst. 3 b. 1 P. Wms. 529.

(s) Lit. a. 168. 1 Inst. 112. a.

(t) Lord Hardwicke has said, that there is no rule of law, or upon the statute of wills

So an infant *en ventre sa mere* may take by devise, and the land shall descend to the heir, till its birth. Dub. 11 H. 6. 13. Cont. Dy. 304. Acc. Mo. 177. R. 1 Sid. 153. R. 2 Mod. 9. Agreed per 4 J. 2 cont. 1 Lev. 135. Ray. 163. Semb. 2 Rol. 335. (u)

So, if land be devised to his executors, and he makes A. and B. his executors, who refuse; yet they may take the land. R. Mo. 594.

So every one shall take as a devisee, who is named with such certainty that the person may be known, though he does not take immediately upon the death of the testator (x): as, a devise to one of the daughters of B. who marries to a Norton within fifteen years; the first daughter, who so marries} shall have it. R. Ray. 82. (y)

So a devise to a woman, when she marries, is good; and it shall descend to the heir till her marriage. R. 1 Sid. 153.

A devise to the heirs males of B. now living, and other heirs males and females of his body; a son of B. being godson to the devisor, shall take. R. 2 Jon. 100. 1 Vent. 334. 2 Vent. 313. 2 Lev. 232. Pol. 457. Carth. 155.

A man, having three daughters, devises to his wife till his heir be of full age, paying to his heir 10l., to his other daughters 20s., and afterwards gives to B. and C. the younger daughter so much, and if A. his heir dies, &c. it shall be a good devise to the eldest daughter. R. 2 Lev. 162.

If A. having a son and seven daughters devises to a younger daughter for life, remainder to the son and the heirs of his body, (who dies without issue) remainder to two other younger daughters for life, remainder to the next of his blood; the son of the eldest daughter shall have it. Semb. Bridg. 15.

So, though some part of the description be mistaken: as, if a devise be, To Bevil Grandvill, second son of my second brother, who is my godson, and bears my father's name; B. G. who was godson to the testatrix; the daughter of Sir Bevil G. took, though he was second son of Bernard G. who was second son of the second brother of the testatrix. Per Master of the Rolls, H. 8 Ann., upon the will of Lady J. Thornhill.

So a devise to Eleanor daughter of B. who has several daughters, one named Hellen, but none Eleanor; Hellen shall take.

If a man devises to the heir of N. and it be found by verdict that P. his son is reputed his heir; P. shall take though N. be an alien. Semb. 1 Sid. 194. Vide post, (K).

If he devises to W. eldest son of Cha. W. of T. and the eldest son is named Andrew. R. Ch. R. 404. Per Weston, 3 Leo. 18.

So a devise to the mayor and governors of B. hospital; though it be not their corporate name. 3 Leo. 18.

wills, to prevent an alien from taking by devise; although it is a doubtful matter for whose benefit he is enabled to take. 2 Ves. 362.

(u) And may take by the description of a child living at the time of the decease. 2 H. Bl. 399.

(x) *Nihil facit error nominis, cum de corpore constat.* 6 Cruise, 208.

(y) 1. A devise was to Margaret, the daughter of W. K.; the daughter's name was Margery; and held that she should take, *quid constat de persona.* Freem. 293. — 2. A person devised an estate to William Pitcairne, eldest son of Charles Pitcairne of Twickenham: who had an eldest son, but his name was Andrew. It was decreed that Andrew should take. Finch, 403.

So,

So, a devise to A. for life, and afterwards to the heirs male of the body of his grandfather; a son of the body of his grandfather shall take, though he be not heir general. R. 2 Ver. 729.

A devise to the issue of B. begotten; all the issues take, though born afterwards. R. 2 Ver. 545.

A devise to A. if he be known by that name; though his true name is W. Per And. Godb. 17.

So a devise to B. to the use of another, is good to the *cestuy que use*. 1 Leo. 254. Vide Uses, (C).

But it cannot be averred to be to the use of another. 4 Co. 4.

And if the *cestuy que use* refuses, the devisee shall not have it. R. 1 Leo. 254.

Vide post, (K).

### (K) Who not.

But a devise to (z) any *tanquam in esse*, when there is no such person *in esse* at the death of the testator, is void: as, a devise to such a chantry, and there is none such at his death, though it be afterwards erected, is void. 1 Rol. 609. l. 50. Vide ante, (I).

A devise to the heir of B. who was an alien; for he cannot have an heir. R. 1 Lev. 59. 1 Sid. 194. Vide ante, (I).

So a devise to the heir of B. is void, if B. be living at the death of the devisor, for *non est hæres viventis*. R. 1 Lev. 59. Semb. 1 Sal. 230.

Or, to the first son of B. when he has no son *in esse* at the death of the testator. 1 Sal. 229.

So a devise of lands or goods to B. is void, if B. dies in the life of the testator. Pl. Com. 345.

So, if a devise be to B. and his heirs; if B. dies, the heir shall not take, for he is named only by way of limitation. R. Pl. Com. 345.

Or, to B. and the heirs of his body, and if he dies without issue, to another; if he dies in the life of the testator, his issue shall not have it. R. Cro. El. 423. Per 2 J. 2. cont. R. 2 Ver. 722. Eq. Ca. 115. Pr. Ch. 442. 452.

So, if a devise be to his four daughters and their heirs equally to be divided, and one has issue, and dies in the life of the testator; the devise shall be void for a fourth part. Eq. Ca. 116.

So, if a devise be to A. to the use of B., and B. dies before the testator; the devise will be void. (a) R. 1 Leo. 254. (b)

But

(z) 1. Bodies politic and corporate are expressly disabled by stat. 34 & 35 Hen. 8. c. 5. s. 14., from taking by devise. — 2. It was held, however, in consequence of the st. 43 Eliz. c. 4., that a devise to a corporation, for a charitable use, was valid, as operating in the nature of an appointment. — 3. But now the st. 9 G. 2. c. 36. has rendered all devises for charitable uses void, except such as shall be made to the two universities, and to the colleges of Eton, Winchester, and Westminster. — 4. The king being both a body politic and corporate, is incapable of taking by devise. 6 Cruise, 20.

(a) *Pro non scriptis sunt iis relicta, qui vivo testatore decedunt*. 2 Domat. 98. 6 Cruise, 163.

(b) 1. 2 Vern. 722. 3 Bro. P. C. 95. 1 P. Wms. 397. 1 Str. 25. 10 Mod. 370. Dougl. 337. 3 Bro. P. C. 435. — 2. And a republication of a will after the death of a devisee in tail, will not give any estate to the issue of the devisee. 4 T. R. 601. — 3. Yet since a trust sufficiently created, will fasten itself upon the land, and will not become void by the incapacity or death of the trustee; where an estate is devised upon trust for a charity, the death of the devisee in the life-time of the testator, will not make the devise void. 6 Cruise, 168. Amb. 571. — 4. In the case of copyholds, though the land passes by the surrender, and the will is only directory of the uses, yet

But a devise to A. for life, remainder to B. shall be good to B. though A. dies before the testator. Pl. Com. 344. b. R. Dy. 122.

If it be to A. and the issue of his body, remainder to B., and A. dies before the testator, leaving issue, B. shall have it. Cro. El. 428. R. 2 Ver. 723.

If to A. and B. and their heirs, and A. dies in the life of testator, B. shall take the whole. R. Cart. 4. 1 Co. 100. b. Acc. 1 Sal. 238. 1 Ver. 425. F.g. 231.

So, a devise to the eldest son of A. remainder to B., and A. has no son; B. shall take. R. Mod. Ca. in Eq. 4. (c)

So a devise to A. in trust for B. shall be good, though A. dies before the testator. Dub. 2 Ver. 468.

A devise of 300l. to A. with a direction that he shall give it B. when he dies, or sooner, shall be good, though A. dies in the life of the testator. R. 2 Ver. 467.

If money be devised to A., B. and C., and if any of them die within age, his part to the survivor; it shall go to the survivor, though the person died before the testator. R. 2 Ver. 611. 653.

If a devise be of lands, to trustees for A. and B. till full age, and then to convey to them; though A. dies before the time comes for the conveyance, the conveyance shall be to his heir. R. 2 Ver. 562.

If a devise be to A. and B. in common, and A. dies in the life of the testator; his moiety is void. Eq. Ca. 157. (d)

Or, to A. and B. jointly for life, and to their heirs in common; the inheritance to A. shall be void. R. Eq. Ca. 159. 160.

So a devise, so uncertain that it cannot be known who was intended as devisee, (e) is void: as, if a devise be to A. for life, and that it shall remain to his issue, when he has several; the remainder is void. R. Cro. El. 742. Denied, Ray. 83. Cont. Pol. 106. R. that by a devise to the issue of B. all the issues take for life. 2 Ver. 545.

So, a devise to his son, when he has several. Cro. El. 742. Semb. Ray. 82.

So a devise to twenty of the poorest of his kin, shall be void; for it is not known who is poorest. 1 Rol. 609. l. 12.

So, a devise *melioribus hominibus de B.* Cro. El. 743.

So, a devise to his right heirs of his name and posterity; where a daughter, his heir, is not of his name, and his brother is not his heir. R. Mo. 860. Hob. 29.

So a devise to the heir at law, of the same estate which he would take by descent, is void; for the descent shall be preferred. 1 Rol. 626. l. 30. Hob. 30. 1 Sal. 242. Vide Descent, (A). (f)

Though

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if the devisee dies in the life time of the devisor, the devise is void. 2 Ves. 77. — 5. And in the case of a lapsed devise in fee, the estate will not go to the residuary devisee of the real estate, but will descend to the heir at law of the testator. Fort. 182. 184. Vide Willes, 293.

(c) Second Part of 2 Mod. Ca.

(d) Second Part of 2 Mod. Ca.

(e) Or what was meant to be given. 5 Rep. 68. b. 6 T. R. 671. 3 East, 172. 7 East, 299. 3 Smith, 291. 1 Taunt. 266. 2 M. & S. 165.

(f) 1. Where a testator makes the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary is void. And therefore if a person devises his lands to his heir at law in fee, it is a nullity, and the heir will take by descent, as his better title; for the descent strengthens the title by taking away the entry

Though it be devised to the heir, subject to a charge; for that does not make an alteration of the estate. R. Lut. 798. Vide infra, (g)

Or, subject to a contingency upon which another shall have it; for it descends in the mean time. Semb. Lut. 798. (h)

So a devise by him in remainder in fee, of the same estate, which the devisee would take by descent, shall be void. 1 Sal. 233.

But if the devise gives the estate to the heir in another quality, (i) he shall take by the devise: as, if the devise be to co-heirs to hold jointly, or in common. R. 1 Leo. (k) 313. R. Cro. El. 431. R. Bend. pl. 63. Vide Assets, (B). (l)

Or, to an heir upon condition to pay debts, and for non-payment, to another. R. Cro. Car. 161. Cont. per Holt, for the heir takes by descent, and upon failure of payment, the other shall have it by way of executory devise. Mod. Ca. 241. Per 2-J. acc. 2 Mod. 286. R. Cont. Lut. 798. 1 Sal. 241. Vide supra, (g)

If the devisor has two daughters, and devises to the son and heir of one, he shall take the whole by the will. R. 1 Sal. 242. (m)

entry of such as may possibly have a right to the lands; whereas if the heir takes by the devise, he is then only in by purchase. 6 Cruise, 158. Plowd. 545. 1 Inst. 12. b. 2 Saund. 7. n. — 2. Which rule applies to wills made in pursuance of powers, as well as to devises deriving their effect from the statute of wills. 6 Cruise, 159. — 3. And if a person devise lands to his wife for life, remainder in fee to J. S., who is his heir at law, it is a void devise as to the remainder; because the reversion would have descended to J. S. after the determination of the particular estate. 2 Leon. 101. 1 Blk. 187. — 4. Which rule is applied to copyhold; and therefore the surrender of a copyhold to the use of a will, and a devise thereof to the heir at law, will not give the devisee an estate by purchase. Str. 487.

(g) And although the devisor charges the estate with payment of debts, or with portions to his younger children, yet if he afterwards devises the estate to his heir at law in fee, it will be void, and the heir will take by descent. Fearne's Opin. 229. Cro. Eliz. 833. 919. Ld. Raym. 728. Com. Rep. 72. 1 Blk. 22.

(h) Cro. Eliz. 833. 919. 920.

(i) 1. Or *quantity*. — 2. And, therefore, if a man devises his land to his son and heir, to have to him and the heirs of his body, this is a good devise. Plowd. 545. — 3. So where a person devised to his eldest son, and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one then from and immediately after his death, under age and without issue, unto testator's son William; it was considered, that the eldest son took by devise, as having under the will a different estate to what would have descended to him; the one being pure and absolute, the other not. Amb. 383.

(k) 112.

(l) In an opinion of Mr. Fearne's which has been published, he says, that a devise to the heir and another as tenants in common, will not prevent the heir's taking his moiety by descent. For suppose a testator devises a moiety, or any other undivided share of his real estate, to a stranger, making no disposition of all the remaining undivided shares, such remaining share would of course descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear, therefore, that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate of which his ancestor was solely seised, and it appeared to be immaterial whether the share he so takes is expressly devised to him, or left unnoticed by the will; for if expressly devised he takes in common; and if not noticed he takes in the same manner; and a devise to two or more as tenants in common is in effect a devise of one undivided part to one, and of another undivided part to another. So that under such a devise to an heir and a stranger as tenants in common, the heir takes as if one undivided moiety were devised to the stranger, and the residue to himself; that is in the same manner, as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and therefore the same estate being devised to him in such residue, as he would have taken by descent, the general rule respecting devises to an heir extends to it. Fearne's Opin. 128. 6 Cruise, 161.

(m) Ld. Raym. 829. Com. Rep. 123.



If he devises the whole to one daughter, she takes the whole by devise. Per Dod, 2 Rol. 352.

So, if he in reversion devises an estate to others, in the same words by which it was limited to them by a prior settlement; the devise shall be good, for the tenure is thereby varied. R. 1 Sal. 233.

### (L) What things may be devised.

By the statute (*n*) 32 & 34 H. 8. A man may devise all his lands, (*o*) tenements, rents, (*p*) and hereditaments. (*q*) Vide ante, (A—B—G—H 1.) &c.

So, if a man has a rent for him and his heirs for the life of B. he may devise it. Dub. Cro. El. 805. Mo. 625. (*r*)

So (*s*) an interest, though it be in contingency, may be devised. (*t*) R. 2 Rol. 129.

Vide post, (M).

### (M) What not.

But a devise of lands, (*u*) of which a man is joint-tenant, is void. Vide ante, (H 7.)

Or,

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(*n*) 1. Chattels real were devisable at common law, being considered as personalty only. — 2. Though when a man acquires a term as executor, he cannot devise it. Plowd. 525.

(*o*) 1. Trust estates are devisable. — 2. So an equitable interest. 1 Ves. J. 254. — 3. And though a devise by a mortgagee before condition broken is void, because a condition is not devisable; yet after breach, it is valid, and equity will decree a foreclosure to the devisee. 2 Ch. Ca. 8. 1 Ch. Rep. 18. — 4. So an equity of redemption is devisable; and where the mortgagee devised the estate, it went to the devisee. 1 Ch. Rep. 101. But where a person has only an equitable interest in lands, his devise of them amounts to no more, than a direction to those who have the legal estate in trust for him, to convey it according to the devise. 2 P. Wms. 258.

(*p*) 1. A rent-charge is devisable by this statute. — 2. But formerly it was doubted, whether a rent-charge *in esse*, issuing out of gavelkind lands, and having commenced within time of memory, was within the custom of devising; nor was it settled in the affirmative till the time of Lord Hale. 1 Inst. 111. a. 1 Mod. 112. Rob. Gav. 79.

(*q*) 1. An advowson appendant to a manor will pass by a devise of the manor; and an advowson in gross being an hereditament, is devisable under the statute; and the next or any number of presentations may be devised, in which case the devisee may either present himself or any other person. Cro. Eliz. 359. 2 Blk. 1240. 6 Cruise, 33. — 2. And where the incumbent of a church, having the inheritance of the advowson in him, devised the next presentation, it was held good. Cro. Jac. 371. — 3. Tithes impropriate in lay hands are devisable. 6 Cruise, 33. — 4. As to franchises, see 3 Rep. 32. b.

(*r*) 1. The statute 34 & 35 Hen. 8., only extends to estates in fee simple, and therefore did not enable persons to devise estates *pur auter vie*. Cro. Eliz. 804. — 2. But now by st. 29 Car. 2. c. 3. s. 12., any estate *pur auter vie* shall be devisable by will in writing. Supra.

(*s*) Not only estates in fee simple absolute, but also determinable fees, and base fees, are devisable under the statute of wills; the word fee simple being taken in its most extensive sense. 3 Bulst. 184.

(*t*) 1. Contingent remainders, and all other contingent estates and interests in lands, are now held to be devisable; though formerly an opinion prevailed that they did not pass by a will made previous to their vesting. Fearne, C. R. 537. 1 Blk. 222. 251. 2 Burr. 1131. 1 H. B. 30. 33. 3 T. R. 88. — 2. But a bare possibility or hope of succession, such as the heir has from the courtesy of his ancestor, is not devisable. 3 T. R. 88. 1 H. Blk. 30. 1 Ves. J. 251. 2 Eden, 342. 17 Ves. 182. — 3. Nor is a right of entry, on a fine, devisable. 8 East, 552. 1 Taunt. 578.

(*u*) 1. Since the statutes of wills only mention lands held by knight's service and in socage, they do not extend to copyhold estates; but a power of devising this kind of property has long been indirectly exercised, by an application of the doctrine of uses, similar

Or, which he has in his politic capacity. Vide ante, (H 6.)

So a man cannot devise lands, which he has not at the time of his making, or republishing his will; for the statute says, having lands may devise. 3 Co. 30. 1. (x)

And therefore, If a man devises all his lands in A. and afterwards purchases other lands there; the new purchase does not pass, without a new publication. R. Pl. Com. 344. Vide ante, (E 3.) — Post, (N 21.)

So, if he devises all lands, which he has or shall have at the time of his death. Dub. Lut. 736. R. 1 Sal. 237. F,g. 225. 234.

Yet, if he devises a reversion after an estate for life, or in tail, and that comes to his possession; the land passes. F,g. 231.

So, if a disseisee, before entry, devises his land, the devise is void.

similar to that which was anciently resorted to in respect of freehold lands. For this purpose the copyholder surrenders his estate to the use of his last will, and then disposes of it by his will, which operates as a declaration of the uses of the surrender, and not as a devise under the statute of wills. Gilb. Ten. 322. 1 Inst. 111. b. n. (1). 6 Cruise, 44. — 2. By the general custom of all manors, every copyholder has a right to surrender his estate to the use of his will; and a custom to the contrary is void. 3 Bro. C. C. 286. 15 Ves. 403. — 3. The surrender must be presented. Supra, Copyhold, (F 10.) — 4. Though by special custom, the presentment may be made at the next court after the death of the surrenderor, though it be not the next after the surrender made. Ibid. — 5. And it is said that it would be good without any special custom. Ibid. — 6. But the surrender cannot be made before the admittance of the devisor. 11 East, 246. — 7. After the surrender, the estate still remains in the copyholder, and does not vest in the lord. 4 Rep. 23. a. Gilb. Ten. 195. Cro. Eliz. 442. — 8. And a copyholder having surrendered to the use of his will, and afterwards surrendered to new particular uses, with reversion to himself in fee; he was held to be in of the old use, and might devise the reversion, without any admittance or fresh surrender to the use of his will. 2 Blk. 1046. — 9. Where a copyholder makes a surrender by way of mortgage, he continues in possession of the legal estate till the mortgagee is admitted, and cannot therefore devise, without a surrender to the use of his will. 5 East, 132. 137. — 10. And where a copyholder surrenders his estate to the use of his will, and afterwards makes a will; the lands do not pass by the will but by the surrender. 1 Bulst. 200. — 11. In the case of a surrender by a copyholder to the use of his will, and a devise thereof, the devisee has no title till he is admitted; but if a devise is to two persons, and one of them is admitted according to the purport of the will, this shall enure to both. Co. Cop. s. 35. 6 Cruise, 47. — 12. The devisor must have the copyhold at the time of making his will. Amb. 299. 1 T. R. 438. n. — 13. And where a copyholder, having an estate *pur autre vie*, surrendered all his estates in possession, remainder, or reversion, to the use of his will, and afterwards acquired the fee by descent, such fee did not pass by the will. — 14. An estate in remainder or reversion in a copyhold may be devised, as well as an estate in possession, but a surrender is requisite. 6 Cruise, 49. — 15. But an equitable interest is devisable without a surrender. 1 Ch. Ca. 39. 2 Freem. 156. 1 T. R. 601. 3 Atk. 73. Vide 7 East, 8. — 16. Thus an equity of redemption. 3 P. Wms. 359. 1 B. C. C. 481. — 17. Where the intention of a testator to pass his copyhold estates is clear, and the heir, takes any benefit under the will, he must make his election, either to surrender the copyhold to the uses of the will, or to relinquish the benefit of such will. 3 Ves. 65. 67. 15 Ves. 390. 6 Cruise, c. 4.

(x) 1. Salk. 237. 11 Mod. 129. 3 Bro. P. C. 19. Cowp. 90. 305. — 2. But where articles are entered into for the purchase of lands, and before a conveyance of the legal estate is made, the purchaser devises the property, and dies, such devise will be held good in equity. 1 Ch. Ca. 39. 9 Mod. 78. — 3. And where an agreement for the purchase of land is not to be carried into execution till a future day, and previous to such day the purchaser makes his will, yet the lands so agreed for pass by such will. Prec. in Ch. 320. — 4. And even a parol agreement for the purchase of lands, which is admitted, so as to be binding on the parties, notwithstanding the statute of frauds, will vest such interest in the purchaser, as he may devise by his will. 1 Ves. S. 437. — 5. Otherwise there must be express articles or a positive agreement, binding within the statute of frauds, for the purchase of an estate, entered into and completed before the execution of the will. 2 P. Wms. 629.

Or, be afterwards disseised, and dies before entry. (*y*) 1 Mod. 217. (*z*)

If an infant, *feme covert*, &c. devises, and does not republish after full age, or the coverture dissolved, it will be void. F,g. 226. Vide ante, (E 3. — H 2. 3.)

Though the lands are devisable by custom; for he ought to be seised at the time of his will. F,g. 226. 228. 243.

So, if a man devises all his chattels, a term for years, afterwards purchased, does not pass. Semb. 1 Sal. 238. F,g. 228. 229. (*a*)

Yet, if A. devises the manor of D. and afterwards purchases it, and dies; the devise will be good, though he had it not at the time of making the will. Pl. Com. 344. a. Cont. per Holt, F,g. 230.

So, if a disseisee by will devises land, and afterwards enters upon it; the devise will be good. 1 Sal. 237. F,g. 230. (*b*)

If he in remainder devises, and afterwards the tenant for life dies; his devise will be good. 1 Sal. 237.

So, if a man devises a manor, and a tenancy afterwards escheats; it passes by the will. 1 Sal. 238. (*c*)

So, if he who has an estate only by estoppel, devises; it will be good against parties or privies to the estoppel. Semb. Jon. 457.

So, if a man devises his personal chattels, goods afterwards purchased pass. 1 Sal. 237. 238.

When a void or defective devise shall be aided. Vide Chancery, (3 A 1., &c.)

What goods and chattels cannot be devised. Vide Chancery, (3 Y 5.)

## (N) Devises, how expounded.

### (N 1.) What words make a devise.

Any words, (*d*) which shew the intent of a devisor to dispose, are sufficient for a devise: (*e*) as, if he says, (*f*) I release all my lands to A.

(*y*) Bro. Abr. Devise, pl. 15.

(*z*) For the devisor must not only be actually seised, or well entitled to the lands, at the time of making his will; he must continue seised or entitled to them, till the time of his death. 11 Mod. 128. Rep. T. Holt, 748.

(*a*) A term for years, purchased after the execution of the will, passes by it. 1 P. Wms. 575. 3 Atk. 176.

(*b*) 4 Burr. 1961. 8 Ves. 282.

(*d*) 1. 11 Mod. 129. — 2. And where a person seised of a manor makes his will, and afterwards purchases a copyhold held of the manor, the land passes. 6. T. R. 708.

(*e*) The proper and technical words are, *give and devise*; but any other words which sufficiently declare the intention are sufficient. 2 Vern. 467.

(*f*) 1. A will being considered as an instrument made at a time when the testator cannot have the assistance of persons skilled in the law, or, as it is usually expressed, when he is *inops consilii*, the courts have at all times held that it shall not be construed strictly like a deed; but that the intention of the testator, though not expressed in the proper legal and formal words, shall notwithstanding be carried into effect, it being a maxim of the English law, *quod ultima voluntas testatoris perimplenda est, secundum veram intentionem*. 6 Cruise, 171. — 2. In construing a will, therefore, two questions arise; 1°. What is the testator's intention, as it is to be collected from the words of the will? 2°. Whether he has used words which in legal construction, can carry such intent into effect. 3 M. & S. 43. — 3. And if a testator expresses an intention precisely,

A. and his heirs. R. Bend. 30. 1 And. 33. 2 And. 13. Vide Chancery, (3 Y 7.)

I will

precisely, in clear and positive terms, and there is no legal objection to it; no inconvenience arising from a literal adherence to such intention so expressed, is to be regarded. 3 M. & S. 30., &c. — 4. But the case is very different where the intention is not fully expressed, but is to be collected and inferred as only probable; for in that case the probability from which the intention is to be inferred may be outweighed, by the improbability that the testator could intend to make a distribution of the property attended with such inconveniences as would follow from carrying into execution his supposed intention. 3 M. & S. 30., &c. — 5. Effect must be given to every word in a will, if it may be done; and to this end, expressions admitting of two interpretations, must receive that which will make them consistent with other parts of the will. 2 T. R. 209. Lofft. 97. 6 Ves. 100. Swanst. 28. — 6. Thereby giving effect, if the case require, to devises apparently inconsistent. 4 M. & S. 1. — 7. And where intentions really irreconcilable are expressed, the last in order shall be preferred. 6 T. R. 307. 5 Ves. 243. 6 Ves. 102. — 8. Unless in the case of a general and particular intention; when the general intention shall prevail. 4 T. R. 82. Vide 6 Ves. 129. — 9. It being the best rule in the construction of wills, to discover the general intent, and then as far as grammar and language will permit, to interpret particular expressions accordingly. Lofft. 270. — 10. Yet where a particular intention is expressed in clear and precise terms, it must be fulfilled in opposition to a general intention that is only to be implied, though supported by conjecture in the highest degree probable, that the devisor did not know the force of the expression which he was using. 6 T. R. 512. 3 M. & S. 158. Dougl. 323. — 11. And in clearing up ambiguities, attention must be given to the words and context only, not to the punctuation. 1 Mer. 651. — 12. Words are always to be taken in their ordinary sense, unless an intention is demonstrated that they are used in another. 3 B. & P. 627. — 13. And therefore (with a similar reservation) in their grammatical sense. 6 T. R. 30. — 14. But no technical words are requisite to express a particular intention. 3 T. R. 86. — 15. And therefore supposing the intention upon the face of the will to be clear, it is difficult to say what words, by which such intention is clearly expressed, or from which it is manifestly and with certainty to be implied, are not also capable of giving effect to it. 3 M. & S. 60. — 16. Nor are words necessarily to receive the technical meaning which the law has annexed to them; but rather that sense, whether technical or ordinary, which will best effectuate the devisor's intention. 4 T. R. 294. 296. — 17. In aid of which rule are the following maxims; 1<sup>o</sup>. where a term is used to which the law has annexed one idea, and common opinion another, the latter shall be preferred. 5 East, 51; 1 Smith, 318; 2<sup>o</sup>. where a term has obtained a definite technical sense, it must be presumed that the testator used it in that sense. 6 T. R. 352. — 18. But with these limitations, words are to be read with reference to rules of law, and interpreted according to their legal effect and operation. 6 T. R. 352. 2 B. & B. 204. 2 Burr, 1108. Dougl. 341. 2 P. Wms. 741. — 19. For it is always to be presumed, that a testator was acquainted with those rules. 2 Mer. 22. — 19. And neither an intent manifested by him to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition describing the order of succession in which the devises are to take place, nor the introduction of powers of jointuring, or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words; it must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controuled by such apparent intent. 3 B. & P. 627. — 20. As to rejecting words in a will. Vide 3 T. R. 87. 484. 5 Ves. 243. 2 Mer. 25. — 21. Adding words. 5 T. R. 323. Lofft. 444. 3 Burr. 1626. 3 Bro. P. C. 269. — 22. As to the individuality and distinctness of different clauses or devises, in the same will. See 9 East, 267. 462. 11 East, 220. 4 M. & S. 56. 10 East, 503. — 23. As to the influence of conjecture, and matters dehors. See 3 T. R. 86. 2 M. & S. 454. 455. 3 M. & S. 25. 30. 5 T. R. 92. 11 East, 58. 3 Mer. 316. 7 Ves. 522. 1 Mer. 194. 296. 13 Ves. 108. — 24. As to mistakes, see 8 East, 91. 149. 9 East, 366. — 25. As to a construction *cy pres*. See 1 P. Wms. 322. 6 T. R. 213. 3 Burr, 1416. 1 Blk. 428. Amb. 479. — 26. And finally there is an inclination so to construe a residuary clause as to prevent intestacy. 2 Mer. 386.

(f) 1. A person having conveyed his estate to feoffees to his own use, before the statute of uses, made his will after that statute, and also after the statute of wills, by which

I will my feoffees shall stand seised to the use of A. 1 Rol. 611. l. 10.

Though they cannot stand seised to such use. R. Dy. 323. 1 Rol. 611. l. 15.

Though he had not any feoffees of that land; for his intent appears, that A. shall have the land. R. 1 Rol. 611. l. 20. Mo. 280.

A. B. did declare, that his brother and his heirs should be heir to his land, being written by a stranger, and signed by A. B. was sufficient. R. 1 Sid. 362.

If A. covenants to levy a fine of land to such uses, and does not levy it, but by his will confirms all estates granted by such deed; it will be a good devise, though only intend to be granted. R. 1 Sal. 225.

If he says, my younger son shall grant a rent out of such land, to B; it is a devise of the land to the younger son. 2 Rol. 478.

I promise to entail the land to B. and the heirs of his body, &c. amounts to a devise. R. 2 Rol. 478.

A devise to A. and his heirs, to the intent that he permit B. to take the profits for his life, and after his death to stand seised to the use of the heirs of the body of B. will be a devise executed in B. in tail. R. Lut. 824. Sal. 679.

So, if a man devises the rents and profits of land: the land itself passes. Vide 1 Sal. 228.

Or, gives authority to A. to take the profits of the land until he be paid 400*l*. Al. 45.

Or, devises that A. receive the rents by the hand of his executor; it will be a devise to the executor in trust for A. Per 2 J. Holt cont. 5 Mod. 63. 103, 104. Said to be, per 2 J. cont. Holt. acc. 1 Sal. 228.

Or, that his executor shall have the rents and profits for the maintenance of his children until the full age of his son: it will be a devise to the executor. R. Cart. 25.

But a devise that his executor shall sell, does not amount to a disposition, but gives an authority only. Mod. Ca. 111.

So, if A. devises lands to his son at his age of twenty-four, and that B. shall have in the mean time the oversight and dealing of the said lands; B. has only an authority. R. Mo. 774.

A devise of money to his wife, to pay for land, which with land in A. is estated on my wife, and is in full of her jointure, is not a devise of the land to her. R. per 3 J. Powel cont. 2 Vent. 57. 3 Lev. 259.

(N 2.) By what words lands pass in a devise, [and to whom.]  
Vide supra, (I—K.)

What description is sufficient to pass lands in a grant. Vide Fait, (E 4.) — Grant, (E 1, &c.)

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which he willed that his feoffees should make an estate to W. N. and the heirs of his body; which was adjudged to be a good devise of an estate tail to W. N. the intention being clear. Bro. Abr. Devise, pl. 48. — 2. So where A., seised of lands in fee, and having issue two sons B., and C., devised several estates to B. his eldest son, and directed that B. should renounce all his right in Blackacre, of which the devisor was then seised, to C.; this was adjudged to be a devise to C. L. R. 127. — 3. So where a person, after giving by his will an annuity of 200*l*. a-year to his wife, and 6000*l*. to each of his younger children, his just debts being first paid, appointed three persons "as trustees of inheritance for the execution thereof;" this was held to be a devise of the testator's real estate to the trustees. 1 Dow. 102.

In



In a devise such description, by which the intent of the devisor may be collected, is sufficient: as, (g) if a man devises 20l. a-year out of his lands, without saying, what part; the devisee shall take so much in common with his heir. Lit. 218. Dy. 280. b. in marg.

If he leases land for 10l. rent, and as concerning the disposition of all his lands and tenements devises his rent of 10l. in A. to his wife; she shall have the land itself by this devise. R. 2 Cro. 104. Mo. 771.

Though by the same will he devises other land which was in lease, by the name of his land. Vide Mo. 772.

If he devises all his lands; fee-farm rents, issuing out of those lands, and which were afterwards purchased by the devisor, pass. R. Eq. Ca. 78. (h) Vide infra.

(g) 1. As to the force and import of the following terms: — *Absolute disposal*. See 2 Eden, 87. 1 Bro. P. C. 476. — 2. *All my estate*. Cowp. 299. 8 Ves. 604. — 3. *All my rents*. Cro. Jac. 104. — 4. *All I am worth*. 1 B. C. C. 437. 8 Ves. 604. — 5. *All and every other my lands, tenements and hereditaments*. 8 Ves. 256. — 6. *And or*, Cro. Eliz. 525. Moor, 422. Pollexf. 645. 2 Str. 1175. 2 Atk. 193. 643. 390. 1 P. Wms. 434. 3 Atk. 408. 1 Ves. 217. 2 Ves. 249. 3 Atk. 86. 193. *et id.* n. 390. 6 Cruise, 185. 1 Wils. 140. 3 T. R. 470. 3 Ves. 450. 545. 6 Ves. 341. 557. 7 Ves. 458. 1 Cox, 112. 2 Cox, 213. 9 East, 366. 1 N. R. 38. 1 Taunt. 174. 6 T. R. 30. 1 B. P. 215. 12 East, 288. — 7. *Bankruptcy*. 6 T. R. 684. — 8. *To be begotten*. 1 M. & S. 124. — 9. *Charity*, 9 Ves. 399. — 10. *Child, grandchild, issue, son, &c.* C. T. H. 91. 1 Ves. 290. 1 Ves. 335. Amb. 397. 701. 5 Burr, 2703. Cowp. 314. 3 Anst. 684. Lofft. 19. Cowp. 309. 7 T. R. 322. 1 East, 120. 2 Eden. 194. Amb. 603. 2 B. C. C. 33. 2 Ves. J. 673. 3 Ves. 232. 421. 4 Ves. 437. 692. 5 Ves. 530. 6 Ves. 43. 345. 7 Ves. 522. 10 Ves. 166. 176. 195. 13 Ves. 340. 1 Cox. 248. 327. 2 Cox. 184. 190. 1 B. & B. 459. 462. 483. 486. 499. 1 V. & B. 422. 462. 469. 2 V. & B. 313. 3 V. & B. 59. 67. 69. 113. 1 Mer. 654. 2 Mod. 124. 166. 2 Mer. 382. Dick. 344. 1 Eden, 64. 1 B. C. C. 530. 2 B. C. C. 68. 230. 658. 3 B. C. C. 148. 347. 352. 434. 367. 391. 416. 4 B. C. C. 55. 1 Ves. J. 405. 3 Ves. 257. 609. 5 Ves. 136. 335. 10 Ves. 152. 166. 11 Ves. 238. 2 Cox, 258. 1 Cox, 250. 38. 19 Ves. 125. 18 Ves. 288. 15 Ves. 363. 125. 2 Cox, 384. 425. 1 Mer. 320. 2 Mer. 419. 1 Mad. 290. 2 Vern. 545. 1 L. R. 205. — 11. *Death*. Swanst. 161. — 12. *Dying without issue*. 12 East, 253. 3 East, 302. 491. 1 Ves. 562. 10 Ves. 562. 17 Ves. 482. 1 B. & B. 1. — 13. *Effects*. 13 Ves. 39. 15 Ves. 326. 507. Cowp. 299. Vide infra. — 14. *Estate*. 1 Salk. 236. 6 T. R. 610. 11 East, 246. 2 V. & B. 222. 2 Atk. 38. 3 Atk. 486. Amb. 155. 216. 12 Mod. 592. 1 T. R. 659. n. 8 Ves. 604. 9 Ves. 187. — 15. *Family*. 5 Ves. 159. 8 Ves. 604. 9 Ves. 319. Cooper, 117. — 16. *Furniture*. Amb. 605. — 17. *Goods*. 2 Ves. 163. 3 Atk. 63. 1 P. Wms. 267. 2 P. Wms. 302. 1 Atk. 171. 177. 180. 182. 1 Ves. 273. 1 B. C. C. 127. 11 Ves. 666. — 18. *Heir*. 2 Vent. 311. 1 P. Wms. 229. 3 Bro. P. C. 60. 454. 2 P. Wms. 1. 369. 2 Blk. 1010. 4 Ves. 326. 766. 794. 2 Atk. 89. 580. 3 East, 533. 5 Burr, 2615. 11 Mod. 189. 8 Vin. Abr. 317. 1 T. R. 630. L. R. 185. — 19. *Item*. 1 Atk. 437 1 Salk. 234. 239. 3 Atk. 259. — 20. *Legacy*. 5 T. R. 716. — 21. *Next of kin*. 3 East, 278. 15 Ves. 536. 4 Ves. 649. 12 Ves. 433. 15 Ves. 109. 3 B. C. C. 64. 14 Ves. 372. Cooper, 272. — 22. *Last will*. 7 T. R. 138. — 23. *Messuage and house*. Cro. Eliz. 89. 2 Ch. Ca. 27. 2 T. R. 498. 1 B. & P. 53. — 24. *Name and blood*. 15 Ves. 92. — 25. *Relations*. Vide supra, Child. 2 Ch. Rep. 146. 394. Pre. Ch. 401. C. T. T. 215. 1 P. W. 327. 2 Ves. 527. Amb. 70. 507. 595. 636. Dick. 50. 380. 1 B. C. C. 31. Amb. 397. 3 B. C. C. 64. 234. 2 Vern. 381. Amb. 708. 3 Ves. 231. 19 Ves. 323. 324. 1 Cox, 234. 1 Taunt. 163. 3 Mer. 689. 5 Ves. 529. 16 Ves. 206. 1 S. & L. 111. Cooper, 275. — 26. *Rents and profits*. 2 V. & B. 65. — 27. *Residue, surplus, &c.* 2 Atk. 168. 11 Ves. 330. 14 Ves. 364. 15 Ves. 406. 18 Ves. 466. Dick. 477. 1 B. C. C. 589. 4 B. C. C. 207. 1 Ves. J. 63. — 27. *Servant*. 12 Ves. 114. — 28. *Specifically*. 16 Ves. 451. — 29. *Stock*. 15 Ves. 319. 4 Ves. 751. — 30. *Such*. 2 Atk. 92. — 31. *Survivor*. 8 Ves. 10. 17 Ves. 482. 6 Taunt. 213. Cowp. 257. — 32. *Things*. 11 Ves. 666. — 33. *What I may die possessed of*. 8 Ves. 604.

(h) Second Part of 2 Mod. Ca.

If A. has the reversion of tithes after the death of B., and devises all his fee-simple lands to his brother, if his wife has not a son, but a daughter, and dies, having no other tenements; the reversion of the tithes passes. R. 1 Rol. 614. l. 7. (i)

So, if he devises all his real estate, copyhold lands pass. R. Eq. Ca. 78. (k) (l)

If he devises his rents, or lands mentioned in such a deed, or writing, it will be good. R. 2 Cro. 145.

If he devises all his lands, (having land in possession, and land in reversion after an estate for life) to his executors for ten years, and then to sell for payment of debts, and the estate for life ceases; they may sell the land in reversion. R. Cro. El. 525. Ow. 155. (m)

If a man devises to A. for life, and to enable his wife to pay his debts and legacies devises all his lands, tenements, and hereditaments not disposed of before to his wife for ever; the reversion of the lands devised to A. passes to the wife as an hereditament not before disposed of, though he had assets sufficient otherwise. R. cont. in B. R. but

(i) Where the words used by a testator are only applicable in their strict technical sense to a species of property which the testator has not, they shall be applied if possible to some other species of property, which the testator has; in order to effectuate his intention. 6 Cruise, 231. 3 Leon. 165. 1 P. Wms. 286.

(k) Second Part of 2 Mod. Ca.

(l) It is laid down by Lord Hardwicke, that where copyhold lands are surrendered to the use of a will, they pass by a general devise of all the testator's lands and tenements, notwithstanding there are freeholds to answer such devise. But where copyholds have not been surrendered to the use of the testator's will, they do not pass by general words, because the want of a surrender, renders it doubtful whether the testator intended to dispose of his copyholds or not. 2 Atk. 85. 1 Ves. 226. Vide etiam, 2 B. C. C. 64. 3 B. C. C. 188. 15 Ves. 396. 3 Atk. 8. 3 Ves. 191. 5 East, 51.

(m) 1. Wherever a testator shews an intention to dispose of all his property by his will, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass. 6 Cruise, 244. Allen, 28. 3 P. Wms. 63. n. 1 Lev. 212. Saund. 180. 2 Vern. 461. Skin. 631. 3 Bro. P. C. 24. 2 Vern. 621. 3 P. Wms. 56. Cowp. 363. 808. — 2. And since general words in the residuary clause of a will, will carry every estate and interest which is not expressly or by necessary implication excluded from its operation, it will therefore carry all reversions. 2 B. & P. 600. 11 East, 322. — 3. Yet where it is manifest that a testator does not intend to devise a reversion by general words, it will not pass; as where A. Mervin, on the marriage of his eldest son Henry, settled the manor of Arlestown on himself for life, remainder to his son Henry for life, remainder to the first and other sons of Henry in tail, &c. with the reversion in fee to the father; A. Mervin had issue three other sons, Audley, James, and Theophilus, and four daughters, and being seised of other lands in fee simple, he made his will, by which he devised all those lands whereof he was seised in fee simple in possession to his wife; and also all other the lands, tenements, and hereditaments, whereof he was seised in fee simple, or of which any other person was seised in trust for him; with a proviso that if his sons Henry and Audley (who were his first and second sons) should both of them die without issue male, in the life-time of his son James, (who was his third son) whereby the estate settled on his son Henry on his marriage should descend on his son James, that then his son James should not take any interest or estate in the land thereinbefore devised to him: and held that the reversion in fee did not pass. 2 Burr. 912. 3 Bro. P. C. 219. — 4. So where A. seised in tail of a moiety of an estate, and of a reversion in fee expectant on the determination of the estate tail in the other moiety, after reciting that she was entitled to the first, devised it in fee, then directed that all the rest, residue, and remainder of her estate and effects should be sold and disposed of, and the expenses of her funeral paid thereout, and if there should remain any overplus, the same should be divided equally between her daughters: and held that the reversion expectant did not pass under the residuary clause. 4 T. R. 605.

the

the judgment was reversed and R. acc. per all the judges in the exchequer-chamber. 2 Vent. 285. 3 Mod. 229.

If he devises a manor for six years, other land to A. in fee, and all the rest of his lands to B.; by this the reversion of his manor passes. Al. 29. R. 1 Lev. 212. Adm. Mod. Ca. 111.

If he devises several legacies, and afterwards such and such lands, and all the rest of his goods, monies, and other estate whatsoever to his executor, having other land; those pass to the executor. Per Ld. K. Ca. Ch. 262.

If he devises all his real and personal estate, fee-farm rents pass. R. Mod. Ca. 107. 1 Sal. 237. Vide supra.

So, if it be, all the residue of his real and personal estate. Mod. Ca. 108.

Though it be accompanied with words, which denote the personal estate only. Mod. Ca. 108.

Yet if a man devises all his lands to A. and B. and their heirs, as tenants in common, and afterwards all the residue of his real and personal estate to D. and his heirs; A. dies before the testator; his part does not go to D. but to the heir of the testator. Dub. 2 Mod. Ca. 124. 221. 224. 225.

So, if any part of the description is certain, it is sufficient though the other part fails: as, if he devises his corner-house in the tenure of A. and B. and A. only has it. R. Cro. Car. 447. 473. 1 Rol. 613. l. 51. Jon. 379.

Or, if he has a corner-house in the possession of A. and another house adjoining in the possession of C., and devises his corner-house in the possession of A. and C.; the corner-house only passes. R. Cro. Car. 447. Jon. 379.

If he devises his tenement with its appurtenances in which H. dwelleth in B.; land appurtenant, though out of B., passes. R. Cro. El. 113.

So, if the words may be ascertained by a thing to which they refer, it is sufficient: as, if a man, by deed, covenants upon the marriage of his son, to levy a fine to the use of G. his son in tail, &c. and afterwards by his will says, I ratify to G. all those my estates granted in marriage, &c. though no fine was levied, whereby the conveyance was void, yet the lands pass to him in tail by the will. R. 4 Mod. 132. 1 Sal. 225.

If A. contracts with B. for land, and takes a conveyance of it from C. and afterwards devises all the land purchased of B., it will be a good devise of those lands. R. 1 And. 188.

So, if the words are joined to another sentence, and governed by a verb of it, they shall be ascertained by it: as, if a man devises Black-acre in fee to A. and also White-acre; he shall have a fee in White-acre. 1 Sal. 235.

If he devises all his estate in his term, and also B. (in which he had an inheritance) the devisee shall have a fee in B. Per 3 J. Holt, cont. 1 Sal. 234.

If he devises land in A. to B. and the heirs of his body, and devises to him land in D. and also land in S. then devises land in F. to hold the last devised premises to him and the heirs of his body; he shall have an estate-tail in the lands in D. and S. as well as in F. R. 1 And. 160. 1 Leo. 57. Sav. 80.

So, if there be a sufficient description, it shall not be controlled or restrained

restrained by an imperfect explanation afterwards: as, if a man devises all his tenements in A. to trustees, to pay his debts till B. attain twenty-one, and afterwards all the same tenements, viz. two parts of N. tenement for such a purpose, and the third part for such, and then to B. but says nothing of U. tenement; yet that passes to B. for he has before given all to him. R. 4 Mod. 141. (n)

If a man devises all his messuage in which N. dwells called the Swan; though N. had only three rooms, the whole messuage passes: for the name of the Swan ascertains the whole. R. Cro. Car. 129. Jon. 195. (o)

(N 3.) By what not.

But where words in a devise are express, they shall not be extended by implication: as, if a man has a house and land in A. and a house and land in B., and devises his house and land in A. with all his other lands, meadows and pastures in B. this does not extend to his house in B. R. Cro. El. 476. 658. Mo. 359. (p) Ow. 75. Vide post, (N 12. 13.)

If he has land named H. in A. and B., and devises his land in A. called H.; so much as lies in A. only passes. R. 2 Cro. 22.

So, if he devises it to his son, and if he dies without issue, then he devises H. generally to his daughters; that which lies in A. only passes to the daughters, for no more was devised to the son. R. Per 3 J. 2 cont. 2 Cro. 22. Cro. El. 674.

If he has land in A. and B. in Wales, and mortgages of land in other counties in Wales, and devises his lands in A. and B., or elsewhere in Wales, to D. and the residue of his personal estate, to his executor; the mortgages do not pass to D., for the words, or elsewhere in Wales, extend to little parcels out of A. and B. but not to lands of another nature. R. 1 Ver. 4.

If A. has one hundred acres of land named Jacks, and lets an house and sixty acres of his land to B. and then devises to his wife the said house and all his land named Jacks, in the possession of B., only the sixty acres pass. 2 Leo. 226. Vide post, (N 13.)

If A. tenant for life, remainder to his son in tail, remainder to himself in fee, devises all his lands, &c. to trustees, to raise portions for his daughters; and if his son dies without issue, all, except A., B. and C. to one daughter, and A., B., and C. to another daughter; and whereas he had other lands which his father desired his cousin should have, he requested his brother to provide for that: those other lands

(p) 1. A testator devised all the profits of his houses and lands lying in the parish of Billing, and in a street there there called Brooke-street, to his wife; when, in truth, there was no such parish as Billing, but the land supposed to be devised was in Billing-street; yet the will was held good. Brownl. 131. — 2. So where a person made his will in these words, 'I devise to J. S. all those my lands in Bramstead, in the county of Surrey, in the possession of John Ashley;' whereas in fact the testator had not any lands in Surrey, but he had lands at Bramstead in Hampshire, in the possession of John Ashley; and held that they passed by the devise. Ld. Raym. 728. — 3. Vide Cowp. 94. 2 Blk. 930. 3 Bro. P. C. 375. 8 East, 91. 2 Burr. 1089. 1 Blk. 255.

(o) Equities of redemption will pass by the same words as estates in possession. 1 Ch. Rep. 101.

(p) Mo. 359. reports this cont. and so 2 Rol. 49. l. 53. 50. l. 4., but 2 Rol. 57. l. 25. and 2 And. 123. acc.

do not pass to the first daughter, but descend to both the daughters, upon the death of his son without issue. R. Skin. 631.

So general and uncertain words shall not be extended by construction: as, if a man gives all to his mother; this does not amount to a devise of his lands. R. Ray. 97. 1 Sid. 191. 1 Lev. 130.

If he devises the manor of B. to A. and his heirs, and his manor of C. to S. for life, and if he dies, living A. to him who has his manor of B. afterwards A. sells the manor of B. then S. dies; A. shall not have the manor of C. R. 1 And. 306.

If he devises to A. for life, and afterwards *exitui suo*, and he leaves a son and a daughter: the remainder does not go to both, but shall be void for the uncertainty. R. 2 And. 134.

If he says, I make A. executor of all my goods, lands, and chattels; it shall not be a devise of lands, though he has no chattels real. R. Eq. Ca. 137.

So a devise to a wife, of so much money to pay for lands purchased of A. which are settled upon the wife for her jointure; when they are not settled, shall not be a devise of the lands themselves. R. per 3 J. Powel cont. 3 Lev. 259. 2 Vent. 56.

So general words shall not be extended beyond words of an inferior species, which precede them: as, if a man devises his land to A. and all his goods, chattels, estates, mortgages, debts, &c. to B. The word mortgages does not extend to mortgages in fee not forfeited. 1 Rol. 834. l. 46. (q) It extends to give them only for life. Jon. 380. 1 Rol. 834. l. 46. Cro. Car. 447. 449. (r)

So, estates being subsequent to goods, does not amount to a devise of a fee in the land. R. Jon. 380. Cro. Car. 447. 449.

So a devise of all his lands, tenements, and hereditaments, does not pass mortgages in fee, though forfeited. R. 2 Ver. 625. (s)

Though

(q) N. B. Jon. 380. and Cro. Car. 447. 449., where the case is reported, mention the mortgages as forfeited, though Rol. Abr. states them otherwise.

(r) 1. A person who was seised of lands in fee and of mortgages in fee, devised all his lands to A. B. and gave several legacies, and then said, 'all the residue of my estate I give to my executor;' and held, that the mortgage went to the executor. 1 Vern. 3. — 2. But it was said, if the testator had only devised his lands, without giving any legacies, and had bequeathed the rest of his personal estate to his executors, there perhaps the mortgaged lands would have passed to A. B., for else there would be nothing to answer and make sense of the clause 'all the residue;' for that implied that he had already devised some part of his personal estate, or at least it showed that he intended part of it should have passed. Ibid. — 3. This doctrine, however, has been entirely altered; for the nature of mortgages being now clearly ascertained, and the whole transaction till foreclosure, being considered as a personal engagement only, in which the money is the principal, and the conveyance of the land only an accessory, it is fully established, that neither the general words, lands, tenements, and hereditaments, nor any other words particularly appropriated to the description of real estates, will carry mortgages in fee, if the testator has other property to satisfy those words. 6 Cruise, 252. 2 Vern. 621. — 4. Though if a testator has no other property answering the description given in his will, in point of situation and other circumstances, except mortgages, they will pass by general words, though not particularly adapted to the subject, because otherwise the will could have no effect. 6 Cruise, 253. 2 Eq. Abr. 606.

(s) Where a testator uses general words equally applicable to freehold and leasehold property, they have in general been restrained to freeholds, where he has both freehold and leasehold property, unless a contrary intention appears, and have only been applied to leasehold property, where the testator has no freehold to satisfy them. 6 Cruise, 232. Cro. Car. 292. 3 P. Wms. 26. Sed vide, 2 P. Wms. 456. Amb. 356.

1 B. C.



Though he afterwards forecloses them, or gets a release of the equity. R. 2 Ver. 625.

But words, which otherwise can have no effect, though accompanied with words of an inferior nature, shall not be rejected: as, if a man devises the rest of his goods, lands, and moveables to his children; lands, of which he was seised in fee, pass for life. R. Mo. 594.

So, where the words of a will are express; they shall not be avoided in favour of the heir at law. 2 Ver. 340.

What passes by a devise *cum pertinentiis*, or as incident. Vide in Grant, (E 9. 11.)

#### (N 4.) What words pass a fee.

Words which shew an intent that the devisee shall have a greater estate than for life, and do not limit an estate-tail, make a fee, though there be not the word heirs. (t) Vide post, (N 6.)

1 B. C. C. 78. See however, 2 Atk. 450. 1 H. B. 26. n. 2 P. Wms. 459. n. Sed vide, 6 T. R. 345. See however, 2 B. & P. 303. 5 Ves. 476.

(t) 1. It is clear from all the authorities, that an estate of inheritance may pass by a will, if such appears to be the testator's intention, although neither the word *heirs*, nor any other technical words of inheritance are used. 2 M. & S. 711. 713. 3 Burr. 1684. 1 Blk. 543. Lofft. 95. 100. 1 P. Wms. 77. — 2. If any words are inserted to effectuate which it is necessary that a fee should pass, that is sufficient, though words of limitation are not used. 3 T. R. 356. — 3. Hence a devise apparently for life, may, under circumstances, be a devise in fee. 3 Burr. 1618. 1 Blk. 535. — 4. But to make a devise of lands, without any limitation a fee, such manifest intention must appear that the testator meant to give a fee, as may satisfy the conscience of the court in pronouncing it such. Cowp. 235. — 5. As to the force of introductory expressions, the courts in the first instance seem to have attached more importance to them than at present; for where the *cestui que* trust in fee of a copyhold estate, made his will in these words; 'all the estate I have I intend to settle in this manner, viz. my estate at Kirby Hall I give to my dear brother, and after his decease my desire is, that it should be disposed of to Mr. W. Tuffnell;' Lord Hardwicke said, I think that the inheritance passes; all cases of this nature depend upon the circumstances attending them, and in my opinion the introductory clause of this will is decisive; he mentions his intent to settle his estate; from whence it is plain, that he proposed making an absolute disposal of the premises, which could not be, were the devisee to have but an estate for life. 2 Atk. 37. — 6. And where a testator began his will in these words; 'as touching my worldly estate, wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the following manner;' he then gave to his mother all his estate at N., with all his goods and chattels as they then stood, for her natural life; and to his nephew T. D. after her death, if he would but change his name; if he did not, then he gave him only 20*l.* a-year, to be paid him for his life, out of N. close, and the farm held at R., which he gave her, upon his nephew refusing to change his name, to her and her heirs for ever; and decreed, by Lord Talbot (relying however upon other grounds than the introductory clause), that the nephew took in fee. Fort. R. 157. — 7. Since which it has been decided, that the introductory words, 'as touching all my temporal estate of lands, goods, and chattels,' will not make a subsequent devise a fee, which otherwise would be for life only. 5 T. R. 13. 3 Wils. 414. 2 Blk. 889. — 8. And see the following cases in which estates only for life passed. Dougl. 761. Cowp. 657. 8 T. R. 64. 1 N. R. 335. 497. 1 Price, 353. — 9. Where, however, A. devised as follows; 'first, to my wife, all my household goods, &c. to her and her heirs for ever; also three cow-commons, to her and her heirs for ever; secondly, To my two nephews all that piece, &c. also to my two nephews, all that piece, &c. to them and their heirs for ever; thirdly, To my nephew J. C. all that my house, &c.; also to my nephew J. C. all my land in, &c. to him and his heirs for ever;' it was held that J. C. took a fee as well in the house as the land; for the will by its content shewed a system in the testator of first enumerating what he meant to give, and then adding for what estate he gave it. 4 M & S. 58.

As,

As, if a man devises land to B. (*u*) *in perpetuum*, he shall have a fee. (*x*) R. Cro. Car. 129. Jon. 195. 1 Rol. 834. l. 10. Co. L. 9. b. (*y*)

Or, to B. *habend. sibi et suis*. R. Bend. pl. 9. (*z*)

Or, to B. and his assigns for ever. 1 Rol. 834. l. 15. (*a*)

To B. and his heir, in the singular number. 1 Rol. 832. l. 40. (*b*)

To B. *et sanguini suo*. 1 Rol. 834. l. 17. But this is only an estate-tail. Per Holt, Mod. Ca. 110. (*c*)

To B. and his successors. 1 Rol. 835. l. 15. (*d*)

So, if he devises to B. to dispose at his will and pleasure. 1 Rol. 834. l. 12. R. Mo. 57. Bend. pl. 9. (*e*)

Or,

(*u*) In fee simple. Gilb. on Dev. 18. 8 Vin. Abr. 206. pl. 8. 2 Blk. Com. 108. Perk. s. 557.

(*x*) But in this and other cases it must be understood that no expression is to be found in the will explanatory of the sense in which the particular words have been used, and qualifying their extent; for an express limitation of an estate will controul the implications of law. 2 Prest. Est. 85. citing Dougl. 321. 6 T. R. 30. 1 Inst. 9. b. 8 Vin. Abr. 206. pl. 7. 7. 15 Hen. 7. 12. cited 1 Leon. 183. Latch. 43. — 2. And he adds, p. 86., that it may be advanced as a general position, that where any expression by which the import and constructive meaning of a word of supposed limitation, is qualified, restrained, or explained, or its presumable tendency and application are negatived, the construction will be agreeable to the words of explanation. 1 Bulst. 219. Dy. 357. pl. 44.

(*y*) Bro. Abr. Devise, pl. 33. 1 Rep. 85. b. 1 Bulst. 219. 2 Blk. Com. 108. Gilb. on Dev. 19. 8 Vin. Abr. 206. pl. 6. Ld. Raym. 1152. 1 B. C. C. 147.

(*z*) 1. Gilb. on Dev. 19. Latch. 36. — 2. So to a man and to *his*, and to do what he will with it. 24 Hen. 8. Latch. 36.

(*a*) 1. It is said by Perkins, that if lands be devised to J. S. to hold to him and his assigns he will take a fee. Perk. s. 557. — 2. But Lord Coke says, that without the additional words “for ever;” he will take for life only. 1 Inst. 9. b. — 3. And Mr. Preston in 2 Estates, 78., relying upon 1 Inst. 9. b. Latch. 42. 2 Blk. Com. 108. and 3 Salk. 127. observes, that a devise to a man, or to a man and his assigns simply, without the addition of any words of perpetuity, or declaration of time, and without any other circumstance, to show an intention to pass the fee, gives an estate for life only. There is not, he continues, any sense expressed by these words, from which an intention to pass the fee can be collected. The word “for ever” is therefore the material and operative word, describing an interest to have continuance beyond the period of a life. — 4. A devise to A. and his heirs, and to A., his heirs and assigns, are synonymous. 9 East, 386.

(*b*) 1. Skin. 5. 563. Annesley's Rep. 161. Gilb. on Dev. 20. Gilb. on Uses, 24. 1 Vent. 215. — 2. For, says Mr. Preston, the words express an intention that the interest given should not determine with the life of the person to whom the property is devised, but extend to those persons who shall follow the devisee as his successor. 2 Estates, 79. — 3. So to a person and his heirs for their lives. 2 Prest. Est. 73. — 4. So to a man and his executors. Ibid.

(*c*) 1. It carries a fee. Moore, 356. 1 Inst. 9. b. 8 Vin. Abr. 206. pl. 10. Gilb. Dev. 19. — 2. So to a man and his family. 17 Ves. 257. — So to a man and his house. Dyer, 333. b. Hob. 33. — 4. So to a man and his stock. Ibid. — 5. Quære, what estate passes by the words, to a man and his posterity; whether a fee or fee tail? See 2 Freem. Rep. 286. 1 H. B. 461. 2 Prest. Est. 84. — 6. A devise to a man and his seed gives an estate tail. Prest. Ibid.

(*d*) Rol. Rep. 399. Moore, 853. pl. 1164. 3 Bulst. 194. Gilb. on Dev. 19. 8 Vin. Abr. 209.

(*e*) 1. 6 Mod. 111. 8 Vin. Abr. 236. — 2. To give, sell, or do therewith at his pleasure. Bro. Devise, pl. 59. 1 Leon. 156. 8 Vin. 234. 2 Wils. 6. — 3. To dispose thereof at his pleasure. 1 Leon. 283. — 4. To sell and dispose for payment of debts. 8 Vin. Abr. 236. — 5. To dispose for payment of debts. 1 Ch. Ca. 196. — 6. To a person on the same conditions (being words of reference to conditions raising the implication of a fee). 9 East. 400. — 7. To be at his discretion. 1 Leon. 156. 8 Vin. Abr. 235. — 8. To be at the discretion of a person, without any disposition to him by name, otherwise than to express that the lands are to be at his discretion, and though an express estate for life, not inconsistent, was previously given. 2 Prest. Est. 75. — 9. That a person

Or, to give to his children. Mod. Ca. 111.

To dispose of to which of his children he pleases; (*f*) for he may dispose in fee, (*g*) Dub. 2 Lev. 104. and afterwards R. acc. per 3 J. Vau. cont. that he may dispose of the fee. 1 Mod. 189. Cart. 232. 1 Sal. 240. Semb. Jon. 137. Lat. 939. (*h*)

To make provision for his children. Mod. Ca. 110.

Upon trusts which are perpetual. R. 2 Mod. Ca. 255. 382.

So, if he devises to B. paying a sum in gross, (*i*) 1 Rol. 834. l. 8. 2 Mod. 25. R. 6 Co. 16. a. R. Cro. El. 204. Bro. Testament, 18. Bro. Estates, 78. 2 Ver. 106. R. 1 And. 38. R. 2 Cro. 591. 599. R. 2 Cro. 527. (*k*)

Or, paying so much out of the profits to A. for life, and 20s. per ann. to B. for life. R. 2 Rol. 80. Vide post, (N 7.)

a person (tenant in tail under another devise) shall have power to dispose thereof, at his will and pleasure. Ibid. — 10. That a person shall be his executor or trustee; and from the context of the will, it is clear that he is to have the testator's fee-simple lands in that character. Ibid. — 11. That the executor shall levy a fine of the testator's lands to a particular person. Latch. 138. — 12. That the executors shall grant a rent in fee, or make a feoffment. 4 Leon. 156. Cro. Eliz. 679. — 13. That a person shall be his heir, or his sole heir and executor. 2 Sid. 75. T. Jones. 25. Cowp. 352. Hob. 75. — 14. Or heiress and executrix of his lands, tenements, goods, and chattels, the same to sell and dispose of, as she shall think proper, to pay his debts and legacies. C. T. Talbot. 268. 8 Vin. Abr. 236. — 15. Or that one person shall be heir to another, to whom an estate for life is previously given by the same will. 8 Vin. Abr. 205. pl. 2. Hob. 75. is contra, but the position is recognized by Mr. Preston. 2 Est. 76., as law. — 16. Or that A. B., C. D., and E. F., shall be trustees of inheritance for the execution thereof, *supra*.

(*f*) So where a man devised his lands to his wife to dispose and employ them for herself and her children, at her own will and pleasure; she took a fee. Moor. 57. Bendl. pl. 9.

(*g*) Mr. Preston, in 2 Estates, 81. 82. gives the rule, that between words expressing a power of disposition, which is general, in reference to the persons in whose favour it is to be exercised, and words expressing a power, which is particular in that respect, a difference is made; in that as often as the words of the power are *general*, the estate will be simple and absolute; but that as often as the words of the power are *particular* or *special*, the words expressing the intention of the testator, imply a condition, or trust, that the property which is devised should be held by the devisee, or given to the persons particularly named in the will, and to no other persons. The power of disposition must be without any limitation of estate to the person who is to exercise the power; for grant that an *express estate* is limited, and a power of disposition, either generally or in favour of particular persons, is added, the person to whom the devise is made, will have *merely* the estate limited to him by *express words*; and the right, in point of power, and not of estate, of disposing of the remainder. The general rule is, that when a will devises to a man with a power to give a fee, he is construed to have an estate in fee; which rule, however, must be understood with the qualification, that he has not an express estate divided from the power.

(*h*) 3 Leon. 71. 8 Vin. Abr. 206. pl. 7. 234. Mod. Ca. 31. Owen. 32. 1 Mod. 189. 4 Leon. 41.

(*i*) The reason is, because the devisee is to pay the money at all events, and he may die before he repays himself out of the estate; in which case he would be a loser by the devise, if he was not to have a fee. But if the will directs the payment to be out of the profits of the land, then the devisee cannot lose by the will, and therefore only an estate for life passes. Co. Litt. 9. b. n. (2). 8 T. R. 2.

(*k*) As to when a fee shall be implied from imposing a charge or trust upon the premises or person of the devisee, see 2 Prest. Est. 207, &c. who states the rule to be, that although no estate be limited by express words, yet to charge the land with a trust which cannot be performed, or to direct an act to be done which cannot be accomplished by means of the interest of the devisee in the land, unless more than an estate for his life pass to him, is, in wills in which the intention governs the construction, and in the absence of words of express limitation, equal to a declaration, that the person designated to execute the trust, or perform the act, or bear the charge should have the fee.

Or,

Or, in consideration that he release a debt. R. Bend. pl. 19. 1 And. 35. 2 And. 13.

Or, to pay his debts. Dy. 371. b. R. Bend. 37. Cont. Dal. 13. R. acc. Ca. Ch. 196.

Or, paying a rent out of it perpetually. 1 Rol. 835. l. 30. R. Sal. 685.

Or, paying so much per ann. though less than the annual rent, if there be a possibility of loss thereby. R. 2 Mod. 25. Pol. 399. R. Cro. El. 378.

Or, that he allow maintenance to A. for his life; for he ought to allow it immediately. R. 2 Jon. 107. Pol. 545.

So, if he devises 10*l.* per ann. and devises legacies of 120*l.* to be paid out of it within a year; for they cannot be paid out of the annual profits. R. 2 Lev. 249. 2 Jon. 113. but reported cont. Pol. 553.

So, if he devises the rest of his goods and land to A. to discharge all things charged in his will; A. shall have a fee. 1 Ch. R. 191.

So, if he devises to A. for life, and then to a son of A. except A. purchases land of the same value for his son, and then A. shall sell; A. does not purchase, &c. the son has a fee: for purchase in the second clause imports an absolute purchase. R. 1 Rol. 833. l. 50. 2 Cro. 599. Hob. 65. Vide infra.

So a devise, that his executor shall purchase 100*l.* per ann. for his son, gives him a fee. 1 Rol. 834. l. 5.

So, a devise to A. if he releases a debt to the devisor's executor. 1 And. 35. 2 And. 13.

So, a devise to three daughters, and if one dies before the others, one to be heir to the other, gives a fee. R. 1 Rol. 833. l. 45. Vide post, (N 7.)

So, if he devises to A. and if he dies under age to the heirs of the devisor, A. has a fee; for when he gives it to his own heirs, if A. dies under age, it imports that the heir of A. shall have it, if he does not so die. 2 Sand. 388.

So, if he devises to A. but if his father purchases other land of like value, to another; A. has a fee: for, purchase, imports a fee, and, to the value, ought to be, to the value of the whole estate. R. Hob. 65. 1 Rol. 834. l. 5. 835. l. 20. Vide supra.

So, if he devises to A. and if he aliens, that it shall revert, and says that he shall pay 3*l.* to B. and his heirs. R. Cro. El. 745.

So, if a man devises to another all his lands of inheritance. R. Mo. 873. (l)

All his tenant right estate in such land. (m) R. 1 Mod. 100. 2 Lev. 91. (n)

So,

(l) 1. Mr. Preston in 2 Est. 155. adds a *quære*, — 2. He recognizes the two following cases as passing a fee; where a man devised in this language, 'I devise my messuage, wherein I dwell, to my cousin H. and her assigns for eight years; and my cousin H. shall have all my inheritance if the law will;' and it was held by the Court of C. B., that an estate in fee passed to the devisee. — 3. So where a man after giving his wife an estate for life in W. in express terms, devised to her in these words, 'I give my wife the inheritance of W. if the law allow it;' a fee, it was held, passed, Hob. 2.; and see this case recognized in the text.

(m) Ld. Raymond, 831.

(n) 1. J. S. seised of lands in fee, had two houses, and devised that B., who was his

So, all his estate. R. 3 Mod. 45. R. 1 Rol. 835. l. 5. R. Mod. Ca. 109. 1 Sal. 237. (o)

Or, his whole estate, paying debts and legacies ; if his personal estate be not sufficient for the debts. R. 1 Rol. 834. l. 30.

So, if he devises to A. for years, and that A. shall have the inheritance, if the law will allow it. R. Hob. 2.

So, if he devises to A. for life, and afterwards, all my lands, tenements, and hereditaments not before disposed of, to B. ; this gives the reversion of the lands before devised, to B. in fee. R. 2 Vent. 285. Carth. 50. R. 2 Ver. 560.

Or, all the rest and remainder of my estate to B. ; this gives the reversion of the lands before disposed of, and the other lands not disposed of, to B. in fee. Semb. 4 Mod. 90. 3 Mod. 228. R. 2 Ver. 564. R. Eq. Ca. 92. (p) (q)

So, if he devises his lands in A. to one, and all other his lands, tenements, and hereditaments to his brother ; also, I give to my brother all my goods, chattels, &c. and whatsoever else I have in the world, &c. these last words give him a fee. R. in C. B. T. 8 An. inter Hopewell and Ackland. (Reported Comyns's Rep. 164.) 1 Sal. 239. 2 Ver. 687.

So, if he devises to A. for life, and the whole remainder to B. and, if B. dies under age, to C. and his heirs ; B. has a fee. R. Lut. 764.

Or, devises the fee-simple to A. and after his death to B. for life : A.

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heir at law, should renounce all his right in Blackacre to C. ; and because the words were 'all his right,' it was held to be apparent, that J. S. intended that C. should have the fee. 1 Ld. Raym. 187. — 2. And where the testatrix devised to her son, all her right, title and interest, which she then had (with interposed words referrible to other property) in the Bell Tavern, (for this was the legal application of the words, as far as related to these lands,) three Judges against Holt, (who thought the words 'all her right,' &c. did not refer to this property,) held in K. B. that the devisee had the fee, which decision was confirmed by the exchequer chamber and house of lords. 2 Prest. 153. Ld. Raym. 831. 1 Salk. 234. R. T. Holt, 744. 1 Bro. P. C. 109. — 3. The words 'all my interest in,' &c. carry a fee. 5 T. R. 292. Dougl. 763. — 4. And it seems that under a devise of 'all my messuages at W. late the estate of A. B., and all other my part, share, and interest, of and in the estates of the said A. B.,' the word interest pervades the entire clause, and passes a fee as well in the estate at H. as the other. 5 T. R. 292. — 5. See as to the words 'my half part,' 11 East. 160. — 6. Quit rents. 3 M. & S. 158. — 7. Implication of a fee from the devise of a smaller estate to the heir at law. 9 East. 267. — 8. Implication of a fee from a devise to several to be equally divided. Lofft. 224. — 9. Implication of a fee from analogy to the estate limited to a joint devisee. 3 M. & S. 523. 2 N. R. 125. — 10. Implication of a fee from analogy to the previous devise of a chattel interest. 3 M. & S. 523. — 11. Implication of a fee from a limitation over on a dying under 21. 9 East. 400. — 12. Implication of a fee from a limitation over on a dying without issue or without heirs. 3 T. R. 143. 3 Smith. 459. 16 East. 67. 2 B. & P. 324. 1 Taunt. 174. — 13. Implication of a fee from the distinctness of two clauses. 2 Mars. 413. 7 Taunt. 105. — 14. Implication of a fee from rejecting the expression 'during their lives.' 12 East. 515. — 15. Implication of a fee from the omnipotence of a residuary over a previous clause. Cowp. 308. — 16. A case where a fee passed with a partial restraint against alienation. 2 Smith, 295. 6 East. 173.

(o) 1. The reader is referred to 2 Preston, Est. 88, &c. for a luminous exposition of the force of this term. — 2. J. S. having a remainder in fee devised all his remainder ; and held that the fee passed. 1 Lutw. 762. — 3. But a gift of all the rest and residue, was confined to personal property, although there was, in a prior part of the will, a gift of some real property. 11 East. 160.

(p) Second Part of 2 Mod. Ca.

(q) The testator by one clause of his will, devised in these words, 'I give to my son, Charles Gale, the reversion of the tenement my sister now lives in, after her decease ; and the reversion of those two tenements, now in the possession of Josiah Cook ;' and held that a fee passed. 2 Ves. S. 48.

has



has the fee after the death of B. R. Dy. 357. 2 Rol. 425. Bend pl. 293. (q)

So, if he devises all his estate real and personal (r) for payment of his debts and legacies. R. Ca. Ch. 196. (s)

If he devises the fee of his estate to a woman for life, and afterwards to her son generally, the son has a fee. R. 1 And. 51.

If he devises Blackacre to A. for life, and all his lands not before disposed of to B., the reversion passes to B. in fee. R. 2 Ver. 461.

If A. by settlement tenant for life of part, and tenant in tail of other part, the reversion of the whole to him in fee, devises all his lands and hereditaments out of settlement to his nephew; the reversion passes. R. 2 Ver. 623. (t)

Vide post, (N 6.)

(N 5.) What words make an estate tail.

If (u) a man devises land to another and his issues; this makes an estate tail, in a will. 1 Rol. 835. l. 47. if he has no issue alive. 1 Vent. 229. (x)

Or, to another and his heirs male; for the law supplies the words, of his body. Co. L. 25. b. Per 2 J. 27 H. 8. 27. a. (y)

So, to another and his children, if he has no child living. R. 6 Co. 17. a. Mo. 397.

To another and the fruit of his body. R. Mo. 637. (z)

To A. and his heirs *legitime procreatis*. Mo. 637. (a)

To the heirs males of the body of B. now living; the son of B. (who was the person designed to take) takes an estate tail. R. 2 Vent. 313.

To A. and the heir male of his body, in the singular number. R. Cro. El. 313. Cont. if it be to the eldest issue male. R. Sav. 75.

To A. and his issue male. Cro. El. 40.

(q) 1 And. 51. Bendl. 300.

(r) 1. Vide 18 Ves. 193. 11 East. 518. — 2. And the word, personal estate, may carry real estate. 11 East. 246.

(s) As to the force of the words, property and effects, see 2 Prest. Est. 158, &c.

(t) And finally, any other term or phrase of a collective import, which can, in sound interpretation, and consistently with the apparent intention of the testator, be applied to real estate, will receive a construction under which it will embrace property of that description; and whenever it comprehends real property, it will pass the fee of that property, unless there be words of restriction limiting some other estate. 2 Prest. 172. and see *ibid.* for examples.

(u) As lands may be devised in fee, without any of those technical words which are required in deeds; so may they be devised in tail. 6 Cruise, 288.

(x) 3 East, 548. And. 43. 2 Blk. 1083. 3 T. R. 373. Dougk 321. 1 East, 259.

(y) 1 Ld. Raym. 185.

(z) Seed; so to a man and his wife, *et hæredi de corpore, et uni hæredi tantum*. 1 Inst. 9. b. 1 Vent. 228.

(a) 1. For, notwithstanding a devise to a man and his heirs gives him an estate in fee simple, yet if the word heirs is qualified by any subsequent words, which shew the intention of the testator, to restrain them to the heirs of the body of the devisee, the devise will in that case only create an estate tail. — 2. And, therefore the position in the text was lately confirmed, in spite of the argument, that the words 'lawfully begotten,' were surplusage, and equally applicable to collateral as to lineal heirs. 7 Taunt. 85. — 3. Upon this last case, Mr. Cruise, in 6 vol. 290. remarks, that it is observable, that the testator had in another part of his will devised to a person and to his heirs for ever; so that the variation in the phrase imported a variation of intent. — 4. Lands are devised to A. & B. and their heirs, with power to sell and divide the produce; but if they did not sell, then the rents should be divided, as they became due, between them and the respective heirs of their bodies; and held that the subsequent words restrained the generality of the former, so that A. & B. took estates, not in fee but in tail. 4 T. R. 605.

So, if a devise be to A. and if he dies without issue, to another; A. has an estate tail. R. 3 Mod. 123. R. 1 Rol. 837. l. 3. Per Hale, 1 Vent. 230. (b)

So a devise to A., and if he dies not having a son, &c. A. takes in tail male. Per Poph. Mo. 682. 1 Vent. 231.

So, a devise to A. and if he marries and has issue male, his son shall have it; and if he has no issue male, B. shall have it. R. 9 Co. 127.

So, a devise to A. for life, and then to B. and if A. and B. and his heirs die and his sister survives them, she shall have it; B. has an estate tail. R. 2 Cro. 416. (c)

A devise to A. and such heir of his body as shall be living at his death, and in default of such, the remainder to another; A. has an estate tail. R. 2 Ver. 325.

So, a devise to A. for life, and after his death to the heirs of his body, gives an estate tail, executed in A. R. Cart. 171. R. 2. Lev. 58. R. 1 Rol. 836. l. 50. R. Lut. 824. Sal. 679.

Or, to A. for life, and after his death to the men-children of his body. R. Mo. 397. Bend. 30.

Or, to A. for life, and afterwards to his heir male. Per Poph. Mo. 397. Cart. 171. 2 Ver. 325.

To A. for life, and if she marries after his death and has heirs of her body, then the heirs shall have it. 1 Rol. 839. l. 32.

To A. for life, and if she marries after his death and has an heir of her body, to such heir and the heirs of his body: and if A. dies without issue, to another: A. has an estate tail. Dub. Cro. El. 313. Cont. Mo. 593. Dub. Ow. 148, but it is badly reported. 1 Rol. 839. l. 35. 2 Rol. 417. l. 25.

To A. for life, and after his death to the heir male of his body. R. 1 Vent. 232. 2 Rol. 253. l. 50.

To A. for life, and after his death to the issue of his body by a second wife. Per Hale, but 2 J. cont. 1 Vent. 225, &c. R. in the exchequer-chamber. 2 Lev. 58. 61. Pol. 111.

To A. for life, remainder to the next heir male, and for default of heir male, to B. R. 1 Vent. 230.

To A. for life, and afterwards to the next heir of his body for life, &c. Semb. cont. 1 Leo. 257.

So a devise to A. and his heirs, and if he dies without issue, to B. gives A. but an estate tail. R. Cro. El. 525. R. 2 Cro. 290. Bridg. 1 Yel. 209. R. 2 Cro. 22. 1 Rol. 835. l. 40. 836. l. 17. R. Ray. 453. (d)

(b) 8 Vin. Abr. 234. Vide infra.

(c) 1. And a devise to a person generally without any words of limitation, which of itself would create only an estate for life, may be enlarged by subsequent words, or by implication, into an estate tail. Dyer. 333. 9 Rep. 127. Cro. Jac. 448. 1 Rol. Abr. 837. 3 Mod. 123. 1 Burr. 268. 3 Burr. 1570. 5 T. R. 335. — 2. So, as in the text, an express devise to a person for life may be enlarged by subsequent words, or by a necessary implication, into an estate tail; the doctrine being, that where an estate is devised to a person for life, with a limitation over which is not to take effect while there is any issue of the devisee for life, if there are no words in the will under which the issue can take as purchasers, the courts, in order to carry the manifest general intent of the testator into effect, have disregarded the particular intent, and by enlarging the estate devised for life into an estate tail, have let in all the issue of the first devisee. 6 Cruise, 305. 1 P. Wms. 759. Fitzg. 13. 8 Mod. 258. 1 P. Wms. 173. 3 Bro. P. C. 75. 120. 1 Burr. 38. 2 Ves. 225. 3 Bro. P. C. 80. 4 T. R. 82. 5 T. R. 299. 7 T. R. 531. 1 East, 229. 5 East, 548. 15 Ves. 564.

(d) Vide 9 East, 382. Cro. Jac. 427. 695. Willes, 1. Com. Rep. 538. 3 Bro. P.

So, a devise to A. and his heirs, and if his sister survives him and his heirs, to the sister and fee: for it appears that it was intended, heirs of his body, for he cannot be without an heir general when his sister survives. R. 2 Cro. 416. Mo. 853. 3 Bul. 195. 1 Rol. 836. l. 10. Cont. per 3. J. 2. acc. Cro. Car. 58. Hut. 85. R. acc. T. 12 W. 3. B. R. inter Nottingham and Jennings. 1 Sal. 233. (Reported Comyns's Rep. 82.)

So, a devise to A. and his heirs, and for want of heirs of him, to B; if it be proved that B. was his cousin. R. 3 Lev. 71.

But a devise to A. and his heirs, and if he dies without an heir, to a stranger; A. has a fee. Agr. 2 Cro. 416. R. Cro. Car. 58. Dy. 4. a. Cont. Dy. 4. a. in marg. R. acc. 1 Sal. 238. (e)

So, to A. and his heirs, and other land to B. and his heirs; and if B. dies without issue, living A. to A. and if both die without issue, to D. 1 Rol. 839. l. 25.

So, to A. and his heirs, paying 100*l.* and if he dies after the 100*l.* paid, without issue, to B., is a tail, and B. shall have the remainder, though A. dies before payment. R. Ray. 426.

So, if a devise be to A. and the heirs of his body, and after the death of A. that his son B. shall have it; yet A. has an estate tail. R. Mo. 593. Bend. pl. 244. 1 And. 33.

Or, to A. and the heirs of his body, and if he dies in the life of B. then his brother shall have it; his brother shall not have it, if A. dies in the life of B., if he does not die without issue. R. Cro. Car. 185.

So, if the words be, if A. dies before he has issue during the minority of B. R. Mo. 127. (f)

Or, if he dies without heirs before twenty-one, so that the estate falls to his sister. R. 2 Lev. 162.

So, if a devise be to A. (his younger son) and his heirs, and if he dies without heir, to his own right heirs; A. has but an estate tail. R. 1 Sal. 233.

So, if a devise be to A. and the heirs of his body by a second wife; it shall be an estate tail, though he has a wife living. 1 Vent. 228.

C. 154. Cowp. 410. 6 T. R. 307. 7 T. R. 276. 8 T. R. 211. 1 Eden, 424. Amb. 379. 1 Eden, 473. Amb. 385. 15 Ves. 564. 19 Ves. 73. 170.

(e) 1. In consequence of the principle, that there can be no remainder limited after an estate in fee simple; where there is a devise to a person and his heirs, and if he dies without heirs, remainder to a stranger, the remainder is void, and the devisee takes an estate in fee simple. But where lands are devised to a person and his heirs, with a remainder over to a collateral heir of the first devisee, the word heirs will be construed to mean heirs of the body, and the first devisee will take only an estate tail; because the limitation over to the collateral heir plainly denotes that the testator only meant to give the lands to the lineal descendants of the first devisee; for the first devisee could not die without heirs, as long as the collateral heir, or any of his lineal descendants, were existing. 6 Cruise, 296. 2 P. Wms. 369. Fearne's Ex. Dev. 179. Cro. Jac. 415. Forr. Rep. 1. — 2. And the rule is the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. 6 Cruise, 298. Fearne's Ex. Dev. 180. Com. Rep. 81. supra. 7 P. Wms. 23. Cowp. 234. — 3. But where a devise was to a person and his heirs, and if he died without heirs, remainder to his half-brother; the devise was held by Lord Hardwicke to pass a fee; this being in fact a devise over to a stranger as the law considers him; because he could not inherit from his brother. 1 Ves. 89.

(f) Hence an estate tail may be created by a will by mere implication, without any express words of devise. Vide etiam Com. R. 372. 7 Mod. 453. Willes, Rep. 369. 1 Eq. Abr. 197. Dy. 171. a. 1 Vent. 230.

To A. and the heirs male of her body, provided that she marries and has issue male by a man of the name of S. shall be a special tail to her and her heirs male by any of that name. R. Sal. 570.

So, if a devise be to A. and his heirs, and other land to B. and his heirs, and that the survivor shall be heir to the other if either of them dies without issue; A. has an estate tail. R. 2 Cro. 695.

So a devise to three daughters, and if any of them die before the others, one shall be heir to the other, and if the three daughters die without issue, to B., the daughters have an estate tail. R. 1 Rol. 836. l. 25. R. Mo. 864.

Or, to two sons for life, and afterwards to their sons and their heirs, and that the one shall be heir to the other, and if both die without issue, to B. the two sons have estates tail. R. 1 Rol. 836. l. 40.

So, if a man devises that land shall descend to his son, and that his executor shall take the profits till his son dies without issue, and if he dies without issue, that the whole shall remain, &c. The son has an estate tail. R. 1 Rol. 839. l. 40.

So, if a devise be to A. for life, and afterwards to the heirs male of the body of A. now living, a son of A. then living, takes in tail. R. Pol. 454. 2 Vent. 313. 2 Jon. 100.

So, if a devise be to A. and the heirs of his body for 500 years; it shall be an estate tail, and not a term. R. Mo. 773. R. 2 Cro. 62. 10 Co. 87. Semb. to be but a term for years, but no resolution. Cited to be a term for years. 1 Rol. 741. l. 47. 2 Rol. 424.

So, if a devise be to his wife for life, if she do not marry; but if she marries, to A. and the heirs of his body, remainder to B. the second son in tail, remainder to C. the third son in tail; A. the eldest son has an estate tail, though the wife does not marry: for the intent appears to entail the estate, and the words shall be transposed for that purpose. R. 3 Lev. 125. Ray. 428. (g)

#### (N 6.) What not.

But, if an estate be limited over after a death without issue upon a contingency, this does not make an estate tail, but an executory devise: as, if a man devises to A. and his heirs, and if he dies without issue in the life of B. to B. and his heirs; A. has a fee. and B. only a possibility. R. 1 Rol. 835. l. 45. Bridg. 3. 2 Cro. 592. R. Dy. 354. a. Vide ante, (N 4.) post, (N 7.)

So, if he devises to A. and his heirs, and if he dies before marriage, or within age and without issue, then to B. R. 1 Rol. 835. l. 50. Hard. 150.

If he devises to his wife, and if she has issue, to such issue, or if the issue dies within age, or before his wife, or if she has not issue, to B. the wife takes only for life. R. 2 Cro. 199. Vide post, (N 7.)

A devise to a son for life, and after his death if he dies without issue then living, to a daughter; the son takes but for life. 1 Vent. 231.

So a devise to A. for life, and if he has issue male, to such issue male and his heirs; and if he dies without issue male, to B. and his heirs; the issue has a fee, and not an estate tail. R. 1. Sal. 224.

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(g) 1. Where an estate is expressly devised to a person and the heirs of his body, no charge upon such estate will enlarge it to fee. Cowp. 833.—2. See, with reference to the rule in *Shelley's case*, 6 Cruise, 346. 1 Prest. Est.

To A., B. and C. and if they live unto full age, and have issue, then to them and their heirs; and if they die without issue, to B., shall be a fee, and not an estate tail. R. 2 Leo. 69. 3 Leo. 115.

So, a devise to A. and his heirs, and if he dies before twenty-one and without heirs of his body, to B. Dub. Hard. 148.

So a devise to A. and the heirs male of his body, and if he dies without heir of his body, to B., will be only a special tail to A. and not a tail general. R. Mo. 13. 4 Mod. 318. R. Dy. 171. a. Bend. pl. 114. 1 And. 8. (h)

So, if a devise be to A. and afterwards to his first son and the heirs of his body, then to his second, third, and other sons in the same manner, and for default of such issue to B., &c. and afterwards there is a memorandum, that A. do not alien from his heirs male, but that after default of such issue, the land shall remain to B., this does not restrain the first words; for the son of A. shall take in tail general. R. 3 Mod. 81. Pol. 657.

So, if a devise be to A. for years, and afterwards to the heirs male of his body, and for default of such issue to B.; it shall not be an estate tail to A. by implication, when by such construction his express estate for years will be merged. 1 Sal. 226.

So, if it was to A. for life, and afterwards to his first, second, and third son in tail male; and if A. dies without heir male, to B. it shall not be an estate tail in A. R. 1 Sal. 236. 2 Ver. 450. 546.

Or, to his sisters A. and B. for life, and if they leave issues, to them or the survivors and their issues, and if his sisters die without issue, or having issue such issue shall die without issue, to D. is only an estate for life in the sisters with remainders in tail to their issues. R. 2 Mod. Ca. 382. 384. (i)

Vide post, (N 7.)

### (N 7.) What words make an estate only for life.

But if a man devises (k) to another *indefinite*, he takes only for life. Lat. 40. Pol. 541. (l)

So a devise to A. for life, and afterwards to his three daughters equally to be divided; the daughters take only for life. 1 Rol. 833. l. 40. 834. l. 35. R. Mo. 594. R. 1 Ver. 65.

(k) 1 P. Wms. 605.

(i) This judgment was reversed in the house of lords, though nine judges held it an estate for life, and three an estate tail. Str. Rep. 805. Eq. Ca. Abr. 185.

(k) A term may be devised for life. 5 Burr. 2608. 2 Blk. 692.

(l) 1. Where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee will take only an estate for life. 6 Cruise, 326. — 2. Hence if a man devise in this manner, I devise Blackacre to my daughter F. and the heirs of her body begotten; *item*, I devise unto my said daughter Whiteacre; the daughter shall have but an estate for life in Whiteacre, for the word *item*, is not so much as *in the same manner*. But if a person devise Blackacre to one in tail, and also Whiteacre, the devisee shall have an estate tail in Whiteacre also, for this is all one sentence, and so the words which make the limitation of the estate go to both. 6 Cruise, 326. 1 Rol. Abr. 844. 1 Rol. Rep. 369. 1 Mod. 100. — 3. And where a person devised thus, I give and bequeath to H. my farm and lands at R., to him, his heirs and assigns for ever; and I also give and bequeath to the said H. my farm and manor of E.; held that he took the latter for life only. 14 Ves. 364. — 4. See further Cro. Car. 368. Vaugh. 262. 2 Vern. 338. 2 Wils. 80. Dougl. 761. Cowp. 235. 2 Blk. 1045. Cowp. 657. Dougl. 759. 1 B. & P. 261. 11 East, 603. 5 T. R. 83. 11 East, 594. 5 T. R. 320.



Or, part to A. for life, the other part to B., and after the death of A. the whole to B., he takes only for life. 1 Rol. 834. l. 20.

So, a devise to two sons and their heirs, (*m*) and if either dies before marriage, or within age and without issue, the whole to the survivor; the survivor takes only for life. 1 Rol. 836. l. 5.

So, a devise to three daughters, and if one dies before the others, the one shall be heir to the other, gives but for life. 1 Rol. 836. l. 35. R. cont. 1 Rol. 833. l. 45. Vide ante, (N 4.)

So, a devise to a wife until B. attains twenty-four years; and if B. dies, to A., B. takes only for life. R. 1 Rol. 836. l. 45.

So, if a man devises to A. for life expressly, remainder to his heir male and the heirs of his body, A. takes only for life. R. 1 Co. 66. b. Cro. El. 453. R. Mo. 593.

So, to husband and wife for their lives, remainder to their men-children, and they have a son *in esse*. R. 6 Co. 17.

Or, to A. for life, remainder to the sons of his body. 1 Rol. 837. l. 10. 1 Vent. 231. (*n*)

Or, remainder to his issue, where he has two sons *in esse*. Cont. Cro. El. 742, 743. for the remainder is void for the uncertainty: but Hale semb. acc. 1 Vent. 229.

So, to A. for life, and that he may dispose to which child he pleases. R. 1 Mod. 189. Lat. 40. R. 3 Leo. 71. Vide infra. (*o*)

So, if a devise be to A. generally, and to his issues or children, where he has children living; it will be but an estate for life. Per Hale, 1 Vent. 229.

To A. and his eldest issue male; though he has no issue living. R. Cro. El. 40. 1 And. 132.

(*m*) Although an estate be devised to a person and the heirs of his body, yet if the general intention of the testator can only be carried into effect by construing the words 'heirs of the body' to be words of purchase, the devisee will take for life only. Ld. Raym. 1561. 11 East, 668. 2 Burr. 1100. 1 Blk. 265. 6 T. R. 30.

(*n*) 1. Lord Hale says, that the words in this case were, to his eldest son for life, *et non aliter*, and that it was held to be an estate for life by reason of the words *non aliter*. 1 Vent. 231. — 2. So where a person devised his estate to trustees and their heirs, in trust for Popham for life, remainder to his first and other sons successively in tail male, and for want of issue male of Popham, to another person. Afterwards the testator by a codicil, reciting that he had by his will given the premises to Popham and the heirs male of his body, willed that if the estate should determine, and Popham should die without issue male, then his estate to be disposed of in a particular manner; and held that Popham had only an estate for life by the will, and that the same was not enlarged or altered by the codicil; for there being an express estate given to Popham for life, with remainder to his first and every other son, &c. the words, if Popham should die without issue male, should not enlarge his estate to an estate tail, in regard that these amounted only to make an estate tail by implication, and words of implication could never destroy what before was expressed; so that the words, if he should die without issue male, could mean no more than, if he should die without sons. 1 P. Wms. 54. — 3. So where a testator devised all his freehold estates to trustees, in trust to convey the same to Ewer Edgeley for life, remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters in tail general, as tenants in common, with power to E. Edgeley to make a jointure, and if he should die without issue, then he devised the premises over; and held that E. Edgeley took for life only. 1 P. Wms. 600.

(*o*) 1. 4 Leon. 41. — 2. For although a devise to a person generally, with a power to give and dispose of the estate devised as he pleases, creates an estate in fee-simple, yet where an estate is devised to a person expressly for life, with a power of disposal, the devisee will only take an estate for life, with a power to dispose of the reversion. Cruise, 322. 1 P. Wms. 149. 1 Ves. J. 143.

To his wife until his daughter and heir attain sixteen, and if the daughter dies, B. shall be her heir; the daughter takes only for life. Per 2 J. 3 Leo. 55.

So, a devise to A. and his heirs, and if he dies within age, to all his younger children; the younger children take only for life. R. Ca. Parl. 210. Skin. 339. 563.

Though the devise be of his share in the New River; for share imports his part only, not his estate-or interest in it. R. & aff. in Parl. Ca. Parl. 210. Skin. 339.

So, if a devise be to A. in tail, and to B. and other children other lands in tail, and if any child dies within age and not married, his part shall go to the survivors; the survivors take such part only for life. R. 2 Ver. 388. R. 2 Leo. 129. 193. 3 Leo. 180. Cro. El. 52.

So, to A. for life only without impeachment of waste, and if he dies leaving issue, to such issue and his heirs, gives only an estate for life. R. 2 Mod. Ca. 261. 383.

Or, to A. and B. for life, &c. and if either leave issue, to such issue, their survivors or survivor the mother's share and their respective issues. R. 2 Mod. Ca. 253. 256. 382. but this was reversed by the peers, 9 J. acc. 3 cont. to the judgment. (p)

So, a devise to A. for life without impeachment; and if he has issue male, to such issue male and his heirs; and if he shall not have issue male, part to B. and his heirs; and if A. dies without issue male, the other part to C. and his heirs; A. takes only for life; for the words, if A. dies without issue male, are to be taken with regard to the words before, viz. if he shall not have issue male, and by the first words the intent appears that A. shall take only for life. R. 3 Lev. 434. 1 Sal. 224.

Or, to A. for life, and if he has no issue living at his death, to B. and his heirs, but if he has issue at his death, to the heirs of A. R. Ray. 28. 1 Sid. 47.

So, a devise to A. for life, remainder to his first son in tail, remainder to his second son in tail, and so to all and every the heirs male of the body of A. and their heirs male, gives to A. only for life. R. 2 Lev. 224.

So, a devise to A. for life, and afterwards at his disposal to any of his children then living; he has only an estate for life, with power to dispose in fee. R. 1 Sal. 240.

So, if a man devises to A. *in perpetuum, habendum* to him for life. Lat. 44.

Or, the fee of his estate to A. for life, or to A. generally, with remainder to another. Lat. 44. Dy. 357. a. in marg.

Or, the fee to A. and after his death to B. who was A.'s heir; A. takes for life, remainder to B. for life, remainder to A. in fee. R. Dy. 357. Bend. pl. 293.

Or, to A. *in perpetuum*, remainder to B. in fee; A. takes only for life. Dy. 357. a. in marg.

So, if he devises to A. paying out of the profits so much; it shall be only for life. 2 Ver. 106. Vide ante, (N 4.) (q)

Or,

(p) Eq. Ca. Abr. 185 Str. Rep. 805.

(q) 1. 6 Rep. 16. a. vide Cro. Car. 157. Cro. Eliz. 330. 2 Atk. 541. — 2. And where

Or, paying for it so much per ann. which is less than the yearly value. R. Dy. 371. b. D. 6 Co. 16. a.

So a devise to A. upon condition, that if he sells but to M. only, who is a joint purchaser with me, M. may enter: A. has it only for life. R. Jon. 212.

So a devise to his wife for life if she does not marry, gives an estate *durante viduitate*. R. Ray. 428.

A devise to A. during his exile from his own country, gives an estate for life if he does not return, though his stay here was voluntary. R. 2 Jon. 74. 1 Vent. 325. 2 Lev. 191. 2 Mod. 223.

But if a devise be to A. for payment of legacies and debts of the testator and afterwards to B. for life, &c. A. has not a freehold, as he would have if it were by deed, but a chattel only; though the end of the term be uncertain. Per 2 J. Cro. El. 315, 316. 8 Co. 96. a. Semb. Al. 45.

Or, a devise to A. during his son's minority. Cro. El. 316.

Or, till B. attain his age of twenty-one years. 2 Mod. 289. R. Dy. 210. R. Cro. El. 252.

So a devise for payment of debts till B. attain the age of twenty-one, shall be a devise of a term till that time, though B. dies before such age. R. Ca. Ch. 114. R. 3 Co. 21.

So a devise to A. and the heirs males of his body, remainder to B., &c. and if A. has no issue male, but daughters, that such daughters shall take the profits till B. pay 400*l*. A. dies, having no son, but a daughter; the daughter shall have a term till B. pays 400*l*. Dub. Al. 45.

A devise to A. at his age of eighteen years, and that his wife shall take the profits, to her use till A. attains eighteen years, gives a term for so many years to the wife, which her second husband shall have, and may assign. R. Hutt. 36. (r)

(N 8.) What words make an estate joint, or in common.

If a man devises (s) land to A. and B. and their heirs, they are joint-tenants by a will, as well as if it was by deed. Bend. pl. 145. Vide Estates, (K 1., &c.) (t)

So,

where the payment of a gross sum of money, or of debts and legacies, is charged upon the estate devised, and not upon the devisee such a charge will not operate so as to give the devisee an estate in fee; and therefore if no words of limitation are added, he will take for life only. 5 T. R. 558. 1 B. & P. 558. 7 Bro. P. C. 607. 8 T. R. 497. — 3. And though a devise of land, charged with an annual payment to a third person for life, creates an estate in fee, yet it is otherwise where the annual payment is only to continue during the life of the person to whom the land is devised. Dyer, 371.

(r) See the following miscellaneous cases, in which devises have been held to be for life only. 2 Blk. 1215. Dougl. 759. 3 T. R. 83. 87. n. 5 T. R. 320. 1 East, 264. 11 East, 518. 594. 603. n. 668. 4 Taunt. 313. 2 Mars. 9. 6 Taunt. 94. 2 Mars. 405. 7 Taunt. 129. 2 Eden, 366. Amb. 670. 1 B. C. C. 75. 489. 519. 3 B. C. C. 82. 1 Ves. J. 143. 337. 7 Ves. 450. 11 Ves. 205. 14 Ves. 364. 488. 1 V. & B. 313. 2 V. & B. 222. Cooper, 111. 1 Mer. 414. 448. 654. 2 Mad. 310.

(s) 1. Bequest to two without words of severance makes a joint-tenancy. 3 Ves. 632. 11 Ves. 330. — 2. So where the intention of severance is not sufficiently clear, 6 Ves. 129. — 3. So where the words of severance are confined to the subsequent limitations. 9 Ves. 456.

(t) 1. And though the estates devised to two or more land, should have devised commencements, yet the devisees will take as joint-tenants. — 2. Hence where a person devised lands to his two sons, and the heirs of their bodies, and that his executors should

So, if he devises to his two daughters and their heirs, they are joint-tenants, and do not hold in parcenary. Dy. 350. b. Cro. El. 431.

If he devises to three, and that the survivors shall be heirs to the other, they are joint-tenants. Cro. El. 163. Ow. 25. Vide 3 Leo. 19.

If he devises to the next of his blood, all in the same degree in consanguinity take jointly. Per 2 J. 2 Rol. 256. b. (u)

If he devises to his daughters A. and B. for life, equally to be divided, (x) remainder to the heirs of B. they are joint-tenants for life. R. 6 An. Eq. Ca. 158. (y)

If he devises to two, equally to be divided, *habendum* to them and the survivor, they are joint-tenants. Eq. Ca. 158. (y) (Vide 2 Rol. 93. l. 5.) (z)

So, if a man devises land to A. in fee, and afterwards devises, by the same will, the same land to another in fee; they are joint-tenants. 3 Leo. 11. 2 Cro. 49. R. Yel. 210. Cro. El. 9. Vide ante, (F 2.) (a)

So, if by the same will, he afterwards devises a third part of the same land to another in fee. 3 Leo. 11.

But if a man devises lands to A. and B. and their heirs equally to be divided, they are tenants in common. Cont. till division made. Dy. 25. a. in marg. R. 1 Leo. 258. R. Mo. 594. R. 3 Co. 39. b. R. cont.

should have them until they came to their several ages of twenty-one years, and the question was whether one of them might enter; though it was objected, that it was a joint estate to them, which could not be, if they should have several commencements; yet held, that when either of them came to the age of twenty-one he should then have his part and possession, and yet the joint-tenancy should take place. Cro. Jac. 259. — 3. So where lands were devised to a woman and her children on her body begotten, or to be begotten, by W. A. and their heirs for ever; it was decided that the devisee and all her children took as joint tenants, and that it was no objection that by this means the several estates might commence at different times. 2 Str. 1172.

(s) Vide Palm. 305. Forrester, 251.

(x) The words 'equally to be divided' have always been held to create a tenancy in common in a will, because they imply a division, whereas between joint-tenants there is no division; unless in the case where there are other words in the will, that give a right of survivorship. 6 Cruise, 427. 3 Rep. 39. b. Cro. Jac. 448. Salk. 226. 1 Atk. 493. 10 Ves. 569.

(y) Second part of 2 Mod. Ca.

(z) Devise of all my property, both real and personal, to be divided equally between A. & B., allowing that A. takes, as part of his share, my farm at C. in the occupation of D., except my house and land, which I bought of my father's trustees, with the furniture thereof, I leave to them in common, and to the longest liver in fee; and held that A., who alone survived the testator, took all his property, both real and personal, and his whole estate and interest therein. 2 Mars. 405. 7 Taunt. 129.

(a) The Annotator in n. (1) to 1 Inst. 112. b. says, that there is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold, with Lord Coke, that the second devise revokes the first. Plowd. 541. Others think that both devises are void on account of the repugnancy. Ow. 84. But the opinion supported by the greater number of authorities is, that the two devisees shall take in moieties. The authorities for and against Ld. Coke's opinion, are well collected and arranged in a note in the English edition of Plowden, p. 541. Also amongst those who think that both devises shall operate, there is some difference as to the manner in which the two devisees ought to take. In some of the old books it is said generally, that there shall be a joint-tenancy. But according to the modern opinion, and, as it seems, the best, there will be a joint-tenancy, or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that if the two estates given by the will, have the unity or sameness of interest in point of quantity essential to a joint-tenancy, the devisees shall be joint-tenants, but otherwise shall be tenants in common. Vide 2 Atk. 373. 3 Atk. 493. Cro.

Cro. El. 330. Acc. 2 Rol. 89. l. 40. Vide Chancery, (3 V. 4.) — Estates, (K 8.) (c)

Or, to A. and B. equally, without more. Dub. Dy. 25. a. Semb. Dy. 25. a. in marg. Per Poph. cont. Cro. El. 696. R. cont. 2 And. 17. (d)

So, if a devise be to A. and B. and the heirs of either of their bodies, they are tenants in common. Semb. Dy. 25. a. in marg.

Or, heirs of every of their bodies. Dy. 326. a.

Or, to A. and B., and if either dies, his heir shall inherit. 1 Leo. 258.

Or, to three and their heirs respectively. 3 Lev. 373. (e)

So a devise to two equally, and the heirs of their bodies. R. Cro. El. 443. 696.

Or, to two and their heirs equally. Cro. El. 444. 696. (f)

So, to two equally and their heirs. R. Cro. El. 443. 695. Mo. 558. 2 Rol. 89. l. 37.

So, to two and their heirs part and part like. (g) Cro. El. 444. 696. R. Cro. Car. (h)

So, to A. and B., children of his deceased daughter, and his surviving daughter, by equal parts, viz. a moiety to the children, a moiety to the surviving daughter; A. and B. are tenants in common of their moiety. R. 3 Mod. 210.

So, to two and the heirs of their bodies equally to be divided. Per 2 J. Dal. 77.

To his two sons, to be equally divided; they are tenants in common for life. R. 1 Bul. 113.

To his two daughters, *habendum* to them in common. Dal. 77. (i)

To three daughters in tail, and that every of them be the other's heir in equal portions. R. 1 And. 194. 1 Bul. 113. (k)

To two and the survivor and his heirs, equally to be divided; they are joint-tenants for life, the inheritance in common. (l) R. Eq. Ca. 160. (m) (n)

(c) So to A. & B. between them. 2 Mer. 70.

(d) Vide supra.

(e) Vide 2 Atk. 441. 1 Ves. 102. 165.

(f) 1 Vern. 32.

(g) Though the words share and share alike, in a will, generally create a tenancy in common, they cannot do so where there is an express joint-tenancy. 3 B. C. C. 215.

(h) 1. Het. 29. — 2. For wherever an estate is devised to two or more persons, and there are words in the will indicating an intention that the devisees shall take several and distinct shares, they will be tenants in common. Stiles, 434. Cowp. 657.

(i) Vide 3 Burr. 1881. 1 N. R. 82.

(k) 1. But it was finally resolved to be a joint-tenancy, it being as much as to say that each survivor should be the other's heir. 3 Leon. 19. 2 Rol. Abr. 89. — 2. Lord Hale says a devise to two equally to be divided between them, and to the survivor of them, makes an estate in joint-tenancy, upon the express import of the last words. 1 Vent. 216. — 3. And where a person devised to Jane, the wife of B., and to Elizabeth the wife of C. all his estate, &c. to be equally divided between them during their natural lives, and after the deceases of the said Jane and Elizabeth to the right heirs of Jane for ever, it was held a joint-tenancy. 3 Bac. Abr. 681. R. T. Holt, 370. — 4. Whence it follows that wherever lands are devised to two or more persons, with a benefit of survivorship among them, they will take as joint-tenants, though there are other words in the will, indicating an intention to create a tenancy in common. 6 Cruise, 418. — 5. Vide 1 Wils. 165. 3 East, 533.

(l) See a case in which a devise was held to be either a joint-tenancy, or a tenancy in common with survivorship. 1 M. & S. 428.

(m) Second Part of 2 Mod. Ca.

(n) 2 P. Wms. 280. 9 Mod. 157. 5 Bro. P. C. 104.



To three sons and their heirs, and that the lands be equally to my said three sons; they are tenants in common. R. 2 Rol. 89. l. 50.

Yet, if a man devise to A. and B. equally to be divided, and to the survivor; they are joint-tenants, and not in common; for the intent is express, that the survivor shall have it. R. 1 Vent. 227. 2 Rol. 90. l. 10. (n)

But, to A. and B. and their heirs, and to the survivor of them to be equally divided, makes an estate in common. R. per 3 J. Powell cont. 3 Lev. 373. 1 Sal. 226, 227.

Yet, to A. and B. equally to be divided, and to the survivor and the heirs of the body of the survivor, makes a joint estate. R. Sti. 211. (o)

(N 9.) What words make a condition in a will.

Many words make a condition in a will, (p) which will not make a condition in a deed. Co. L. 236. b. Vide Condition, (A 4.)

And, if the remedy would be otherwise defeated, it shall be taken for a condition: as, if a man having two daughters, and no son, devise to one, paying so much to her sister; it will be a condition, and the other daughter shall enter for the condition broken: for otherwise she will be without remedy. R. 1 Rol. 410. l. 50. R. 1 Leo. 174. (q)

So, in all cases where there are words of condition, it shall be construed as a condition, if the remedy is not thereby defeated: as, a devise to the second son, upon condition that he pays so much to the daughters. R. 2 Cro. 56. R. Cart. 225.

So, if a devise be to A. for life, remainder to B. a condition may be annexed to the estate for life, and shall not be defeated by the remainder over. R. Dy. 127. a. (r)

And if the heir enters for the condition broken, the remainder is not thereby destroyed. Dy. 127. b.

So, if a devise be upon condition to pay 5*l.* per ann. to B. and if he does not pay, B. may distrain; it shall be a condition, though a distress is added. Bend. pl. 281. Dy. 384. Vide post, (N 10. (s))

(N 10.)

(n) Yet words of survivorship in a will, shall not defeat the effect of words importing a tenancy in common, but shall be referred to some time, as the death of the tenant for life; or even to the death of the testator, though a construction not to be adopted, if there can be any other. 4 Ves. 551.

(o) See a case where a codicil made that estate a tenancy in common which the will had made joint. 3 Anst. 727.

(p) 1. In wills, conditional limitations are all either contingent remainders, or executory devisees. Dougl. 755. n. — 2. And a conditional limitation cannot be implied, unless necessary to effectuate the intention. 4 Burr. 1929. 1 Blk. 607. — 3. And if by the grammatical construction of a will in which there are several limitations, a condition annexed to a particular limitation, extends to all the others, yet if the intention of the deviser to confine it to the particular estate, is manifest, it shall be so restrained. 1 T. R. 346.

(q) Cro. Eliz. 146.

(r) A condition annexed to the devise of an estate tail, that if the tenant in tail levy a fine, or suffer a recovery to bar the entail, the remainder man in fee shall enter, is void, since an estate cannot be deprived of the legal incidents annexed to it. 4 T. R. 601.

(s) 1. It laid down by Lord Talbot, that when a person takes upon him to devise what he has no power over, upon a supposition that his devise will be acquiesced under, Chancery will compel the devisee, if he will take advantage of the devise, to take entirely but not partially under it; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the deviser has made. Forrest. 82. — 2. A. having two daughters, B. and C. devised lands whereof he was tenant

## (N 10.) What not. (t)

But where the intent does not appear to be to make a condition, words which otherwise make a condition, shall not be construed as a condition: as, if a man devises land to B. paying a rent of 6*l.* per ann. to A. and if it be in arrear, that A. shall distrain; the clause of distress shews that the word, paying, was not intended for a condition. Dub. 8 Jac. 1 Rol. 411. l. 5. Lane 56. Vide ante, (N 9.)

If he devises rent out of land to his younger son, for his education in literature; it does not make a condition, but he shall have the rent though he be not educated in literature. 2 Leo. 154. 8 Vin. 378. pl. 16.

If he devises land to the lessee of the same land, for a longer term, under the covenants of the former lease; those words do not make a condition, though the covenants of the former lease determined with the lease. R. 2 Leo. 33. 1 And. 179. Poph. 8. Cro. El. 288.

So, if he devises land to others, upon trust, &c. it shall not be a condition, when he reposes a trust in the devisee. R. Cro. El. 288. Mo. 594. Poph. 8. Bend. pl. 287.

So, if he devises to his wife paying 30*l.* to A. and that she shall give bond for payment; for the bond was not necessary, if this was intended as a condition. R. 1 And. 50.

So, if he devises to A. and gives legacies to be paid out of it; it is only a trust. R. 2 Lev. 249.

So, if, by construing the words as a condition the remedy will be defeated, they shall not be taken as a condition, but as a limitation; as, if land of the nature of borough English be devised to the eldest son paying 40*s.* to his other children: it shall be taken as a limitation, and the other children may enter for non-payment: whereas if it should be a condition, the eldest son himself, who was heir, would take advantage of it. R. Cro. El. 205. 3 Co. 21. a. 10 Co. 41. a. R. 2 Cro. 591. (u)

So,

nant in fee-simple to B., and lands of which he was only tenant in tail to C. It was held, that if B. claimed a share of the entailed lands, she must relinquish her claim to the fee-simple lands devised to her; for the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition, that they should release to each other. 2 Vern. 581. 3 Bro. P. C. 167. 4 T. R. 741. — 3. A person by articles previous to his marriage, agreed to settle lands to the use of himself and his wife for their lives, with remainder to the use of the heirs of their bodies. He afterwards made a settlement which was not pursuant to the articles; and on the marriage of his son settled other lands on him in the usual manner, and levied a fine of the lands comprised in the articles, to the use of himself in fee. By this will be devised part of those lands to his daughters, and the rest of his estates to his grandson; and held, that the grandson being entitled to the lands comprised in the articles, should be put to his election, whether he would take under the will, or the articles. Forrest. 176. — 4. But where a will is void, as a devise of land, either from the incapacity of the devisor, or from its not being properly executed, and is good as a personal estate; the heir may take a legacy under it without relinquishing his right by descent; because as to the land there is in fact no disposition of it, and consequently no election. 4 Cruise, 177. 3 Atk. 695. — 5. But where the heir becomes entitled to a real estate by descent, in consequence of its having been purchased after the execution of his father's will, by which interests are bequeathed to him, he cannot take both, but must make his election. 13 Ves. 209. — 6. And in the case of a devise to the heir of an estate which he would have by descent, if no will was made, and to another person of an estate of which the heir is seised in his own right, the heir must elect. Gilb. Eq. Rep. 15. 6 Cruise, 20. 27.

(t) Vide supra (N 9.) in notis; and 1 Blk. 376. 4 Burr. 2052. 1 Blk. 630.

(u) 1. In consequence of the doctrine that no person but the heir can enter for a condition

So, if a man devises land to an elder son, upon condition that he pay to two younger sons, &c. and that they for non-payment shall enter. R. 1 Rol. 411. l. 28. Cro. El. 833. 920. Mo. 644. Noy. 51.

So, if he devises to a younger son, paying so much to his daughters, and if the younger son dies before full age, to the eldest son, paying, &c. and if he does not pay, to the daughters; this shall be a limitation. R. 1 Rol. 411. l. 50. Cro. El. 376. Ow. 112. Gouldsb. 154.

So, if a devise be to A. and B. and their heirs, provided that if either of them dies, the survivor shall sell for payment of legacies; it shall be a direction, &c. and not a condition, for then the whole would be defeated. R. Cart. 3.

So, if a devise be to A. for life, or in tail, provided that if A. marries without consent, &c. it shall remain to B. it shall not be a condition, but a conditional limitation, upon which B. may enter if A. marries, &c. R. 2 Lev. 21. Ray. 236. 1 Mod. 86. 1 Vent. 202. 203.

So, in all cases where a remainder is limited to another upon a breach, or failure of a condition. Per Periam, 1 Leo. 283. R. 2 Leo. 38. Ow. 8. 55. 1 Rol. 411. l. 30. 45.

As, if a devise be to A. his heir, and other land to B. and if A. molest B. the devise to him shall be void, and B. shall enter; it shall be a limitation, and not a condition. R. 2 Mod. 7.

So, if a devise be to a woman, provided that she marries and has issue by one of the name of S. and for default, to B., though the woman takes an estate tail, it shall be a conditional limitation to B. if the woman dies not having issue by S. R. Sal. 570.

But a devise for life, or in tail, upon an express condition, remainder over to another, shall be taken as a condition, though by entry for the condition broken, the remainder will be destroyed: as, a devise to A. in tail upon condition that he do not alien, and for default of issue, remainder to B. in fee. Per 2 J. 1 Rol. 412. l. 7.

If a devise be to a woman of a rent-charge for life, and if she marries, that his executor pay her 100*l.* and the rent shall cease, and return to the executor; it shall not cease till the 100*l.* be paid. Per 2 J. 1 Mod. 273.

As to a devise for payment of debts, and legacies. Vide Chancery, (3 A 3, &c.)

As to a devise of lands to be sold. Vide Chancery, (3 A 6. 7.)

### (N 11.) Condition, how expounded.

The words of a condition shall be expounded strictly: as, if a devise be to A. B. and other children severally in tail, provided that if any child dies within age and before marriage, his part shall go to the survivors; if A. dies before marriage, and afterwards B. dies before marriage; though his part which accrued by the will survives, yet that part

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condition broken, it is that a devise to the heir upon a condition will be construed a limitation. 6 Cruise, 448. — 2. A person devised his estate to his second son in fee, upon condition to pay to his four daughters 20*l.* each at their full age; and held a condition; for it should be expounded according to the common law, where it was not necessary to expound it to the contrary; but that where a devise was to an eldest son, upon such a condition, if it should be expounded to be a condition, it would be void and to no purpose, for it would descend upon the eldest son, and no remedy could be had against him. Cro. Jac. 56.

which

which he had by the death of A. does not go to the surviving children. R. 2 Ver. 388.

(N 12.) What words make an estate by implication.

So by a will a man may have an estate by implication, where such implication is necessary: (*x*) as if a man devises a house to his son and heir (*y*) after the death of his wife; the wife, by implication, shall have it for her life; for his heir cannot take till her death. Vau. 262, 263. R. per all the J. 13 H. 7. 17. b. R. Mo. 852, 853.

So, if he devises to A. his son for life, and after the death of A. and his wife, to the next heir of A. the wife of A. takes for life. R. 1 Leo. 257.

So, if he devises to all his sons except A. and if all his sons die without issue, to B. without saying, except A., he shall take in tail before B. shall have it in remainder. Dal. 44.

If a devise be to A. till his daughter and heir attains sixteen, and if the daughter dies, B. shall have it; the daughter takes by implication for life. 3 Leo. 55.

So, if he has two daughters his coheirs, and devises to one after the death of his wife; the wife takes by implication for life. R. 2. ver. 723.

So, where the implication is necessary, the devisee may take, though he takes another thing or land by express words in the same will: as, if a man devises goods to his wife, and after the death of his wife devises his house to his heir. Vau. 263.

(N 13.) What not.

But lands do not pass in a will by a possible and constructive implication, for the heir shall not be disinherited, but by a necessary implication: as, if a man devises that A. shall have his lands after the death of his son and daughter without issue; the daughter does not take an estate by implication. R. per 3 J. Vau. 260, 261, 262, &c. Vide post, (N 22.)

So, a devise to his son A. of Sofields, and also I will that my bargains from N. my son A. shall enjoy, and his heirs for ever, and for want of heirs of his body, to remain to my heir; A. shall not have an estate tail in Sofields by implication. Vau. 262. Cro. Car. 368.

If A. leases part of his land to a stranger, and devises to his wife his

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(*x*) The implication however must be a plain and not merely a possible or probable one; for the title of the heir-at-law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification. Willes, 141. 1 Ves. J. 561. — 2. So per Lord Eldon, "with regard to that expression 'necessary implication,' I will repeat here, what I have before stated from a note of Lord Hardwicke's judgment in Conyton v. Hillier; that, in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed." 1 V. & B. 466.

(*y*) 1. It was formerly held, that a devise to a *stranger*, after the death of the deviser's wife, would give the wife an estate for life by implication. Cro. Eliz. 15. — 2. But this determination has been repeatedly contradicted, because in this case two implications arise, the one that the testator meant that his lands should go to his wife, the other, that they should descend to his heir; and therefore the implication in favour of the wife being only a possible, and not a necessary one, the title of the heir must prevail. 6 Cruise, 206. 2 Lev. 207. T. Jones, 98. 1 Vern. 21. Vaugh. 259.

land

land in the occupation of the lessee, and, after the decease of his wife, wills that it, with all the rest of his lands, shall remain to his younger son; the wife does not take the land, not leased, for life. *Vau. 266. Mo. 123.*

Or, devises one acre to his wife for life, and the other acre, after the death of his wife, to a stranger. *R. 2 Leo. 226.*

If A. has 100 acres named Jacks, and lets a house and 40 acres to B. and afterwards devises the house and all lands called Jacks in the tenure of B. to his wife, and all his house and all other lands named Jacks to B. after the death of his wife; she shall not have the residue of Jacks for her life. *R. 2 Leo. 226. Vide ante, (N 3.)*

If a man devises to A. for life, and afterwards that the land shall return, after the death of him and his wife, to B. and the heirs of his body, who was not heir to the devisor; the wife takes nothing, but his heir shall have it during the life of the wife. *R. 2 Jon. 98. 2 Lev. 207.*

So, if a term be devised to his son after the death of his wife; it shall not be a devise to the wife, but goes to the executors in the mean time. *Per 3 J. 2 Cro. 75.*

So, if devised to his executor after the death of his wife; for the executor shall have it in the mean time as executor, though not as legatory. *Per Poph. Yel. Cont. 2 Cro. 75.*

If he devises Underwood, as a provision for younger children, for twenty years after the death of his wife; the heir shall have it during the life of the wife. *R. 1 Ver. 22.*

If a man, having no son, but two daughters, devises part of his lands to his wife for life; and, by another part of his will, devises all his lands after the death of his wife, to one daughter and the heirs of her body; the wife does not take an estate by implication in the lands not limited to her for life: for the words, after the death of the wife, are satisfied by the limitation of the jointure-lands after the death of the wife. *R. Eq. 115. Pr. Ch. 439. 452.*

So, if A. has two daughters by different venters, and devises a moiety of his land to his wife for seven years, and that the eldest daughter shall enter into the other moiety at her marriage, and if his wife be enseint with a son, that the son shall have the land, if enseint with a daughter, that she shall have her share with his two other daughters; the wife is not enseint; she enters into a moiety, and within the seven years the eldest daughter marries, and enters into the other moiety; and within the seven years the youngest daughter dies without issue; the eldest daughter shall have only a moiety and not three parts, for the heir of the whole blood shall have the other moiety. *1 And. 47. Dy. 342. a. Vide post, (N 22.)*

So an estate does not pass in a will by implication, when by such construction his estate expressly given would be destroyed. *1 Sal. 226. Vide ante, (N 6.)*

So, no one shall be tenant in tail by implication, when a devise is made to him expressly only for life. *2 Ver. 451. Eq. Ca. 128.*

(N 14.) What words make cross-remainders.

If a man devises lands to divers persons and the heirs of their bodies, and if they all die without issue of them or any of them, remainder to A.; they all have cross-remainders in the part of each, so that A. shall take nothing in remainder till each is dead without issue. *R. Dy 303. b. Adm. Hob. 33.*



So, if he devises Blackacre to B. and his heirs, and Whiteacre to A. and his heirs, and that the survivor shall be heir to the other, if either of them dies without issue; B. and A. have cross-remainders upon the death of the one or the other without issue. R. 2 Cro. 695.

So, if a devise be to A., B. and C. and if any of them dies before the others, the others shall be heirs to him, equally to be divided, and if all die without issue, to D. &c., each has an estate tail. R. 2 Cro. 448. 3 Leo. 19.

So, if devise be to his two daughters and their heirs, and if they die without issue, all the same lands to B; they are cross-remainders to the daughters; for the intent appears, that B. shall not take till both die without issue, and then the whole land. R. Ray. 453. 2 Jon. 172. Pol. 425, 434. Skin. 18. (z).

(N 15.) What not.

But where each takes an express and several estate by the devise, there shall not be cross-remainders by implication: as, if a devise be of a house to A. and his heirs, another to B. and his heirs, another to C. and his heirs, and if they all die without issue, the houses shall remain to D. If A. dies without issue, his house shall go immediately to D. and there shall be no cross-remainder to the survivors. R. Per 3 J. Lea dub. 2 Cro. 656.

So, if a man devises to A. and B. for their lives, remainder to their two sons, and their heirs equally, and each to be heir to the other; and if both die without issue, remainder to D. If either dies without issue, his part shall go to D. R. cont. 4 Leo. 14. R. acc. 2 Rol. 416. l. 25. but it was denied, Ray. 455. & Pol. 434.

If he devises to A. his eldest daughter and her heirs a house, another to B. his youngest daughter and her heirs, and if she dies before 16, living A., her house shall be to A. and if A. dies without issue, living B., her house shall be to B. and if both die, having no issue, all the houses shall be to others; if B. dies after 16 without issue, A. shall not have it, for they are not cross-remainders. R. per 3 J. Dy. 330. b. (Vide 2 Jon. 173.)

If a devise be to his two daughters and their issue, and for default of such issue to B. they are not cross-remainders to the issues; for they have a joint-estate for life, with several inheritances; and upon death, though the one has issue, the part of the other shall go to B. R. 2, Ver. 545, 546.

So, where several devises are made to three (a) or more, there never shall be cross-remainders to the survivors, without express words, for the confusion and uncertainty. Per Dod. 2 Cro. 656. Adm. Pol. 434. Skin. 20. (b).

As,

(z) Vide (N 15.) in notis.

(a) Cross-remainders shall not be raised between two persons without words creating a necessary implication. Sh. 969. 1 Atk. 579.

(b) 1. The rule formerly was, that cross-remainders should never be implied between more than two persons; and for two reasons; one to prevent as well the confusion which it was said would follow, from the division of an estate among many, as the uncertainty which would arise whether the surviving shares should vest in them as joint-tenants or tenants in common, and for what estate; the other to avoid the splitting of tenures. 1 Saund. 185. n. (6). 1 Vent. 224.—2. The rule now is, that wherever cross-remainders are to be raised between two and no more, the presumption is in favour of cross-

As, if a devise be to three sons severally in tail, and if any one dies without issue, the survivors shall be each others heir. Dub. Sav. 92.

(N 16.) What words make an executory devise. (c)

If a devise be to A. upon a contingency or condition precedent, A. takes nothing, but by way of executory devise (d) when the contingency, &c.

cross-remainders; where they are to be raised between more than two, the presumption is against cross-remainders; which presumption, however, may be rebutted by words or circumstances, whereby an opposite intention is expressed or can be inferred. 4 T. R. 710. Cowp. 777. 2 East, 47. n.—3. See cases in which cross-remainders were implied. 4 T. R. 710. Cowp. 31. 797. 2 East, 36. 6 East, 628. 1 Dow. 384. 1 Taunt. 234. Lofft. 443. 6 T. R. 30. 17 Ves. 64. 2 Cox, 8. Cooper 257.—4. And see a case in which they were not implied. 1 East, 229.

(c) Vide in Estate (B 16,) (B 17.) for the learning of executory devises.

(d) 1. An executory devise, says Mr. Fearne, is *defined* to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency. Fearne, 381.—2. This is the definition commonly given of an executory devise. It comprehends, indeed, every species of an executory devise; but, at the same time, it is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future;) now every contingent interest in lands limited by devise, is not an executory devise, for some contingent interests by devise are contingent remainders; therefore such a definition must be considered as defective in point of precision and accuracy. Id. 385.—3. He then defines it strictly to be such a limitation of a future estate or interest in lands or chattels, (though in the case of chattels personal, it is more properly an executory bequest,) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder. Ibid. 386.—4. These rules and distinctions he discusses in the first section of his first chapter.—5. In the second section he shews, that if a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation, which is not immediately connected with or does not immediately from the expiration of the particular estate of freehold, the latter limitation is incapable of taking effect as a remainder, but may operate as an executory devise, if confined to the requisite limits of time.—6. In his third section he *distinguishes* executory devises into three kinds, two relative to real, and the third relative to personal estate only. And explains the first sort to be, where the devisor departs with the whole fee simple, but, upon some contingency, qualifies that disposition, and limits an estate on that contingency: the second to be, where the devisor does not depart with the immediate fee, but permits it to descend to his heir, and on the happening of a future event devises it to another person.—7. And in his fourth section explains the third sort; comparing all that relates to chattels, to be, where a term, or any personal estate, is bequeathed to one for life, or otherwise, and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to another person.—8. The fifth and last section of his first chapter contains observations on some circumstances relative to the degree or quality of the property acquired by persons taking a limited or restricted interest for life in chattels, under testamentary dispositions or limitations of trusts.—9. In his second chapter the *general qualities* of executory devises are considered; and in the first section it is shewn, that an executory devise differs from a contingent remainder, first, because an executory devise is admitted only in last wills and testaments; secondly, because an executory devise respects personal estates as well as real; thirdly, because an executory devise requires no preceding estate to support it; fourthly, because when any estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines; and, fifthly, which is considered to be the great and essential difference, because an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which, or after which it is limited.—10. The second section contains an exemplification of the last position by the case of a limitation to T. in fee simple, and if T. should die without issue, living W., to W. and his heirs; in this case T. cannot bar the limitation over to W.—11

&c. happens; for in the mean time he has only a possibility: as, if a man devises to his son in fee, and if he dies in the life of A. then to A. A. shall

In the third section it is shown, that executory devises or bequests in chattels are equally secure as on real estates, against the disposition of the first devisees or legatees. — 12. But, in the fourth, that a release, from the person decidedly entitled to the future executory interest, to the first taken entitled to and in the possession of the antecedent limited interest, will discharge that future executory interest. — 13. In the fifth, that a recovery by a tenant in fee simple will not bar an executory limitation subsequently limited; but, when an estate tail is first limited, and then an executory or conditional limitation is made upon that estate, a recovery suffered by the tenant in tail will bar such executory or conditional limitation. — 14. In the fifth, that this privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the contingency on which an estate of this sort is permitted to take effect, is such as must happen within a short space of time, such as a life in being, and a few years after. — 15. The third chapter treats of executory estates, *limited upon a failure of heirs or issue*; and in the first section it is shown, that wherever an executory devise is limited to take effect after a dying without heirs, or without issue, subject to no other restriction, the limitation is void. — 16. And, in the second, that the like rule holds in the limitation of a term or personal estate. — 17. In the third, that the limitation of a personal estate to one in tail, vests the whole in him. — 18. But, in the fourth, that though a devise over after a dying without heirs, is in general void, this rule is not without exception; for if the person to whom the limitation over is made, be a relation of, and capable of being collateral heir to, the first devisee, the first devisee takes only an estate tail. — 19. In the fifth, that if a devise to one and his heirs be followed by an executory devise over, limited to take place on an event which must happen within the compass of a life in being, the executory devise over is good. — 20. And, in the sixth, that, on the same principle, where the dying without issue is restrained to the period of a life in being, an executory devise limited therein will be good. — 21. And, in the seventh, that, in these instances, an executory devise of a term, and the limitations of the trusts of a term, are governed by the same rules. — 22. In the eighth, that by the foregoing principle, an executory devise over to take effect on the decease of the first devisee without issue, is good, if the dying without issue be confined to the compass of twenty-one years after the period of a life in being. — 23. In the ninth, that, in executory devises of terms for years or other personal estates, the Court of Chancery has very much inclined to lay hold of any words in the will to tie up the generality of the expression of 'dying without issue,' and confine it to dying without issue living at the time of the person's decease. — 24. But, in the tenth, that in the case of a real estate, it seems, the construction is generally otherwise. — 25. In the eleventh, that in cases of personal estates, where such restrictive circumstances as have been mentioned appear, it matters not whether the term or other personal estate, be limited to the first devisee or legatee indefinitely, or for life expressly, or to him and his heirs, or the heirs of his body, or to his issue or children, as the restriction is equally valid under any of these circumstances, and gives effect to the limitation over. — 26. And, in the twelfth, that in the construction of these cases, the general rule appears to be, that, although in the limitation of personal estate, after a dying without issue, the words 'dying without issue,' shall not, without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate tail, by implication only; yet, on the other hand, they shall not, where there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail. — 27. In the thirteenth, that with respect to the validity of the limitation over, it is the same thing in devises of personal estate whether the first devise be to one for life expressly, and, if he die without issue, remainder over; or, to one indefinitely, and if he die without issue, remainder over. And that, if there be any differences in the cases, it may be that though in the latter case, where there are no restrictive circumstances to confine it to a devise without issue then living, the whole vests in the first devisee; yet in the former, it might, perhaps, in some instances at least, be considered as returning to the executors or personal representatives of the testator, after the death of the tenant for life. — 28. In the fourteenth, that, though an executory devise in tail or in fee to one *in esse* after a dying without issue, is void; yet an executory devise for life to one *in esse*, to take place after a dying without issue, may be good. — 29. In the fourth chapter are considered *other matters relating to executory devises*; and, in the first section, it is shown that if a term be devised to one for life,

A. shall take when the son dies (if it be in his life time) by executory devise. R. 2 Cro. 590. Vide Springing Use, in Uses, (K 7.)

A devise

and afterwards to the heirs of his body, these words are generally words of limitation and the whole vests in the first taken; but that if there appears any other circumstance or clause in the will, to show the intention that these words should be words of purchase, and not of limitation, the ancestor takes for life only, and his heir will take by purchase.—30. In the second, that an executory devise to a person not *in esse*, if confined to take effect within the limits before expressed, is now held to be good.—31. In the third, that the limitations of an estate *pur auter vie*, in such a manner as would give an estate tail in lands of inheritance, do not confer an estate tail properly so called, or operate by way of executory devise, but convey to the party an estate of freehold descendible to the heirs of his body; and a limitation over to take effect on failure of such heirs, is a good remainder. That any person entitled for the time being under the first limitation, may dispose of the whole, and bar both the issue and the remainders over, by deed, surrender, or even articles; and if he make no such disposition of the land, the person in remainder will be entitled to it on the expiration of the first estate.—32. In the fourth, that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is, by our courts, considered void in its creation.—33. In the fifth, that whenever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken.—34. In the sixth, that, notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise; yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional, (otherwise than in respect of the possibility of its expiration before the former vests or fails,) but may be so limited as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect.—35. In the seventh, that when a devise is made after a preceding executory or contingent limitation, or upon a condition annexed to a preceding estate, then, though that preceding limitation or estate should never take effect or arise, the remainder over, speaking generally, will nevertheless take place.—36. In the eighth, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest: but if the preceding executory limitation does not carry the whole interest, a subsequent one does not necessarily fail, if the preceding limitation takes effect.—37. In the ninth, that when there is a preceding vested limitation, and a future estate or interest is limited to take effect at too remote a period; or where there is no preceding limitation, and a future estate or interest is immediately limited to take effect at too remote a period; the future limitation is void in its creation, and no subsequent accident can make it good.—38. In the tenth, that when an estate of freehold is limited, with a limitation over by way of remainder over in contingency, and the estate of freehold, (as by the death of the devisee in the testator's life time,) becomes incapable of taking effect, and the limitation over is in contingency at the testator's decease, that limitation will have effect as an executory devise.—39. In the eleventh, that though a condition to determine an estate tail as to a particular person only, is void; it has been held, that a rent may be granted on a condition to cease during the non-age of any heir of the grantee.—40. In the twelfth, that a rent *de novo* may be granted to commence *in futuro*, and offices and dignities may be granted by the king, to commence *in futuro*.—41. In the thirteenth, that estates shall not cease as to part, and vest and re-vest.—42. In the fourteenth, that it was formerly held, that when an executory devise is made *per verba de presenti*; that is, when the devisee is mentioned as a person in present existence, and the commencement of the estate was not expressly defined to a future period, there the devisee must be a person capable at the death of the deviser, or otherwise the devise will be void, but this doctrine is now generally exploded.—43. In the fifteenth, that whenever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the heir.—44. But, in the sixteenth, a devise of all the rest and residue of the real estate will pass the profits as well from the testator's decease, up to the time of the estate's vesting, as from the determination of the first estate, to the vesting of a subsequent one.—45. In the seventeenth, that where there is no residuary



A devise to the eldest son and his heirs, and if he does not pay such and such legacies, to the legatees and their heirs; it takes effect as to them as an executory devise, for his heir does not take by the devise. R. Cro. El. 920. Vau. 271.

So, if a devise be to A., to commence at a time after the testator's death, and there is no devise to any one, so that it descends to the heir in the mean time; this takes effect as an executory devise; for it cannot be a remainder, there being no particular estate on which it depends. Vau. 269.

As, if a devise be to an infant *en ventre sa mere*: for till the birth, the devise does not take effect. 2 Mod. 9. 1 Sal. 229. Vide ante, (I)

So a devise, to the daughter of B. who shall marry a Norton within fifteen years, is good, by way of executory devise. R. Ray. 83.

So a devise from Michaelmas for fifteen years, remainder to A. and his heirs; if the devisor dies before Michaelmas, the remainder will be good, for it descends to the heir in the mean time. R. Cro. El. 878. Noy. 43.

So, a devise till A. attains the age of twenty-one years, and then to A. and his heirs, and if A. dies before, to the heirs of the body of B. as they shall attain their respective ages of twenty-one years; if A. dies in the life of B. yet the heir of B. if he be of full age, shall take at the death of B. by executory devise. Semb. 2 Mod. 291.

So, if a devise be to commence within the compass of a life, it will be good: as, if husband and wife seised of a copyhold and to the heirs of the husband; he surrenders to the use of his will, and devises to the heirs of the body of his wife if they attain the age of fourteen years, remainder to A. and the wife has issue by a second husband which attains the age of fourteen; the devise to him shall be good by way of executory devise. Per Twisd. and Keeling, contra Morton and Wind. Ray. 163. 1 Lev. 135.

A devise of such land to A. the eldest son, such to B., and such to C., and if any of them die, his estate shall remain to the others, shall be a good executory devise; and the part of the eldest is not merged by descent of the reversion. R. 2 Lev. 202.

So, if a devise be to commence within the compass of a life or lives. 1 Sal. 229.

Or, within twenty, or thirty years. 1 Sal. 229.

As, a devise to A. for fifteen years, and afterwards to the first son of B. Ray. If the testator shows, that he intends it *in futuro*, and not *in presenti*. 1 Sal. 229.

devise, or other particular disposition of them, the profits of personal estate between the death of the testator and the vesting of an executory estate, or between the determination of the first limitation, and the vesting of a subsequent one, will accumulate, for the benefit of the person next to take by virtue of the limitations. See, however 3 Bro. C. C. 58; 4 Bro. C. C. 144; and 2 Roper's Leg. 200.—46. But, in the eighteenth, when an absolute property in lands is given, and a particular interest in the mean time, till the devisee comes of age, the estate vests in him immediately, subject to the particular interest.—47. In the nineteenth, that possibilities of personal estates are devisable and assignable in equity.—48. In the twentieth, that an executory interest, whether in real or personal estate, is transmissible to the representatives of the devisee, when such devisee dies before the contingency happens.—49. In the twenty-first and last, that in cases of contingent or executory interests, the Court of Chancery will interfere in behalf of the persons entitled to such interests, to prevent unreasonable waste being committed by the tenants in possession.



(N 17.) What not. (e)

But a devise does not operate as an executory devise, but for necessity: and therefore, where a man devises to A. for life, and if he dies without issue living at his death, to B. it shall be a contingent remainder to B., and not an executory devise. R. Ray. 29. 1 Sid. 47. 1 Lev. 11.

Or, devises to another upon a contingency, without any previous estate to him; if there be a precedent estate for life to another, which is sufficient to support the contingent remainder, it shall never be construed an executory devise, but a remainder. Per Hale, 2 Sand. 388.

So, it shall not be an executory devise, where there is an express devise of the same land precedent. Per Wind. Ray. 164. If there be a particular estate precedent. D. 4 Mod. 284. Skin. 431.

As, if a devise be to A. for life without impeachment, and if he has issue male, to such issue male and his heirs; if he has not, to B. and his heirs; here being a freehold, the devise to the issue male shall not be executory, but a contingent remainder. R. 1 Sal. 224.

So a devise by words *de præsenti* shall not be taken as an executory devise: as, I give the inheritance to the heir of A., and A. is living at the death of the testator. 1 Sal. 226.

So, if a man devises to A. for years, and afterwards gives the inheritance to the heirs males of A., for it is a devise *per verba de præsenti*, and limited as a remainder. R. 1 Sal. 226.

Or, to A. for ten years, and then to the first son of A. and the heirs male of his body. R. 1 Sal. 229.

So an executory devise, after the death of any one without issue, is void. 1 Lev. 136. Acc. 1 Sal. 229. Ccnt. per Vau. 270. Forest. 262. acc.

But if A. be tenant in tail, the reversion to B. in fee; a devise by B. to another when A. dies without issue, is good. 1 Sal. 233. 4 Mod. 316. 319. Forest. 262. 267. 268.

If the contingency upon which the executory devise is to commence becomes impossible, the devise will be void. R. 2 Mod. Ca. 347.

When a remainder shall be contingent, or vested. Vide Estates, (B 16. 17.)

(N 18.) What words give a present estate.

If a man devises to A. until B. attains his age of twenty-one years, and then to B. and his heirs; B. has an estate in remainder vested in him immediately by the devise: for A. had it for years till B. shall attain his full age, and therefore, if B. dies before his full age, his heir shall take. R. 2 Mod. 290. Vide Chancery, (3 Y 8.) Vide post, (N 19.)

So, if a devise be to A. for fifty years if he lives so long, and after the term to the heirs males of the body of A., remainder to B. the limitation to the heirs males of the body of A. being void, the remainder to B. vests immediately. R. 1 Sal. 226.

So, if a devise be to A. and before he comes to twenty-one years, of age, to my executor; A. has a present interest, and if he dies within age, his administrator shall have it. Per. 3 J. 2 Bul. 123.

If a devise be to A. of goods to be delivered at his age of twenty-one years, and if he dies before twenty-one, then to B. if he dies before, B. shall have them immediately. R. Bend. 35. 1 And. 33.

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(e) Vide in Estate (B 16.) (B 17.) for the learning of executory devises.

So, if a devise cannot take effect as a remainder, it shall be a present interest: as, a devise to A. for years, remainder to B. in fee; B. takes the freehold immediately. R. Cro. El. 878. Noy. 43.

If chattels personal are devised to A. for life, and if he has a son, to the son; if A. has no son, or such son dies without issue, to B. for life, and then to C. his son; A. has no son, and B. dies in the life of the testator: the interest vests in C. R. Ca. Ch. 130.

If a devise be to A. for life, and there is no such person *in esse*, remainder to B. he shall take immediately. Pl. Com. 414. a.

So, if a devise be to A. for life, or in tail, and after his death without issue to B., and A. dies in the life of the testator, having issue: yet B. shall take immediately. R. Cro. El. 423. R. Dy. 122. a.

So, if A. refuses. Cro. El. 423. Pl. Com. 414. 1 Co. 101. a.

So, if A. be incapable, as, a monk, &c. Perk. Devise 566, 567. Dy. 127. b.

So, if a devise be to A. and B. and their heirs, and A. dies before the testator, B. shall have the whole. R. 1 Sal. 238.

What words give an estate *in futuro*. Vide ante, (N 16. 17. Executory Devise.) — Vide post, (N 19.)

#### (N 19.) When in reversion, or remainder.

By the st. 32 H. 8. 1. and 34 (or 34 & 35) H. 8. 5. all persons who have lands, &c. in reversion, or remainder, may devise, &c. Vide ante, (N 18.)

If a lessor disseises a lessee for life, and makes a lease to A. for the life of the first lessee, remainder to B. in fee, and the first lessee enters; yet B. may devise his remainder.

But the devise of a remainder, after an estate in fee, will be void, as well as a grant. Vide Estates.

~~When~~ a devise commences upon a limitation. Vide Limitation, in CONDITION, (T.)

#### (N 20.) When upon a contingency.

If a devise upon a contingency be in the disjunctive, if the one or the other happens, the estate commences: as, if a devise be to A. and B. and other children, and if any of the children die within age, or not married, his share shall go to the survivors; if A. dies before marriage, though he be of full age, his part goes to the survivors. R. 2 Ver. 388. Post, 229. Vide Executory Devise, ante, (N 16, 17.) — Contingent Remainder, in Estates, (B 16, 17.) — Vide Condition, (B 3.)

If a devise be to A. for life, and afterwards to the child of which A. is ensient, and if such child dies within age, then a third part to A. her executors and administrators; A. shall take a third part, though she was not ensient. R. Eq. Ca. 74.

But if the disjunctive be annexed to the act which ought to happen before the commencement of the estate, the estate does not commence, though one part happens: as, if a devise be to A. and his heirs, and if he dies before he attains twenty-one or has issue, to B. if A. attains twenty-one years, though he afterwards dies without issue, B. shall not have it. R. Pol. 645.

(N 21.)

**(N 21.)** Regard shall be had to the testator's death.

If a devise be to A. in tail, remainder to the next of his name, and at the death of the testator he has a sister unmarried, who was the next of his name; she shall take, though she was married at the death of A. without issue, by which she lost her name. R. Cro. El. 532. 576. Vide Chancery, (3 Y 17.)

But if the sister married before the death of the testator, by which she lost her name; she shall not take, but his next heir male. R. Cro. El. 582. 576.

But the death of the testator shall not be regarded in the exclusion of the intent at the time of the will made: as, if a man devises all his lands in A. and afterwards purchases more lands there, these do not pass. Pl. Com. 353. b. Vide ante, (M).

If a devise be to the wife of B. who dies, and his wife marries D. and then the testator dies; the wife of D. shall take. Pl. Com. 344. b.

Or, to A. dean of P. and his chapter, and a new dean is made in the testator's life-time; the dean and chapter shall take. Pl. Com. 344. b.

If a devise be to the next of his blood; the next at the time of the will shall take. Per 2 J. 2 Rol. 256.

If a man devises to Francis Carter a house in B. and all other messuages, lands, tenements, and hereditaments in B. and elsewhere, to James Lamas and his heirs; if Francis Carter dies in the life of the testator, Lamas shall not take the house devised to him. R. P. 11 Geo. in C. B. inter Wright and Hall. S. C. Fortesc. 182.

**(N 22.)** Words shall not be strained to disinherit an heir at law.

There shall not be a strained construction of words to disinherit an heir; and therefore whatever is not expressly disposed of descends to the heir: as, if a man devises the demesnes of a manor to his wife for life, and the services to her for fifteen years, and the whole manor after the death of his wife to a stranger; the heir shall have the services after the fifteen years during the life of the wife. R. Mo. 7. Dal. 5. Vide ante, (N 12, 13.) — Vide Chancery, (3 P 5.)

If a man has two daughters by different venters, and devises a moiety to his wife for seven years, and that his eldest daughter shall enter into the other moiety at her marriage, and if his wife be ensient with a son he shall have the land, if with a daughter she, with his two other daughters, shall have the whole, and dies, having two daughters, and his wife not ensient; she enters into a moiety and within the seven years the eldest daughter marries and enters into the other moiety, and within the seven years the youngest daughter, dies without issue; the uncle of the youngest daughter, being heir of the whole blood, shall have a full moiety; for the words, that the eldest shall enter at her marriage do not import a devise of a moiety to her, but denote when she shall have possession of of it. R. Bend. pl. 278. Dy. 342. a. Vide 1 And. 47. Vide ante, (N 13.)

If a devise be to an heir until B. attains twenty-one, and then to him; the heir shall have a fee until the contingency happens. R. 1 Leo. 101.

But

But such a construction ought to be made of a will, that all the words may stand, if it be possible. Lat. 39.

So, where the words are not ambiguous, the construction shall not be in favour of the heir. 2 Ver. 340.

(N 23.) An exception shall be expounded liberally.

So an exception shall be liberally expounded: as, if a devise be to A. in tail, to B. in tail, and all the remaining part of his estate to D. except that which he has given to A. and B., the exception extends to the fee of the estate devised to A. and B. R. 3 Mod. 228.

If he devises all his goods and furniture in such a house to his wife for life, and afterwards to his eldest son, except the pictures; the pictures hung up as furniture at the time of the will, or afterwards, and pictures in boxes, do not pass to the wife. R. 2 Ver. 538.

But where a devise was to charitable uses of lands, except the wood, underwood, and timber-trees; the soil of the wood is not within the exception. R. 1 Ch. R. 184, 135.

(N 24.) The exposition shall be according to the intent of the testator.

So a construction shall be made, if it may be, to support the intent of the testator.

As, if A. having lands in four counties, devises those in three counties to his wife in part, and part to others, and afterwards devises all generally to his wife for the benefit of his son; this shall be extended only to the land in the fourth county. R. Dal. 63.

If he devises land to B. upon condition that he pay 5*l.* per ann. to D., and afterwards gives several legacies, and then says, that for non-payment of the legacies, they may distrain, and if no distress, re-enter, &c. this does not extend to the 5*l.* per ann. Semb. Pol. 404.

If A. has issue B. and C., and B. has issue a son and C. a daughter only, and A. devises to B. for life, then to his son in tail, and for default of such issue to the daughter in fee, paying such sums, provided if C. have issue a son my lands shall go to such son and his heirs, paying as the daughter ought to pay; C. has issue a son; the remainder only, in default of issue of the son of B, goes to the son of C. by force of the proviso. R. 2 Mod. 298.

But if the intent be contrary to the rules of law, it shall be void. 2 And. 10.

And therefore, such an estate cannot be made by a will, which cannot be created by deed. 2 And. 11. 2 Rol. Rep. 425.

(N 25.) When explained by averment.

So words of a will, applicable to two persons, or things, may be ascertained by averment: as, if a devise be to John his son, and he has two sons of that name. (Vide Eq. Ca. Abr. 212. 231. 232. 5 Co. 68. 2 P. W. 137.) Vide Chancery, (3 A 2.)

But, generally, an averment shall not be allowed to expound the words of a will: as, if A. devises to his youngest son in tail, afterwards to the heirs of the body of his eldest son, remainder to his daughter in fee,

fee, and the youngest dies without issue in the life of his elder brother evidence shall not be admitted to prove, that it was the intent that the daughter should not take till both the sons died without issue. R. 2 Leo. 70.

### (O) *When a man takes by a devise.*

If there be a feoffment to the intent to perform his will, and after he devises the same land to B. in fee; B. takes by the will, and not by the feoffment. Co. L. 271. b.

So, if there be a feoffment to the uses of his will. R. 1 Vent. 194.

But if the feoffment be to B. for such estate as shall be limited by his will; B. takes by the feoffment, and the will is only a direction of the uses. Co. L. 271. b. R. Cro. El. 878. 2 Cro. 31. 6 Co. 17. b. Mo. 567. Vid. 2 Ves. 76. & MS.

Or, to such uses as shall be declared by his will. R. 1 Vent. 194, R. Jon. 8.

So, if the feoffment be to the use of the feoffee and his heirs, provided that he may dispose by his will. 1 Vent. 194.

So, if the devise would not be effectual for the whole if he took by the will, he shall take by the feoffment. Semb. Cro. El. 878.

### (P) *Pleading of a devise.*

If a man pleaded a devise after the st. 32 & 34 H. 8. and before the st. 12 Car. 2. 24. which changed tenures to common socage, he ought to show that the land was holden in socage; for it would not be otherwise intended. Cont. per 3 J. ad mensam, but Sand. acc. Dy. 329. b. But it is said in marg. to be often adjudged cont. Temp. Eliz. And this case was denied, Mo. 279. Semb. cont. 1 Sid. 265. Di acc. per Dyer, Pl. Com. 376. a. R. acc. 1 And. 246. 4 Leo. 195.

So, if he pleaded a devise before the st. 32 H. 8. he ought to show a custom to devise. Bend. pl. 145.

So, if he pleaded a devise of a rent-charge, he ought to plead seisin of land of socage-tenure. R. Cro. El. 667. Dy. 329. b. in marg.

So, if a devise was found by verdict it ought to have been found to be holden in socage: for otherwise it should not be intended. R. Mo. 279. Dy. 329. b. marg. But it was R. cont. 24 Car. 2 Rol. 697. l. 20. and 1651. ibid. l. 25.

So, if a man pleads a devise it is not sufficient to say, that he was seised generally; but he ought to show, of what estate, that the court may judge that he could devise. R. Cro. El. 530.

So, if a man pleads a devise of land, he ought to plead, that it was in writing. Per Holt, 8al. 519.

So he ought to show that the devisor died seised; for otherwise the will does not operate. Dy. 148. a. 1 Mod. 217.

But he need not say that he was of full age, &c. for that is not required by the purview of the act, but by a separate proviso. Pl. Com. 376. a.

Concerning devise, vide also Chancery, (3 A 1. &c. — 3 Y 1. &c.) — London, (N 4.)



## ESTOPPEL.

## (A) Estoppel; what shall be.

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## (A) Estoppel; what shall be.

(A 1.) By matter of record.

An estoppel is, when a man is concluded, by his own act or acceptance, to say the truth. Co. L. 352. a.

And it may be by matter of record, of writing, or *in pais*. Co. L. 352. a.

By matter of record; as, (a) if the king by his letters patent grants lands

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(a) 1. From the variety of cases, says Lord Chief Justice de Grey, relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true; first, that the judgment of a court of *concurrent* jurisdiction directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of *exclusive* jurisdiction, directly upon the point, is in like manner conclusive

lands to B. claiming nothing in the freehold; B. cannot afterwards say against the king, that he was enfeoffed by A. 1 Rol. 864. l. 6.

So, if a man levies a fine, or suffers a recovery to A. of the land of B. in the name of B. It shall be an estoppel to B. and he cannot avoid it without a writ of disceit; for he cannot aver against the record. 1 Rol. 863. l. 17, 20, 22.

If a man acknowledges a deed to be inrolled in court, and it is inrolled of record; he cannot afterwards say, *non est factum*. R. 39 H. 6. 32. b. 1 Rol. 862. l. 12.

Though it be acknowledged by his attorney for him, and not in person. R. 39 H. 6. 32. b.

Though the attorney had no special authority to do it. R. 39 H. 6. 32. b.

If A. levies a fine of the land of another, he shall be estopped to say, *Partes finis nihil habuerunt*. Jon. 459.

So a man may be estopped, by pleading upon record: as, if a *scire facias* be upon a judgment in Trinity term, and *nul tiel record* is pleaded, and judgment thereupon; the defendant cannot afterwards say, that the judgment was in Michaelmas term. R. 1 Sal. 276.

S, if A. by deed be bound that he will not sue B. and a breach is assigned, that he sued an original, and at the return in bank, *obtulit se versus B. in placito præd'*; he cannot plead, that he did not sue *modo et formâ*: for he is estopped by the record. 1 Rol. 863. l. 30.

In waste against a lessee of the demise of the plaintiff, if the defendant abates the writ by plea, that the demise was by the plaintiff and another; in another action by them he shall be estopped to say, that the lease was only by one. 1 Rol. 864. l. 10.

If a man by plea confesses a tenure *in capite*, and then alleges licence of alienation; he cannot say upon another alienation, that he does not hold *in capite*. 4 Inst. 111.

If in a *nuper obiit*, or *rationabili parte*, by one parcener against another, the defendant disclaims in blood, and claims by purchase; the plaintiff shall have a writ of *mort d'ancestor* for the whole. Co. L. 352. b.

So a man may be estopped by an imparlance, or continuance upon record. Co. L. 352. a.

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clusive upon the same matter coming incidentally in question in another court, between the same parties, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, or of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. 11 St. Tr. 261. 22 Howell's St. Tr. 538. — 2. In the case of *Moses v. Macferlan*, the court of K. B. held, that the plaintiff might recover back money which he had paid under a judgment obtained against him by the defendant in an action in a court of conscience, which action the defendant brought against him as indorser of a bill of exchange in breach of a written agreement. They admitted it, however, to be a clear principle, that the merits of a judgment can never be over-ruled by an original suit either at law or in equity; and that the judgment is conclusive as to the subject matter, until it is set aside or reversed. 2 Burr. 1006. 1009. Phill. Evid. 315. — 3. The ground of the decision in that case was, that the breach of the agreement was no defence to the action in the court of conscience, being a collateral matter not within their cognizance. But this has been since questioned, and it has been thought, that the breach of the agreement went to the essence of the debt demanded, and was necessarily as much a defence in that court, as it would have been in the court of K. B. By Eyre, C. J. in 2 H. Bl. 414. and see 7 T. R. 269 1 Esp. C. 279. Phill. Evid. 315. — 4. The case of *Moses v. Macferlan*, therefore, does not in any manner infringe, but rather confirms the general rule, that the merits of a question which has been directly determined by a court of competent jurisdiction, cannot be tried over again, between the same parties, in any shape whatsoever. Phill. Evid. 315.

Or,

Or, by any confession or admission upon record. Co. L. 852. a. (b)

So a man may be estopped by a verdict upon record: (c) as, in trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say, that in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff. (d) Semb. Sho. 28. (e)

So a man may be estopped, by not denying a matter alleged upon record: as, if A. be seised in fee, and B. brings waste against him, supposing him in of his demise; though A. pleads, no waste done, and it be found for him, he shall be estopped to say, that he is not in of the demise of B. 1 Rol. 864. l. 15.

If a prior prays in aid of his patron, and the plaintiff says, that he has a convent and common seal; if he does not deny it, but demurs, whereby he is outsted of aid, he cannot afterwards say, that he has no convent or common seal, when he did not deny it before. 1 Rol. 864. l. 40.

If the defendant prays in aid of the reversioner, and the plaintiff says, that he is seised in fee, which he does not deny, whereby he is ousted of

(b) A judgment in one action of ejectment is not conclusive in another, in consequence of the fictitious nature of the proceedings. However it is conclusive evidence of the plaintiff's title against the tenant in possession, in an action for mesne profits; for the plaintiff, to entitle himself to recover in an ejectment, must show a possessory right not barred by the statute of limitations. This judgment, like all others, only concludes the parties as to the subject matter. It proves nothing beyond the time laid in the demise; because beyond that time the plaintiff has alleged no title, nor could he be put to prove any. As to the length of time also; during which the tenant has occupied, or as to the value, the judgment proves nothing for the same reason. Phill. Evid. 327. 2 Burr. 668. Vide 3 Camp. 455.

(c) 1. A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject matter of such title, if pleaded by way of estoppel; but unless so pleaded, it will not be conclusive. 3 East, 354. 365. — 2. For if a party will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact. Salk. 276. Infra, (C). — 3. And, therefore, in an action upon the case for widening a water-channel to the damage of the plaintiff's mill; it was held, that a verdict obtained by the defendant in a former action, brought by the plaintiff for the same cause, was not conclusive as evidence under the general issue, though it would have had that effect, if it had been pleaded in bar by way of estoppel. 2 Barn. Ald. 662. — 4. When a judgment is pleaded as an estoppel, the plaintiff will not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question; but if the defendant plead not guilty in the second action, he has thereby elected to submit his case to the jury, who are to give their verdict upon the whole evidence submitted to them, per Abbott C. J. 2 Barn. Ald. 668. — 5. The jury upon the general issue are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty of the wrongful act imputed to him, per Bayley J. 2 Barn. Ald. 669. Phill. Evid. 314. 315.

(d) A verdict against two defendants will be evidence in an action, upon the same subject matter, against one of the defendants alone, if he alone was substantially interested in the former action, and the other defendant was joined with him merely for form. Thus where a person brought an action of trover against a creditor and the sheriff, for goods levied under an execution, in which action the plaintiff failed; and afterwards he brought an action of assumpsit against the creditor alone, to recover the proceeds of the sale of the goods, the judgment in the first action has held to be a bar to the second action. 2 Blk. 827. Phill. Evid. 316.

(e) The doubt there was, whether this was a good estoppel as against a co-plaintiff, a stranger to the former action; and the court gave judgment on another point. On this subject, see the judgment in the case of Outram v. Morewood, 3 East, 354, 355.

aid,

aid; he shall not afterwards say, that he is tenant for life. 1 Rol. 864. l. 45.

And matter of estoppel in a count (though it be but by way of supposal) after judgment, concludes the parties, in another action. Co. L. 352. b. Vide post, (E 5.)

So a matter expressly alleged in a plea, replication, or other pleading, after nonsuit, as well as after judgment. Co. L. 352. b.

But after a nonsuit, a matter of supposal in the count, does not estop. Co. L. 352. b. (f)

(A 2.) By matter of writing.

So a man, (g) may be estopped by matter of writing, which is not of record: as, if a condition in a bond recites, that there are divers suits in B. R. The obligor is estopped to say, that there are no suits there. R. Cro. El. 756. Vide Estates, (G 7.)

If a condition be, to perform the covenants in an indenture; he shall be estopped to say, that there is no such indenture. R. 1 Rol. 408. 1 Rol. 872. l. 30.

So in all cases, where the condition of a bond has a reference to any particular thing, the obligor shall be estopped to say, that there is no such thing: as, if a condition be, to pay all sums which T. is bound to pay to the children of B. according to the will of D.; he shall be estopped to say, that T. is not bound to pay, &c. 1 Rol. 872. l. 50. Dy. 196. a.

If a condition be, to release all the right which he has in B. for his life, he cannot say, that he has no right in B. for life. Per Tanf. 1 Rol. 873. l. 5. Vide infra.

If a condition be, to pay money for which he is bound in such a particular recognizance; he cannot say, that there is no such recognizance. R. 1 Rol. 873. l. 10.

So he cannot plead, that he was bound in such an one as appears to be no recognizance. R. 1 Rol. 873. l. 15.

If it be, to give part of the goods which A. devised to him; he cannot say, that A. did not devise. R. 1 Rol. 873. l. 20.

If a condition be, that A. and his wife shall appear in B.; he cannot say, that he has no wife. R. 1 Rol. 873. l. 25. Al. 13.

If a condition, reciting that A. carried 1200 billets to D. be, that he

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(f) A bill filed in 1757, by H. pretending to be a devisee, charging that B., the only son of testator, was illegitimate, and making M. a party, (who, in case of B.'s illegitimacy, was heir-at-law to testator) issue of *devisavit* only now directed; H. and B. proceed to the trial of that issue, M. taking no part in it; the issue found in the negative, and the bill dismissed in 1770. On a bill filed in 1776, by B., for the possession and title deeds, he has an equity against H.'s never insisting on the will or the illegitimacy; and also against M.'s insisting on the illegitimacy, after having declined to contest it on the issue. 1 S. & L. 413. 426. 436.

(g) 1. The rule, that a party is estopped by his deed, does not hold, where he is contracting for the benefit of the public; thus, as a trustee under a public turnpike act. 2 T. R. 169. — 2. Or, where to admit it, would controul a public statute. Ibid. — 3. A. having obtained a patent as for a new invention, but which, in fact, had been discovered already, enters into an agreement, under seal, with B., permitting him to use it in a particular manner. In an action on the agreement by A. against B. for using it in a different manner, B. is not estopped by his deed from disputing the novelty of the invention. 5 T. R. 438.

shall

shall pay so much a hundred: he cannot say, that he did not carry 1200. R. Al. 52.

If a lease be by indenture; the lessee shall be estopped to say, no demise. 1 Leo. 156. (*h*)

If a lease be by husband and wife; after the death of the husband the lessee shall be estopped to say, that the wife had nothing. R. 1 Rol. 872. l. 45.

So a man may be estopped by any indenture, or deed poll. Co. L. 352. a.

By an acquittance or defeazance by indenture or deed poll. Co. L. 352. a.

But, if the condition of a bond contains (*i*) a generality to be done, the party shall not be estopped to say, that there was not any such thing; as, if a condition of a bond be to perform all agreements set down by A.; the obligor may say, that no agreement was set down by A.: for the condition is general. R. 1 Rol. 872. l. 25.

If a condition be, to carry away all the marle in such a close; he may say, that there was no marle there. R. 1 Rol. 872. l. 35.

So, if it be, to release all his right in B.; he may say, that he has not any right there. Per Tanfd. 1 Rol. 872. l. 37. Vide supra.

So a deed poll does not estop a lessee, grantee, &c. for it is the deed of the lessor, grantor, &c. only. Co. L. 363. b. (*k*)

(A 3.) By matter *in pais*: — By acceptance of an estate, &c.

So a man may be estopped by matter *in pais* which is not in writing: as, if an husband, seised in right of his wife, enfeoffs A. who afterwards demises to the husband and wife for life; though the wife be in her re-mitter, and A. has not any reversion, yet in waste against the husband and wife, the husband is estopped to show such remitter, against his feoffment and acceptance of an estate from A. though it was not in writing. Lit. S. 666. 667.

So, if a wife brings dower, and recovers, she shall be estopped afterwards to claim land settled upon her for her jointure.

Though she had entered clandestinely into the land settled for her jointure, before the writ of dower brought. 1 Rol. 862. l. 20. 25. 4 Co. 5.

So a man may be estopped by acceptance of rent. Co. L. 352. a. (*l*)  
So,

(*h*) Vide infra, (A 3.)

(*i*) There can be no estoppel where the state of the fact is detailed in the indenture. 4 Taunt. 23.

(*k*) Father, under covenant for an equal division at his death of all the property he should die seised or possessed of between his two daughters or their families, though he retains the power of free disposition by act in his life, he cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. 19 Ves. 67.

(*l*) 1. A tenant is not permitted to controvert the title of the person under whom he came into possession. 2 Blk. 1259. 1 T. R. 760. n. 3 T. R. 14. 6 T. R. 62. — 2. Or, where there are more persons than one, the title of any of them. 1 B. Moore, 389. — 3. And it seems, that though a lease do not enure by estoppel, yet the tenant cannot dispute his landlord's title in an action of covenant. 3 T. R. 14. — 4. A plea, that the lessor at the time of demising had only an equitable estate in the premises, is equivalent to *nil habuit in tenementis*. 8 T. R. 487. — 5. A lessee however, even where the demise is by indenture, may, by admitting an interest in the lessor when he executed the lease, shew that his interest has expired. Vide infra, (E 8.) — 6. And where the



So, by entry, or livery, &c. Co. L. 352. a. (m)

(B) Who are bound by an estoppel.

An estoppel is reciprocal, (n) and binds both parties. Co. L. 352. a. (Vide Cro. El. 700.)

All parties (o) and privies are bound by an estoppel. Pol. 61. Jon. 460.

So a privy in blood, as the heir, shall be bound by an estoppel. Co. L. 352. a.

As, (p) if a contingent remainder be to A. in fee, who makes a lease by fine, or indenture, and then dies before the contingency happens; his heir shall be estopped by the lease. R. Pol. 61. 66.

If the eldest son of tenant in tail levies a fine, and then his father dies, and afterwards he dies without issue; his younger brother shall be estopped by the fine: for he must derive his title as heir to him. Pol. 61.

Though there was no interest at the time of the estoppel created, but the interest accrued afterwards to the ancestor. R. Pol. 66. (q)

So, a privy in estate: as, if A. demises the manor of D. by indenture, for years, and afterwards purchases the manor, and sells it to B. The vendee shall be bound by the estoppel to say, that A. had not any thing in the manor at the time of the lease. 1 Sal. 276.

So, if judgment be in a *scire facias* upon a judgment in Trinity term after *nul tiel record* pleaded, where in truth the judgment was in

a tenant by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of *non tenet* in replevin against the supposed landlord, to shew that the latter is not entitled to the rent. 1 Mars. 541. 6 Taunt. 202. — 7. The foregoing rules apply with equal force to the under-tenant of the original lessee; so that if B., claiming under A., let the lands to C., and A. afterwards bring an ejectment against C., C. cannot dispute A.'s title. 7 T. R. 488.

(m) And where a man assents to an act, and derives and enjoys a title under it, he cannot impeach it. 1 T. R. 4.

(n) 1. Estoppels must be mutual. Gilb. Ev. 28. B. N. P. 252. 11 St. Tr. 261. C. T. Holt, 134. B. N. V. 233. — 2. If a stranger to a record might plead it as an estoppel against one a privy to it, the privy might plead it against the stranger, and thus one who had no opportunity of being heard, and who perhaps has evidence not heretofore adduced, would be bound. 4 M. & S. 475. — 3. And if A. prefers his bill against B., and B. exhibits his bill against A. and C. in relation to the same matter, and a trial at law is directed, C. cannot give in evidence the depositions in the cause between A. and B., but the trial must be entirely as of a new cause. Hard. 472.

(o) 1. In considering the effect of verdicts and judgments, courts of justice will always take notice of the real parties to the suit. Phill. Ev. 316. — 2. In an action of ejectment, the lessor of the plaintiff and the tenant in possession, are judicially considered the real parties. 2 Burr. 668. — 3. For the same reason, in an action for a penalty incurred by destroying fish in the plaintiff's fishery, a verdict for the plaintiff in a former action, for a trespass committed in the same fishery, against one who justified as servant, was allowed to be evidence against the defendant. At the trial of the cause, this was admitted, after argument, as conclusive evidence of the plaintiff's right of fishery; as it appeared that the defendant in the second suit acted by the command of the same person, under whom the defendant in the first action had justified, and who was considered by the judge to be the true party in both causes. And the court of K. B., afterwards, on a motion for a new trial, considered the evidence admissible, though not conclusive. 2 Dougl. 517. Vide 3 East, 366. Phill. Evid. 317.

(p) If an ancestor has obtained a verdict, the heir may give it in evidence, as privy to it. 3 Mod. 142.

(q) If a man demises by indenture lands in which he has no interest, and afterwards buys them, he will be estopped from saying that he had no interest in them when he bought them. 1 Ld. Raym. 729.

Michaelmas term; the party to the judgment, and all who claim under him, shall be bound by this estoppel. R. 1 Sal. 276. (r)

So, a privy in law: as, the lord by escheat. Co. L. 352. a. (s)

Every one, who claims under another by act of law, or in the *post*. Co. L. 352. b.

Tenant in dower, or, by the curtesy. Pol. 61. Co. L. 352. a. (t)

So, where the title of the plaintiff is made by estoppel, the court and jury are bound by it: as, if the plaintiff in ejectment makes title by a judgment in a *scire facias* upon a judgment in Trinity term where it was in Michaelmas term; the jury cannot find that the original judgment was in Michaelmas term. R. 1 Sal. 277.

So, if a woman sues, or be sued, as sole, and judgment is against her as such, though she was covert; she shall be estopped, and the sheriff shall take advantage of the estoppel. 1 Sal. 310. R. 1 Rol. 869. l. 50. Vide *post*, (D).

If an executor or administrator admits assets, though he has them not; the sheriff may return a *devastavit*. R. 1 Sal. 310.

### (C) Who not.

But, generally, (u) a stranger (x) shall not be bound by, nor take advantage of, an estoppel. (y) Co. L. 352. a. (a)

So

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(r) 1. If several estates in remainder be limited in a deed, and one of the parties in remainder obtain a verdict in an action brought against him for part of the lands, that verdict may be given in evidence by another person in remainder, in an action brought against him for the same land, although he does not claim any estate under the first remainder-man; because they all claim under the same deed. 1 Ld. Raym. 730. This Dig. Evidence, (A 5.) B. N. P. 232. Phill. Evid. 317. — 2. So a verdict for or against a lessee is evidence for or against the reversioner. Hardw. 472. This Dig. Evidence, (A 5.) B. N. P. 232. Gilb. Evid. 35. 36. 2 Gwill. 632. Phill. Evid. *ibid*.

(s) In the same manner, persons standing in either of these relations will be bound, equally with the parties themselves, by a judgment in a former action for the same matter, if pleaded in bar. Phill. Evid. 317.

(t) 1. A verdict on a question of tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. 3 Gwill. 1237. et vide *ibid*. 1239. 2 Gwill. 701. Phill. Evid. 318. — 2. And a decree in the court of exchequer, in a cause between the vicar on one side and the impropiator on the other (establishing the vicar's title to small tithes under an ancient endowment against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes) is evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit. 3 Gwill. 1261. Phill. Evid. 318. — 3. So a judgment for or against the schoolmaster of an hospital, concerning the rights of his office, has been admitted to be evidence for or against his successor. Skin. 15. Phill. Evid. 318. — 4. And so, where on an information in the nature of a *quo warranto* against the defendant, for acting as bailiff of a corporation, the defendant pleaded that he had been duly elected under a nomination by two persons who were bailiffs of the corporation, and the point in issue was, whether they were bailiffs at the time of the election, the record of a judgment of ouster in a *quo warranto* against them, was adjudged to be good evidence against the defendant, who claimed under them. Andr. 388. 2 Str. 1109. B. N. P. 231. 2 S. N. P. 1047. 1 Burr. 2601. Phill. Evid. 318.

(u) See the exceptions to the rule in title Testmoigne.

(x) One not suing or sued in the same quality or character, is a stranger.

(y) In the instance of a *verdict*, the reason, says Mr. Phillips, (Evid. 320.) why it is not evidence against a person, who was neither a party to the former suit, nor claims under one of the parties, is because he had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. And the reason, why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because if he had been party to that suit

So a woman shall not be estopped, after coverture, by an admission upon record by her husband and her, during coverture.

As, if husband and wife admit B. to be a mulier; in another action by B. after the death of the husband, the wife may plead, that he is a bastard. 1 Rol. 865. l. 10.

If husband and wife plead a feoffment; the wife, after the death of her husband, may say, that nothing passed by the feoffment. 1 Rol. 865. l. 5.

If husband and wife make a lease, where the wife has nothing; after coverture, she shall not claim by estoppel. Cro. El. 700. Vide post, (F).

So an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother: as, if a woman, who had an estate for life, recovers in a *cui in vitá* against the donee of her husband, supposing that she had a fee, and afterwards makes a feoffment, and dies, and the donee dies without issue; the heir of the father shall recover against the feoffee of the mother, though heir also to her, and shall not be estopped by the record of the judgment in the *cui in vitá*, which affirmed the mother to have a fee. Co. L. 365. b. (b)

So, if a son be estopped by his pleading upon record, and dies, his uncle and heir shall be bound; but if he dies, and the land descends to the father, he shall not be bound by the estoppel of his son; for he cannot be heir to him. Co. L. 12. a.

So, if the heir does not claim the land from him who made the estoppel, but by his own purchase, or by another ancestor, he shall not be bound by the estoppel. Jon. 460.

Though he derives his blood from the party to the estoppel. Jon. 460, 461.

So, if the plaintiff does not rely upon the estoppel, the court and jury shall not be bound by it; but the jury may find the matter at large, and the court shall give judgment accordingly; as, in debt for rent upon a lease by indenture, if the defendant pleads *nil habuit in tenementis*, and the plaintiff replies, *quod habuit*. 1 Sal. 277. Vide Pleader, (S 5.)

### (D) Who shall take advantage of an estoppel.

Every one, who claims under an estoppel shall take advantage of the estoppel: as, a woman, who claims a dower, shall take advantage of an estoppel by deed between her husband and his tenant. 1 Rol. 868. l. 47.

suit instead of the person who gained the verdict, the result might have been different; for as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circumstances to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from availing himself of directly in his own suit. But this reason, it is evident, only applies where the verdict is offered in evidence by a third person, against the party who failed in the former action, and not where it is produced against the party who succeeded.

(a) If, therefore, B. plead that the contract upon which A. is suing him was made by C. as well, and it be found against him, C. cannot plead this finding as an estoppel when sued by B. for contribution as co-contractor. 4 M. & S. 475.

(b) 1. So a party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may shew, that the letters of administration have been since repealed. 5 Rep. 32. b. — 2. So an acquittal of a person as accessory, cannot be pleaded by him in bar, on a charge against him as principal; for the quality and nature of the offences are quite different. 2 Hal. P. C. 244. Fost. Disc. 136.

If A. demises by indenture to B. for life, and afterwards by fine grants the reversion; the conusee shall estop B. in a *quid juris clamat*, to say that A. had nothing. 1 Rol. 868. l. 50.

If a man recovers a rent-charge against B. out of his land, who afterwards sells the land to another; the vendee shall be estopped by the recovery, and the recoveror shall take advantage of it. 1 Rol. 868. l. ult.

So an officer, in the execution of process, shall take advantage of an estoppel upon record in the same action: as, if a *feme covert* be sued as

If a man be sued as a knight and baronet, though he be not a baronet, a *feme sole*; the sheriff shall take her in execution, though she be the wife of another, and hath another name. R. 1 Rol. 869. l. 50. Vide ante, (B.) and the sheriff takes him in execution; he shall not have an action against the sheriff. R. 1 Rol. 869. l. 45.

So the king shall take advantage of an estoppel, though he be not party to the record; for he is always present in the court. 2 Inst. 39.

So, every person shall take advantage of a disability, which appears by record; as, outlawry, excommunication, attainder, &c. though a stranger to the record. Co. L. 352. b. 128. b.

So, of bastardy, mulierty, certified, &c. Co. L. 352. b.

But a stranger shall not take advantage of the misnomer of any one upon record; for he is not bound by it. Co. L. 352. b.

So a stranger shall not have advantage of villenage confessed, or found; but the lord only. Co. L. 128. b.

### (E) What shall not be an estoppel.

#### (E 1.) A record *coram non judice*.

But a man shall not be estopped by a record, which was *coram non judice*: as, by a record of an action in the Marshalsea, where neither party was of the king's household. 1 Rol. 863. l. 50.

Nor, by the record of *formedon* sued in B. B. 1 Rol. 863. l. ult.

#### (E 2.) Where the truth appears by the same record.

So a man shall not be estopped, where the truth appears by the same record. Co. L. 352. b.

As, if a fine be levied, or concord made upon an original upon which a *retraxit* is entered; though the parties are estopped to say, when the fine is pleaded, that it was not upon an original (for it shall be intended well levied, till reversed by error), yet, if by the same record it appears that a *retraxit* was entered upon the original, then the parties are not estopped to say it; for it appears by the record itself. Co. L. 352. b.

If an impropriation be to a bishop of a rectory after the death of the incumbent; and by indenture, showing that matter, the bishop demises the rectory for years in the life of the incumbent, and the lease is confirmed by the dean and chapter; the bishop is not estopped by the indenture of demise: for it appears by the same deed that he then had nothing in the rectory. Co. L. 352. b.

#### (E 3.) Where the thing is consistent with the record.

So a man shall not be estopped to aver a thing consistent with the record, writing, &c. as, if A. B. senior and A. B. junior are bound by an obligation,

obligation, that the said A. B. shall not resort to such a woman, &c. it may be averred, that A. B. junior was intended. Semb. 3 Mod. 216.

If a deed, release, &c. be inrolled upon record, the defendant may plead, that nothing passed by the deed, or, not seised at the time, &c. for these pleas are consistent with the record. 1 Rol. 862. l. 35.

So, if an obligor, being warned in detinue brought for the obligation itself, pleads conditions not performed; he may afterwards plead to debt against him upon the obligation, a special *non est factum*. Semb. 1 Rol. 862. l. 45. 50.

If a man purchases a charter for licence to alien his lands; he may afterwards traverse the tenure of the king. 1 Rol. 864. l. 3.

If A. demises two closes called Lane's Meadows, the lessée shall not be estopped to say, that they are arable, and not meadow. R. 2 Mod. Ca. 312.

(E 4.) Where the allegation is uncertain.

So an estoppel ought to be certain to every intent. Co. L. 353. b. 303. a.

And therefore, if a thing be not directly and precisely alleged, it shall not be an estoppel. Co. L. 352. b.

As, if a defendant pleads, within age, viz. *ætatis 14 et non amplius*, and after judgment, brings error within seven years, and assigns error by attorney, he shall not be estopped to say that he was of full age at the time of the error assigned; for the allegation after the viz. that *fuit ætatis 14 et non amplius*, is not positive. R. 2 Jon. 170. (Vide Ray. 456.)

So, if a man pleads a licence or pardon of alienation, he is not thereby estopped to say, that he does not hold *in capite* upon another alienation: for the licence says, *quæ tenentur de nobis in capite, ut dicitur*, and the plea is not more positive. 4 Inst. 111.

So, if it be alleged by way of argument, or inference. Co. L. 352. b. Pol. 396.

So, if it by way of recital. Co. L. 352. b. (c).

(E 5.) Or only a supposal.

So, if a thing be alleged only as a supposal in a count, it shall not be an estoppel. Co. L. 352. b. Vide ante, (A 1.)

As, if in a *scire facias* upon a fine, the plaintiff makes himself heir by lineal descent, he may vary in his descent in a second *scire facias* if the first was mistaken. 1 Rol. 864. l. 27.

(E 6.) If it is not traversable, or material.

So, if the thing alleged be not traversable, or material, it shall not be an estoppel. Co. L. 352. b.

As, in debt upon an obligation alleged to be made at A.; in another action upon the same obligation, he may say that it was made at B. 1 Rol. 864. l. 25.

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(c) 1. Though a party to a deed be not concluded by a general recital, yet is he by the recital of a particular fact therein. Willes, 9. — 2. And therefore where it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee which he had not brought to an account, but acknowledged that a balance was due to the obligee; it was held that the obligor was estopped to say, that he had not received any money for the use of the obligee. Ibid. — 3. As to whether a tenant is estopped by describing lands in a lease, see Str. 610.



If in error upon a judgment, 20 Car. 2. it be assigned for error, that the defendant was within age, viz. *ætatis 14 annorum*; though the error was assigned 26 Car. 2. and in both cases the defendant appears by attorney, the judgment shall be reversed: for the material part of the plea is, that he was within age, and the words after the viz. *14 annorum* do not conclude him to be now within age. R. Ray. 456. (Vide 2 Jon. 170.)

So, if upon a distress for rent, the tenant prays in aid, alleging that he has a lease for ten years; he is not estopped afterwards to say, that he has a lease for sixty years; for in *aide prier* it is not material, for what term, if he be a lessee. Ray. 457.

In *rescous* upon a distress for rent, out of a house and one acre, the plaintiff shall not be estopped, because he at another time avowed for the same rent issuing out of a house and five acres. Ray. 457.

So, if A. claims by a deed to B. and C. and the heirs of their bodies, remainder to D., and that upon the death of C. without issue B. aliened to A. and D. entered, and issue is joined that at the entry of D. C. was alive, and this is found by verdict; after the death of C., D. may plead that nothing passed by the deed, and shall not be estopped. Ray. 457.

(E 7.) So an estoppel may be avoided where an act *in pais* is done by him, who had not power to do it.

So acceptance of rent, &c. by him, who then had no title, shall not be an estoppel. Co. L. 352. b.

(E 8.) If an interest passes, though not *pro tanto*.

So, if any interest passes from the party, there shall be no estoppel: as, if A. be tenant for life, remainder to B. in fee, and A. and B. join in a lease, if the lessee brings an ejectment upon the demise of both, in the life of A. he shall not recover; for it was only the demise of A. and the indenture shall not be an estoppel to them; for an interest passed from both. Co. L. 45. a.

If lessee for the life of B. leases for twenty-one years, and afterwards purchases the fee, and B. dies; he shall avoid his lease for years though it was by indenture; because an interest passed by his lease for the life of B. Co. L. 47. b. Mo. 20. (d)

If A. demises to B. the herbage of his own land by indenture; B. is not estopped to say, that A. had nothing in the land: because the lease was not of the land. Co. L. 47. b.

(E 9.) If there be an estoppel against an estoppel.

So an estoppel against an estoppel sets the matter at large: as, if A. claims common by grant, and, in another action against the same defendant, claims it by prescription, and the defendant admits it; A. who was estopped by his former claim to allege prescription, by the admission of the defendant shall be now at liberty to do it. 1 Rol. 874. l. 50.

So, if a defendant pleads joint-tenancy with B. and the plaintiff tra-

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(d) 1. Though a demise be by indenture, yet the lessee, admitting an interest in the lessor when he executed the lease, may show that his interest has expired. 4 T. R. 682. 8 T. R. 487. 1 N. R. 158. 3 M. & S. 516. — 2. In covenant as heir, and breach assigned for want of repairs on a lease for years, a plea that the lessor was only tenant for life, with a traverse of the reversion being in him and his heirs, was held good. 2 Wils. 143.

verses that he is sole tenant; the defendant may vouch as sole tenant: for the plaintiff is estopped to gainsay it. 1 Rol. 875. l. 5.

(E 10.) If the truth be found by verdict.

So, if the jury finds the truth of the fact, the court will give judgment accordingly, without regard to the estoppel. Vide ante, (C) — Pleader, (S 5.)

And the therefore, if a lease be by indenture by A. to B. and afterwards B. brings an ejectment for lands demised against A., and upon not guilty the jury find that A. having nothing in the land demised to B. by indenture *prout*; there shall not be judgment for B. Dub. Sav. 99.

If by confession in a court of record, by livery sued, &c. tenant in tail be estopped to say, that he does not hold of the king; upon a *diem clausit extremum* the jury shall find the truth, and thereby the heir shall be relieved. 1 H. 4. 5. b.

But where an estoppel binds the estate, and converts it to an interest, the court will adjudge accordingly; as if A. leases land to B. for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C. for ten years, and all this is found by verdict; the court will adjudge the lease to B. good, though it was so only by conclusion.

So, if A. leases for years, having only a contingent remainder not vested, and after the contingency levies a fine to B. in fee, and the whole is found by verdict; the lease for years shall be adjudged good. R. Pol. 68.

So, if A. be disseised, and during the disseisin a common recovery is had against him as tenant, to the use of B. though the recovery was void for want of a good tenant to the *præcipe*, it shall be good by estoppel against A. his heirs and assigns. R. upon a special verdict. 1 Rol. 865. l. 15. Cro. Car. 389. 1 Rol. 868. l. 35.

### (F) When an estoppel determines.

So an estoppel determines by cesser of the act, deed, &c. which made the estoppel; as, if a man takes a lease for years by indenture of his own land; if the lease determines, it shall be a determination of the estoppel. Co. L. 47. b.

If A. accepts a lease from B. and his wife, where the wife has nothing; after the death of the husband, the estoppel ceases, and that she had nothing may be pleaded in bar of an action by the wife. R. Cro. El. 700. Vide ante, (C).

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### ESTRAY.

Vide WAIFE, (F).

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### ESTREAT.

Vide PRÆROGATIVE, (D 57. 59.)

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### ESTREPEMENT.

Vide WASTE, (B 2.)

**EXCHANGE.****EVESQUE.**

Vide **CERTIFICATE**, (A 1. &c.) — **ECCLESIASTICAL PERSONS**, (C 2.)  
— **ESGLISE**, (H 11. 13.) — **IRELAND**, (E) — **PLEADER**, (3 I 9. 12.) —  
**VISITOR**, (A 8.)

**EVIDENCE.**

(Removed to **TESTMOIGNE**, which see.)

**EXACTION.**

Vide **EXTORTION** — **OFFICER**, (G 15. — H.)

**EXAMINATION.**

Vide **BANKRUPT**, (D 6, &c.) — **CHANCERY**, (P 1, &c.) — **TRIAL**,  
(B 4. 5.)

**Examination** in perpetuam rei memoriam. Vide **CHANCERY**, (R.)

**EXAMINER.**

Vide **CHANCERY**, (P 1, &c.)

**EXCEPTION.**

**Exceptions** to an answer. Vide **CHANCERY**, (L.)

**Exceptions** to a master's report. Vide **CHANCERY**, (W 3.)

**Exception** in a deed. Vide **FAIT**, (E 5, &c.)

**Exception** in a devise. Vide **DEVISE**, N 23.)

**Exception** in a pardon. Vide **PARDON**, (I.)

**EXCHANGE.****(A) Erchange.**

(A 1.) What shall be a good one.

An exchange is, when a man gives lands and tenements to another in exchange for other lands or tenements of an equal quantity in estate with that given to him. Co. L. 50.

And to such exchange the word, *excambium*, is requisite; for it cannot be supplied by any periphrasis, or circumlocution. Co. L. 50. (a)

(a) In the case, 3 Wils. 483. 2 Blk. 436. Lofft. 401. one reason given why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act. Co. Litt. 51. a. n. (2).

So an exchange may be made of things in grant; as, an advowson, rent, common, &c. Co. L. 50. a.

So, of a thing in grant, for land: as, a rent.

Though it be a rent created *de novo*. Co. L. 50. b.

So a release of a rent, *estovers*, or a right to land, &c. shall be good in exchange for land: for there needs not any transmutation of possession. Co. L. 50. b.

So tithes, for land. Co. L. 50. b.

A tenure by divine service, for a temporal seigniory. Co. L. 50. b.

An exchange shall be good, though the estates are not equal in value. Lit. S. 65. (b)

So two joint-tenants may exchange their lands, for lands to them in jointure or in common. Co. L. 51. a.

An exchange of lands, both being in the same county, shall be good without deed. Co. L. 50. (c)

### (A 2.) When it shall not be good.

But an exchange is not good, (d) without the word, *excambium*. Co. L. 50. b.

So an exchange will not be good, if it be not of estates equal in their extent and duration: for, if land in tail be given in exchange for land in fee, it will be void. Lit. S. 64.

Or, an estate tail, for an estate for life. Lit. S. 65.

Or an estate in tail general, for an estate in tail special. Lit. S. 65.

So, it will not be good without deed, if the land of either party lies in a different county. Co. L. 50. a.

Or, if it be made of things which lie in grant. Co. L. 60. a. (e)

So an exchange is not perfect, till it be executed by entry. Co. L. 50.

And therefore, if one of the parties dies before entry, the exchange shall be void; for the heir cannot enter. Co. L. 50. b.

Vide more concerning exchange, in Chancery, (3 H.)—*Enfant*, (B 3.)

**Bill of exchange.** Vide ACTION UPON THE CASE upon Assumpsit, (A 2.)—MERCHANT, F. 4. &c.

## EXCHEQUER.

Vide COURTS, (D 1, &c.)—DISMES, (M 13, &c.)—PLEADER, (3 B 4.)  
SCOTLAND, (D 14.)

(b) Vide Lofft, 416. 2 Blk. 936. 3 Wils. 483.

(c) Vide the st. 29 Car. 2. 3.

(d) 1. An exchange in the strict legal sense of the word cannot be between *three*, the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1°. The consideration of an exchange and of the implied warranty incident to it, is the receiving something with warranty from the *same* person, to whom something with warranty is given; but if there could be *three* distinct parties, each would give to one and receive from another. 2°. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title, as well as of his own. 3 Wils. 483. 2 Blk. 936. Lofft. 401. Co. Litt. 50 a. n. (1).

(e) Vide the st. 29 Car. 2. 3.

**Exchequer chamber.** Vide COURTS, (D 5, &c.) — **PLEADER**, (3 B 5.)

**Exchequer seal.** Vide PATENT, (C 3.)

## EXCOMMENGEMENT.

### (A) Excommunication.

(A 1.) What effect it shall have. p. 202.

### (B) The Writ de excommunicato capiendo.

(B 1.) When it lies. p. 204.

(B 2.) What ought to be done previous. — A certificate of the contempt. — By whom it shall be made. p. 206.

(B 3.) In what manner. p. 207.

(B 4.) How the writ shall be executed. p. 207.

(B 5.) How discharged. p. 209.

### (C) Absolution. p. 210.

### (A) Excommunication.

(A 1.) What effect it shall have.

Excommunication (*a*) is (*b*) when a man by sentence of the ordinary (*c*) is deprived of communion with the church of God.

And

(*a*) 1. The 53 G. 3. c. 127. s. 1. provides, that excommunication, together with all proceedings following thereupon, shall, in all cases, save those hereafter to be specified, be discontinued; and that in all causes which are cognizable in the ecclesiastical courts, when any person having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, shall neglect or refuse to appear, or neglect, &c. to pay obedience to such orders, &c. or when any person shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced save in the cases hereafter to be specified; but, instead thereof, it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders, &c. have not been obeyed, or before whom such contempt shall have been committed, to pronounce such person contumacious and in contempt, and within ten days to signify the same in the form to this act annexed, to his majesty in chancery, as hath heretofore been done in signifying excommunications; and thereupon a writ *de contumace capiendo*, in the form to this act annexed, shall issue from the court of chancery, directed to the same persons, and returnable in the same manner as the writs *de excommunicato capiendo* have heretofore been directed and returnable, and shall have the same force and effect as said writ; and all rules and regulations not hereby altered, nor by law applying to the said writ and proceedings thereupon, and particularly the provisions contained in the 5 Eliz. c. 23. shall be applied to the writ *de contumace capiendo*, and the proceedings following thereupon; and the proper officers in chancery are hereby required to issue said writ *de contumace capiendo* accordingly; and all sheriffs, gaolers, and other officers are required to execute the same, by taking and detaining the body of the person against whom said writ shall be directed to be executed; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited, and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, &c. in whose custody he shall be in the form to this act annexed, for discharging such party out of custody; and such sheriff, &c. shall, on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him. — 2. And by § 2. provides, that nothing in this act shall prevent any ecclesiastical court from



from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force of definitive sentences, such sentences or decrees being pronounced as spiritual censures for the offences of ecclesiastical cognizance, in the same manner as such court might have pronounced the same had this act not passed. — 3. And by § 3., no person who shall be so pronounced excommunicate, shall incur any civil penalty or incapacity in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court declaring such person excommunicate shall direct, and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his majesty in chancery, in the same manner as excommunications have been heretofore signified; and thereupon the writ *de excommunicato capiendo* shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical court. — 4. And by s. 12. if any action or suit shall be brought for any thing done in pursuance of this act, such action, &c. shall be commenced within three calendar months after the fact committed, and shall be laid and tried in the city or county wherein the cause of action shall have arisen, and not elsewhere; and the defendant shall and may plead the general issue, and give this act and the special matter in evidence, and that the same was done in pursuance of this act; and if the same shall appear to have been so done, or if any action, &c. shall be brought after the time above limited, or shall be laid in any other place than as aforesaid, then the jury shall find for the defendant; and the defendant shall have treble costs upon such verdict, or, in case of nonsuit, or discontinuance, or of judgment against plaintiff upon demurrer.

(b) 1. It is the highest ecclesiastical censure which can be pronounced by a spiritual judge against a Christian, for thereby he is excluded from the body of the church, and was disabled to bring any action, or sue any person in the common law courts. Co. Lit. 133. Godb. Rep. 624. — 2. And by the 33d of the articles of the church of England, that person who by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken by the whole multitude of the faithful, as an heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto. — 3. It was in its original, inflicted by way of punishment only for great and heinous crimes, according to the rule in the *reformatio legum*, fol. 80., '*non debet excommunicatio minutis in delictis versari, sed ad horribilium criminum atrocitatem admovenda est, in quibus ecclesia gravissimam infamiam sustinet, vel quod illis evertatur religio, vel quod boni mores pervertantur.*' — 4. Though afterwards the frequent use of excommunication was in cases of contumacy for not appearing or for disobeying sentences, though in the smallest matters, and those oftentimes of a civil nature; which was one of the principal means of bringing a contempt upon it, and yet was the only way which the spiritual court had to enforce obedience. Gibs. Cod. 1095. — 5. The use of it in cases of mere contumacy is abolished by the st. 53 G. 3. c. 127., supra; and its severities, where it is still allowed, are also mitigated by that statute. — 6. The Druids in Gaul, says Sir Henry Gwillim, 3 Bac. Abr. 329., had recourse to the process of excommunication, as appears from the account left us by Cæsar; and the features of their excommunication have so strong a resemblance to those of the excommunication of later days, that he subjoins the passage: "*Illi [Druides] rebus divinis intersunt, sacrificia publica et privata, procurant, religiones interpretantur.*" — '*Fere de omnibus controversiis, publicis privatisque, constitunt; et si quod est admittum facinus, si cædes facta, si de hæreditate, si de finibus controversia est, iidem decernunt, præmia pœnasque constituunt. Si quis aut privatus, aut publicus, eorum decreto non steterit sacrificiis interdicunt. Hæc pœna apud eos est gravissima. Quibus ita est interdictum, ii numero impiorum ac sceleratorum habentur; iis omnes decedunt; aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant; neque iis petentibus jus redditur, neque bonos ullus communicatur.*' Com. lib. 4. — 7. Mr. Hume, in his history of the reign of James I., after stating that his object was to establish a conformity of discipline and worship between the churches of England and Scotland, observes, that he never could hope to establish it, but by first procuring an acknowledgment of his own authority in all spiritual causes; and that nothing could be more contrary to the practice as well as principles of the presbyterian clergy. The ecclesiastical courts possessed the power of pronouncing excommunication; and that sentence, besides the spiritual consequences supposed to follow from it, was attended with immediate effects of the most important nature. The person excommunicated was shunned by every one as profane and impious; and his whole estate, during his life time, and all his moveables, for ever, were forfeited to the crown. Nor were the previous steps, requisite before pronouncing this sentence, formal or regular, in proportion to the weight of it. Without answer, without summons, without trial, any ecclesiastical court, however inferior, sometimes pretended, in a summary manner, to denounce

And there is a major (*d*), or a minor excommunication: by the minor he is deprived only of participation of the sacraments. Co. L. 133. b.

By the major excommunication he shall be deprived *de fidelium communione et ab omni actu legitimo*. Co. L. 133. b.

*Cum excommunicato nec orare, nec loqui palam aut absconditè, nec vesci licet*. Co. 133. b.

And therefore, if a plaintiff sue an action real, personal, or mixed, it is a good plea in disability of his person, that he is excommunicated. Lit. S. 201. Vide Abatement, (E 7). Where a statute says that a man shall be excommunicated, *ipso facto*, there needs no sentence of excommunication. 1 Vent. 146.

Yet he shall not be excommunicated, till the conviction for the offence be transmitted to the ordinary. R. 1 Vent. 146. Semb. Cro. El. 919.

But after excommunication the ecclesiastical court cannot send a pursuant or letters missive to take him; for they ought to make a certificate, and upon that a *capias excommunicatum* issues. R. Cro. El. 741.

And upon this writ they shall not break a house in the night to take the person. Cro. El. 741.

## (B) The writ de excommunicato capiendo.

### (B 1.) When it lies. (*e*)

If (*f*) a man be excommunicated and continues in contempt for forty

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nounce excommunication, for any cause, and against any person, even though he lived not within the bounds of their jurisdiction. And by this means, the whole tyranny of the Inquisition, though without its order, was introduced into Scotland.

(*c*) 1. The sentence of excommunication can only be pronounced by the bishop, or other person in holy orders, being a master of arts at least. Gibs. Cod. 1095. — 2. Also the priest's name pronouncing such sentence is to be expressed in the instrument issuing under seal out of the court. Ibid.

(*d*) The greater excommunication, says Sir Henry Gwillim, seems to have been formerly the same with the Anathema; though in later times there was a material difference between them. 3 Bac. Abr. 329. He refers to the first volume of M. Du Boulay's *Histoire du Droit Public Ecclesiastique François*, for an admirable dissertation upon excommunications and interdicts.

(*e*) 1. As to its original, vide supra (A 1.) in notis. — 2. To which may be subjoined, in the words of Dr. Robertson, that the censure of excommunication was instituted originally for preserving the purity of the church; that obstinate offenders, whose impious tenets or profane lives were a reproach to Christianity, might be cut off from the society of the faithful. This, ecclesiastics did not scruple to convert into an engine for promoting their own power, and inflicted it on the most frivolous occasion. Whoever despised any of their decisions even concerning civil matters, immediately incurred this dreadful censure, which not only excluded them from all the privileges of a Christian, but deprived them of their rights as men and citizens; and the dread of this rendered even the most fierce and turbulent spirits obsequious to the authority of the church. Hist. Charles V. 2 vol. 160, 161. — 3. The spiritual consequences which the sentence entailed, the proofs employed to establish them, and the ends to which the sentence was applied, will be understood by referring to an extract from an ancient work, given by the editor of the Quarterly Review, in the article "Cemeteries of Paris;" commencing with "When the blessed St. Augustine," &c. — 4. It seems agreed, that wherever the spiritual court hath jurisdiction in any cause, and the party refuses to appear to their citation, or after sentence, being admonished, refuses to obey their decree, that he may be excommunicated. Rol. Abr. 883. 12 Rep. 76. — 5. That anciently the king's tenants who held in *capite*, and whose attendance was necessary on the person of the king, could not be excommunicated, see 2 Inst. 631. Gilb. Cod. 1102. — 6. That a bishop or other peer of parliament may be excommunicated, see 7 Mod. 56. — 7. And that a clergyman of the church of England, acting contrary to the rules and discipline thereof, may, notwithstanding the toleration act, be excommunicated, see 2 Atk. 498.

(*f*) It lies on an appeal and complaint of nullity; for it is their form to which regard must be had. Str. 1189.

days,

days, upon certificate by the ordinary to the chancery, a writ *de excommunicato capiendo* issues. (g) Cro. El. 741.

And by the st. 9 Ed. 2. 12. such writ shall not be denied, though it be against the king's tenant.

By the common law, such writ not returnable in chancery. 1 Sal. 293.

And needed not to mention any cause but for contempt; for the cause appeared to the chancery by the *significavit* of the bishop. 1 Sal. 293. (h)

But since the st. 5 El. 23. the cause of excommunication ought to be mentioned in the writ, whereby B. R. where it is returnable by that statute, may judge of it. 1 Sal. 293. (i)

By the st. 5 El. 23. the writ of *excommunicato capiendo* shall bear *teste* in term, and be (k) returnable in B. R., some day in the next term, and there shall be twenty days between the *teste* and return.

If it was not returned, by the common law there was an *alias*, and *pluries*, and afterwards an attachment against the sheriff, returnable in B. R. F. N. B. 62. O.

And now, by the st. 5 El. 23. the writ made and sealed shall be brought into B. R. and there delivered (l) of (m) record to the sheriff, who, failing to make return, shall be amerced at the discretion of the justices.

If the party live in Wales, any county palatine, or cinque-port, the *significavit* into chancery shall be sent by *mittimus*, &c. and they shall direct process to their officers there.

If

(g) 1. It is said that the writ *de excommunicato capiendo*, is a liberty or privilege peculiar to the church of England, above all the realms in Christendom. For though the assistance of the secular arm hath ever been afforded to the church in most other Christian countries, as well as in this, yet in no instance is it perhaps so surely and effectually reached out as by the execution of this writ. Gibs. Cod. 1102. — 2. It has been said likewise that the writ is *debitum justitiæ*, and not made to depend upon the pleasure of the prince. Ibid. — 3. But in 2 Inst. 623. 631., it is laid down that the writ, *de gratiâ regis procedit*.

(h) Lord Raym. 619.

(i) 1. Lord Raym. 618. 1 Str. 43. 76. 2 Abr. 946. 1067. — 2. The cause of excommunication is sufficiently stated in a writ *de excommunicato capiendo*, when it is alleged to be 'in a cause of defamation merely spiritual.' 7 T. R. 153. — 3. So 'for slander or defamation.' 2 Str. 950. — 4. And false grammar is no ground of objection. Str. 265. — 5. But if the writ command the sheriff to hold two defendants 'till they have made satisfaction,' so that if one alone made satisfaction he could be discharged, the writ shall be quashed. And. 220.

(k) The writ is directed to the sheriff (or to the proper officer when the sheriff is incapacitated); and therefore if a prisoner for debt in Newgate is removed to the Fleet, and afterwards excommunicated, chancery will not order the cursitor to make out a writ directed to the warden of the Fleet, but it must be directed to the sheriff, who may return *non est invent.* into B. R., and that court will grant a *habeas corpus*, and then charge the prisoner with *excommunicato capiendo*. 3 P. Wms. 53.

(l) The statute runs, 'and there in the presence of the justices, shall be opened and delivered,' &c.; and that the precise form of the statute must herein be observed, and that the writ must be brought and openly delivered in court. See Cro. Jac. 567.

(m) 1. That the writ must be enrolled and delivered to the sheriff in convenient time, see Cro. Car. 583. Vent. 338. — 2. And the prisoner may be discharged on motion as well as by pleading this matter at the return of the *habeas corpus*. Vid. Sid. 285. — 3. But in one case, for such a fault the court refused to discharge the prisoners, or to bail them, because they were dangerous persons; and refused to take the oath of allegiance. Sid. 165. — 4. It was formerly doubted, whether after the writ had been issued out of chancery, and brought into the court of B. R., and there delivered to the sheriff, but not actually returned into B. R., the court of chancery, on a plain error appearing, could supersede it. 1 P. Wms. 435. — 5. But it was determined by Lord Hardwicke, that after the return of the writ is out, the court of chancery cannot, on a petition to quash the writ, do any thing in it, as they have no authority; for the

And if a writ of *excommunicato capiendo* be delivered upon record in B. R. process goes from that court till the party be taken without resorting to the chancery for a new original. (n)

Though it be not for any of the causes mentioned in the statute. R. 1 Rol. 174.

(B 2.) What ought to be done previous. — A certificate of the contempt. — By whom it shall be made.

Before the writ of *excommunicato capiendo* be granted, there ought to be a certificate (o) to the chancery of the contempt of the party, by the ordinary by his letters under seal. 1 Sal. 293.

And such certificate ought to be by the bishop, or immediate ordinary.

As, by the archdeacon of Richmond, Co. L. 134. a.

By the guardian of the spiritualities in time of vacation: as, by the dean and chapter, archbishop, &c. if he be guardian of the spiritualities. F. N. B. 62. N. Co. L. 134. a. (p)

So, if the bishop be *in remotis*, viz. beyond sea, or out of his diocese, the certificate may be by his chancellor, or vicar general. F. N. B. 62. N. (p)

And the certificate shall be good, though the bishop be not *in remotis*: for that is not traversable. F. N. B. 62. N.

So a bishop elect may make a certificate, before he be consecrated. Co. L. 134. a.

But none except the bishop, or other ordinary, that is immediate officer to the king's courts, regularly can make a certificate of excommunication. Co. L. 134. a.

And therefore, upon the pope's bull certifying an excommunication, the writ of *excommunicato capiendo* did not go. F. N. B. 64. F.

Nor, upon a certificate, that another bishop certified him of it. F. N. B. 65. A.

the court of B. R. have the cognizance of it, and they can compel the sheriff to return it, and the application to quash it must be to them. If, indeed, the writ issue in the vacation, and be not yet returnable (for it must be returned on one of the return days in the term), the court of chancery will give relief and discharge the party out of custody. 3 Atk. 479. — 6. But if the writ issued from the court of chancery be opened and enrolled in B. R., and on exceptions taken, a rule be made for the prosecutor to show cause, why the delivery of the writ to the sheriff shall not be staid, and before that can be done the return be out, another writ may be sued out from chancery, but not from B. R. 2 Str. 1189. — 7. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant, and before the return the defendant moved and had it superseded; for the court said, that they could judge of it by the entry, and since it appeared that the defendant could not be legally detained upon it if he was taken, it was proper to supersede it, to prevent him from being restrained of his liberty contrary to law; that the intent of this statute in directing the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit*, and they were not to wait till the return, till all the inconveniency, which they should have prevented by not issuing the writ, had happened. 1 Str. 43. 10 Mod. 350. Bac. Abr. 542.

(n) If the writ is issued from chancery, opened and enrolled in B. R., and, on exception taken, a rule made for prosecutor to show cause why the delivery of the writ to the sheriff should not be stayed, and before that can be done the return is out, another writ may be sued out from chancery, not from B. R. Str. 1189.

(o) An excommunication may be certified by letters testimonial, as well as by direct certificate. But in both cases the certificate must be pleaded *sub sigillo*, as well in equity as at law. 1 Vent. 222. Mitf. pl. 186.

(p) Vern. 222. 3 Keb. 60. 69.

Nor,



Nor, upon the certificate of an official, commissary, (q) abbot, &c. F. N. B. 64. F. (r)

(B 3.) In what manner.

The certificate of the bishop ought to signify, that he has been excommunicated for forty days. F. N. B. 64. D. 12 Co. 76.

That he was excommunicated by special name, and in a special suit against him *ex officio*, or by the party: for otherwise he does not incur the greater excommunication. F. N. B. 64. F.

That he was commorant within the diocese of the bishop, by whom he is excommunicated. R. Mo. 467. Semb. Lat. 174. (s)

By what bishop he was excommunicated. R. Mo. 775.

And for what cause articles were exhibited. 1 Rol. 146. (t) Semb, Otherwise it will not appear whether it was within the jurisdiction. 1 Sal. 293.

(B 4.) How the writ shall be executed.

If the party be taken upon the *excommunicato capiendo*, he shall be committed to prison. (u)

And the sheriff shall return his writ; but by the st. 5 El. 23. he need not bring the body into court.

If the sheriff returns, *non est inventus*, by the st. 5 El. 23. there shall go a *capias* with proclamation, on which the sheriff shall make proclamation ten days before the return, at the county-court, assises, or

(q) By the antient common law, as was said by Hankford, 11 H. 4. 64. a. a commissary might certify excommunication; and that he was restrained by parliament. 3 Bac. Abr. 335.

(r) Vide 8 Co. 63. Ro. Abr. 434. reg. 65.

(s) An excommunication is good, if the party was resident within the jurisdiction at the time of citation, though not when excommunicated. 7 T. R. 153.

(t) 1. It seems that at common law the *significavit* of an excommunication might be upon a general clause, as *propter contumaciam*, or *de non parendis mandatis ecclesie*. Salk. 293. 350. Ld. Raym. 586. 618. Gibs. Cod. 1097. — 2. But now by the 5 Eliz. c. 23. the cause must be set forth in the writ *de excommunicato capiendo* itself; because by that statute the writ is made returnable in B. R., which would be to no purpose if the cause were not set forth in the writ, so as to enable the court to judge thereof. — 3. But it was always holden, that the bishop's certificate signifying the excommunication into chancery, on which the writ of *excommunicato capiendo* issued, ought to comprise the particular cause of the excommunication; so that the court might judge whether it were a matter within their jurisdiction or not. 14 H. 4. 14. B. Rol. Abr. 883. — 4. The cause may be set forth generally. 2 Atk. 498. — 5. If it is said that the offender *officiated*, without saying *where*, it is sufficient, for the term implies that it was in public. Ibid. — 6. And so it is, though it is not said that he officiated at the time of the excommunication in the diocese of L. Ibid. — 7. So likewise, though it does not say that the excommunication was pronounced by a person in holy orders; there being an assertion that he was lawfully authorised. Ibid. — 8. So though it does not say when the excommunication was pronounced. Ibid. — 9. A *significavit* of excommunication in a cause for subtraction of tithes, and other ecclesiastical duties, is good; though if in the disjunctive or other, &c. it is bad for uncertainty. C. T. H. 314. Salk. 293. Ld. Raym. 619. 2 Atk. 499. — 10. Where in a writ of *excommunicato capiendo*, the recital of the *significavit* was, that he was excommunicated for not paying the costs in *quodam negotio puerorum educationis sive instructionis, sine aliquâ licentiâ in eâ parte prius obtentâ*, the writ was quashed for uncertainty; because it might be a teaching to fence or dance, and not letters. Salt. 294. Ld. Raym. 818. 1415.

(u) 1. Persons excommunicatè, taken at the request of the bishop, are expressly held to be irreplevisable. — 2. But the court of K. B., it has been said, may, as well before as since this statute, bail a person taken upon *excommunicato capiendo*. Bulst. 122. — 3. But the court in a later case refused it. 7 Mod. 61. — 4. And being a commitment in execution, it seems that the court have no power to bail. 1 Show. 16.

quarter



quarter sessions, that the party in six days render himself, and if he doth not he shall forfeit 10*l.* (x).

And after that shall go a second *capias* with proclamation, and thereon, 20*l.* penalty, and so a third, and *in infinitum*, each with 20*l.* penalty; and if the party be taken, he shall be committed without bail, as on an *excommunicato capiendo*.

If a person after his commitment escapes, and the sheriff has not returned his writ, a *capias excommunicatum de novo* shall go. Mod. Ca. 78.

Otherwise, if the writ be returned. Mod. Ca. 78.

Or, if after commitment upon the former writ, he be removed by *habeas corpus*. Dub. Mod. Ca. 78.

But by the st. 5 El. 23. a person in prison out of the realm, within age, *non sane*, or *feme covert*, shall not incur the said penalties.

Nor any, who in the writ of *excommunicato capiendo* shall not have the addition required by the st. 1 H. 5. 5.

Nor, if in the *significavit* it be not contained, that the excommunication was for contempt in some original matter of heresy, refusal to baptize his child, to receive the communion, to come to church, or in some error of religion or doctrine, incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry.

And therefore, if a *capias* with proclamation goes against any in prison, within age, &c. when taken upon it, he may plead such matter in discharge of the penalties given by the st. 5 El. 23.

So, if he has not a proper addition. Sho. 16. Jon. 226. (x)

So, if the *significavit* to chancery does not show, that the excommunication was for one of the causes contained in the statute. Cro. Car. 197. 199. 2 Jon. 89. R. 1 Rol. 174. R. 12 Co. 77.

So, if the writ of *excommunicato capiendo* was not delivered upon record. Semb. 1 Sid. 165. R. 1 Sid. 285. 1 Vent. 309. 338.

So, if the party comes upon a *habeas corpus*, and it appears that the writ of *excommunicato capiendo* does not show good cause for excommunication; B. R. since the st. 5 El. may quash the writ, or award a *supersedas*. (y) R. 1 Sal. 293, 294.

So, if the cause be uncertain: as, in a cause *subtractionis decimarum, sive aliorum jurium ecclesiasticorum*; for perhaps the *alia jura* were not within the jurisdiction of the court. R. 1 Sal. 293.

(x) This statute doth not take away or affect the *excommunicato capiendo* at common law, but in the particular cases therein mentioned gives a greater penalty to enforce it; and therefore the writ doth not only issue upon excommunication in any other cases; but as hath been often adjudged, though a *capias* with proclamations and penalties go forth in a matter not within this statute, and the person be thereupon imprisoned, and pray to be discharged; because the matter for which he was excommunicated (though of a spiritual nature) is not within this statute, yet nothing shall be discharged, but the penalties, and (without any new writ obtained) the excommunication and imprisonment may remain as at common law, and not be discharged but by absolution in due form. Gibs. Cod. 1106. But for this, vide Cro. Car. 197. 199. Ro. Abr. 175. Jon. 226. Latch. 174. 204. 2 Jon. 89. Show. 17. 3 Mod. 42, 43. Skin. 167. Vern. 24. Salk. 294. 7 Mod. 56. 117.

(x) 1. Salk 294. — 2. But where the parties were named A. B. merchant, C. D. gentleman, E. F. yeoman *de paroch. de D.*, this was held well, though it was objected that the addition of the parish should refer to him only who was last mentioned. 3 Mod. 42. Skin. 176.

(y) 1. Str. 43. Vide Dick. 473. 5 Ves. 113. — 2. K. B. may quash an excommunication. Ld. Raym. 618. — 3. But it will not in the absence of the party taken up upon it. Ibid.

In quodam negotio instructionis puerorum sine licentia, without saying, in what he instructed them. R. 1 Sal. 294.

Yet the writ of *excommunicato capiendo* stands in force, though the penalties are discharged for want of the addition. Semb. Sho. 16. R. 2 Jon. 89. Semb. cont. 1 Sal. 294, 295. R. Jon. 226.

Or, for that the *significavit* does not contain any of the causes required by the statute. Semb. Cro. Car. 197. Adm. Cro. Car. 199. R. 2 Jon. 89. R. 3 Mod. 89. R. Lat. 204. R. 1 Sal. 294.

So an *excommunicato capiendo* lies now by the common law, for causes not mentioned in the st. 5 El. 23. Per Windham, 1 Sid. 181.

So, if an *excommunicato capiendo* be awarded according to the statute for a cause not mentioned there, the party shall not be discharged on motion, or suggestion, without a *habeas corpus* returned, and plea to it. R. 1 Sid. 181. Lat. 174. R. 1 Sal. 294.

So he shall not be discharged for a misnomer; for he has no day to plead, and may have false imprisonment if he be not named in the writ. R. 1 Mod. 70.

So, if several are named in the *significavit*, and at the end of the names it be added, of the parish of A. in the county of B. this addition goes to each of them. R. 3 Mod. 42, 43.

So, if the *significavit* mentions an excommunication for not coming to his parish-church, it is sufficient; though the statute says, generally, come to church; for he might plead it, if he was at another church. R. 3 Mod. 42, 43.

So he cannot plead or move to quash the writ before the return. R. 1 Sal. 294.

#### (B 5.) How discharged.

If the party excommunicated makes satisfaction to holy church for his contempt, and the bishop, &c. certifies it to the chancery, a writ goes to the sheriff for his discharge. F. N. B. 63. A.

And upon that *ar' alias* and *pluries*: and if the sheriff does nothing, an attachment against him returnable in B. R. F. N. B. 63. B.

So, if he gives caution to the bishop to obey, &c. and this be certified to the chancery. F. N. B. 64. A. (z)

So, if the excommunication was pronounced and certified after a prohibition sued, and an attachment upon it, the party may shew it to the court, and shall have a *supersedeas* out of chancery. F. N. B. 64. D.

Or, if the attachment was returned, he shall have it out of B. R. F. N. B. 64. D.

So, upon a certificate by the official, that the excommunicate has appealed. F. N. B. 64. E. 1 Ver. 24.

Or, after appeal, he may sue out a *scire facias* against the bishop and the party at whose suit he was excommunicated, and at the return of the *scire facias*, if it be not denied, he shall have a *supersedeas*. F. N. B. 65. E.

And if the matter cannot be determined at the day of the return, it shall be adjourned, and in the mesne time he shall have a special *supersedeas*. F. N. B. 65. E.

So, if the bishop certifies, that he has commanded the official to ab-

solve him, he may thereupon have a writ for his discharge when absolved. F. N. B. 63. F.

And upon that an *alias*, and *pluries*, and if the sheriff does not regard them, an attachment against him. F. N. B. 63. F.

Upon which writs the sheriff ought to inform himself, as well as he can, whether he be absolved; for the official is not bound to certify him thereof. F. N. B. 63. G.

So, if the *excommunicato capiendo* appears to have been granted without good cause, it may be superseded by chancery at the common law; and now, since the st. 5 El. by B. R. 1 Sal. 293. Semb. cont. 1 Ver. 24. (a)

But if the bishop refuses to take caution or surety to obey the holy church, the excommunicate shall have a writ *de cautione admittendâ* by which the bishop shall be commanded to take caution, and to command the sheriff to deliver him. F. N. B. 63. C.

And if the bishop refuses, he shall have a writ to the sheriff, *quod accedat ad episcopum, et moneat ut acceptâ cautione mandet deliberari, et si idem episcopus noluerit, &c.* then the sheriff shall deliver him. F. N. B. 63. D.

And thereupon he shall have an *alias* and *pluries*, and if the sheriff neglects, an attachment against him. F. N. B. 63. E.

So, if the excommunication be contrary to the law of the realm, so that he cannot have a writ *de cautione admittendâ*, (for then he would be bound *parere mandatis ecclesiæ*,) he shall have a writ to the bishop out of chancery, to absolve him: as, where the cause was out of the cognizance of the spiritual court, and it so appears upon the libel. R. 12 Co. 76.

So, if the cause, upon which he was excommunicated, be pardoned. R. 12 Co. 76.

And this; though the party be taken by a writ of *excommunicato capiendo*. R. 12 Co. 76.

Or, in such case, if the bishop, upon shewing that he was excommunicated for a matter pardoned, or out of the cognizance of the spiritual court, &c. and upon request, refuses to absolve him, an action upon the case lies against the bishop. R. 12 Co. 77.

But if the excommunication was in a cause, which appears by the libel to be sued out of the diocese; there shall not be a writ out of chancery to the bishop to absolve him, but the writ *de cautione admittendâ* is sufficient: for though the st. 23 H. 8. 9. disallows a suit out of the diocese, yet there are many cases in which it may be so. R. 12 Co. 77. (b)

### (C) Absolution.

Absolution ought to be by the same bishop, who excommunicated, or by him, or to whom the cause is removed by appeal. R. Mo. 775.

But, if a man be twice excommunicated, and absolved upon the last; the first stands in force. R. Mo. 849.

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(a) Upon notice. 15 Ves. 346.

(b) If an ecclesiastical judge pronounce the greater excommunication instead of the less, he does not exceed his jurisdiction, but only transgresses the forms of his court; the only mode, therefore, of objecting to it is by appeal, and the judgment is unimpeachable in collateral proceedings. 7 T. R. 153.

## EXCUSE.

Vide EXCUSE. — PLEADER, (E. 15. — F 18. — 3 O 15, &c.) — RETURN, (D 1. &c.)

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## EXECUTION.

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## (A) Execution in actions real.

## (A 1.) By entry.

Execution is (a) *finis et effectus legis*. (b)

After judgment (c) in a real action, if the estate continues in the possession of the tenant against whom the recovery was, the demandant may enter, when the writ shews the certainty of the thing recovered, before seisin delivered upon an *habere facias seisinam*. Co. L. 34. b.

And he may enter within or after the year after judgment. 1 Rol. 885. l. 10.

So, if a recovery be of a rent, common, &c. in certainty, the demandant, after judgment, may distrain before seisin by an *habere facias seisinam*. Co. L. 34. b.

(a) 1. Execution is the obtaining actual possession of a thing recovered by judgment of law; and is called the life of the law, and therefore is, in all cases, to be favoured. Co. Litt. 154. a. Carter, 194. — 2. It differs from an action, which continues only till judgment is given; and therefore a release of all actions is regularly no bar of an execution. Co. Litt. 289. 2 Rol. Abr. 404.

(b) Co. Litt. 289. 5 Co. 87.

(c) 1. To warrant execution, judgment must have been signed, though it need not have been entered. Gilb. C. P. 24. Law of Executions, 43. — 2. And, unless in certain cases, leave of the court need not be obtained. — 3. Which cases are, where a verdict has been taken against one underwriter, and the rest have entered into the consolidation rule, and agree to be bound by it. Tidd, 981. — 4. Where there is a writ of error *coram nobis*. Say, Rep. 166. Barnes, 201. 2 Blk. 1067. — 5. Where in ejectment, the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, the lessor of the plaintiff having succeeded, must apply to the court for leave to take out execution. Tidd, 981. — 6. And in such case if a writ of error be brought by the landlord, it may be shewn for cause, and will be a sufficient reason, against taking out execution. 2 Str. 1241. — 7. But if the landlord omit the opportunity of shewing it for cause, the execution is regular and cannot be set aside. 2 Burr. 757. — 8. These seem to be the only cases in which leave must be obtained; not therefore the case in which judgment is entered up for the sum awarded, under a reference at *nisi prius*. 1 East, 401. 1 B. & P. 97. 480. 3 B. & P. 244. Sed vide 1 Salk. 84. Barnes, 58.

So



So, if the tenant dies before execution, the demandant may enter upon his heir. 1 Rol. 884. l. 47.

So, though there are several descents. 1 Rol. 884. l. 52. Vide post, (A 5.)

So, if before execution a stranger enters and dies seised, the demandant may enter within a year after judgment. 1 Rol. 885. l. 2.

So, if judgment be against tenant in tail, the demandant may enter upon the issue in tail. 1 Rol. 884. l. 50. Vide post, (A 2.)

So, if a writ of error be brought against the heir, and judgment reversed, the demandant in error may enter upon him, though he be in by descent. 1 Rol. 884. l. 42.

But the demandant cannot enter upon a stranger after the year 1 Rol. 885. l. 12.

Or, after a descent cast. 1 Rol. 885. l. 15.

(A 2.) By *habere facias seisinam*.

An *habere facias seisinam* is a judicial writ issuing out of the record of the judgment, and directed to the sheriff of the county where the land lies, commanding him *quod habere faciat* to the demandant *seisinam suam de messuagio, &c.*

In a real action, after judgment *quod recuperet seisinam*, the demandant may take out execution by *habere facias seisinam* at any time within a year and a day after judgment.

And where the certainty does not appear by writ, he cannot enter; but shall have an *habere facias seisinam*: as, in dower. Co. L. 34. b.

So, though the delivery of seisin by the sheriff does not reduce it to a certainty: as, if in dower, a woman recovers the third part of a moiety. Co. L. 34. b.

If the tenant dies after judgment; execution may be sued against his heir.

So, against the issue in tail, where the recovery is upon a real title.

So, where a recovery is against tenant in tail by common recovery; for the issue shall have the recompence in value. Co. L. 361. b. R. Dy. 376. b. R. 1 Co. 94. b. 106. a. Vide Estates, (B 27.)

But if a recovery be against tenant in tail upon a false title, who dies before execution; in *scire facias* against the issue in tail, he may avoid it. Co. L. 361. b.

(A 3.) How it shall be done.

If the writ be, that the sheriff *habere faciat seisinam* of several messuages in the possession of the same person, it is sufficient that he does execution in one in the name of all, without going to each particular. R. 1 Rol. 886. l. 32.

If a recovery be of a rent, common, &c. it is sufficient, that the sheriff, upon the land, delivers seisin of the rent, common, &c. by parol; for thereby the demandant is in actual possession. 1 Rol. 886. l. 52.

So, if the sheriff offers to deliver seisin, and shews the parcels in which, it is sufficient, though the demandant refuses it; for his entry afterwards is *congeable*. Semb. Dy. 278. b.

But where the houses, &c. recovered are in the possession of several, it is not sufficient to deliver seisin of one in the name of all; but he ought to go to each, particularly. R. 1 Rol. 886. l. 40.

If a writ be for seisin in twenty acres, he ought to deliver the acres,

as computed by the country; not twenty measured according to the statute. R. 1 Rol. 886. l. 50.

If the demandant has once had execution, he cannot afterwards have execution again. Vide post, (A 6.)

And therefore, where the sheriff had returned upon an *habere facias seisinam*, execution done, an *alias habere facias seisinam* never was seen. Dy. 278. b.

And if execution be done, the court will compel the sheriff to return the writ. R. 1 Rol. 77. (d)

So, if a fee be executed by the ancestor, it never shall be executed again by the heir. 1 Rol. 886. l. 18.

Or, if a fee tail, it shall not be executed again by the issue in tail. 1 Rol. 886. l. 20.

So, if husband and wife be tenants for life, remainder to them in tail, the husband dies, and the wife has execution; the issue shall not have execution again; though he claims as heir to both: for he claims the same estate. 1 Rol. 886. l. 15. Vide post, (A 5.)

#### (A 4.) By *scire facias*.

If the demandant sues execution after a year after judgment, he must have a *scire facias*. 2 Inst. 469. Vide post, (I 4.) — Pleader, (3 L. 1. 2.)

#### (A 5.) By *habere facias possessionem*.

If there be judgment in ejectment, &c. where only a term for years is recovered; execution shall be by an *habere facias possessionem*. (e)

(d) 1. All writs of execution, which are to be executed by the sole authority of the sheriff, such as a *capias ad satisfaciendum*, *habere facias seisinam* or *possessionem*, *feri facias*, *liberate*, &c. are good when duly executed, though never returned by the sheriff, for the plaintiff has the effect of his suit, and there is nothing farther to be done on his part; and hence it is said that an execution executed is the end of the law. 5 Rep. 90. 4 Rep. 67. — 2. Though if the party apprehends himself injured by an erroneous writ of execution, he may apply to the sheriff to return it, and if he refuses, an action on the case lies against him. Keb. 551. — 3. But in the case of an *elegit*, although it be a judicial writ, yet the sheriff must return it; for this is not to be executed by his sole authority, but by an inquest taken by him, according to the statute of Westminster, 2.; and therefore he must return the writ, that it may appear that he has pursued the directions of the statute. 5 Rep. 20. a. 4 Rep. 74. 2 Inst. 396. Cro. Jac. 569. Cro. Eliz. 584. — 4. Upon which distinction it has been held, that a *capias ad satisfaciendum* may be taken out, returnable the term next but one after the teste; for in this case the intervening term makes no discontinuance, it not being necessary, as in case of a *capias* in mesne process, that the defendant should have a day in court; for his cause is at an end, and he must be in prison, whether the writ be returned or not, whereas on a *capias* in mesne process, the party may be at great prejudice, by reason of the imprisonment in the meantime. 2 Salk 700. Ld. Raymd. 775. 7 Mod. 29. — 5. So if a *feri facias* issues to the sheriff of S. returnable on a common return day, and he at the day returns *nulla bona*, a *feri facias testatum* may issue the day following to the sheriff of Kent, and execution by him shall be good; for though on mesne process there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court. T. Jones, 200. 3 Bac. Abr. 377. 378.

(e) 1. A judgment in ejectment for the plaintiff shews that the defendant has no property in the premises, but that they belong to the plaintiff. The writ of *habere facias* therefore is not to divest the defendant of his property, as a writ of *fi. fa.* is, but to take from him that which belongs to another, and which he is unjustly withholding. 3 M. & S. 557. — 2. The legal relation to the teste of the writ is to be supported in maintenance of the *habere facias possessionem*, on judgment in ejectment. 4 Burr. 1970. — 3. If the lessor take more than he has recovered in the action, the courts will interfere in a summary way, and compel him to make restitution. 3 Wils. 49.

It may be sued after a year after judgment in ejectment, *quoad* the land, without a *scire facias*. R. 1 Sid. 351. R. cont. Sal. 258. 600. Vide post, (I 4.)

If the defendant dies before execution, it may be done against his heir; for, in ejectment, the ejector by intendment is a disseisor. R. 1 Rol. 887. l. 10. Vide ante, (A 1.)

So it may be sued at any time before the term expires. Semb. Skin. 427.

If the plaintiff in ejectment declares for forty acres and recovers only thirty, the sheriff may deliver to him in possession of two or three acres in the name of all, without setting them out by metes and bounds, though the plaintiff recovered only part, of what he supposed in the possession of the tenant. R. 1 Rol. 886. l. 45. Vide ante, (A 3.)

The sheriff upon an *habere facias seisinam*, or *possessionem*, may break open a house to deliver seisin or possession of it to the demandant, or plaintiff. R. 5 Co. 91. b.

May remove all persons in the house. R. 1 Leo. 145.

And ought so to do. 1 Leo. 145.

If an *habere facias possessionem* be executed, and before the return and filing, the defendant re-enters, a new *habere facias possessionem* shall issue. 2 Brownl. 253. Mod. Ca. 27. R. 1 Sal. 321. Semb. 1 Leo. 145. R. 1 Rol. 853.

If he re-enters after the writ executed, returned and filed, an attachment upon an affidavit, shall go against him. 2 Brownl. 253. Dub. if the execution was complete. Mod. Ca. 27. 1 Sal. 321.

But till possession completely given, and the bailiffs withdrawn, the execution is not complete; and upon disturbance, an attachment goes. Mo. Ca. 27. 1 Sal. 321. 1 Leo. 145.

### (A 6.) Execution upon a fine, and common recovery.

A fine *sur conuzance de droit come ceo*, &c. is executed, and needs not any execution. 1 Rol. 885. l. 20. 887. l. 15. Vide Fine, (E 9.) (E 15.) — Plender, (3 A 7.)

All other fines are executory, and must be executed. Vide Fine, (E 10. &c.)

So a fine *come ceo*, &c. to A. in tail, remainder over, may be afterwards executed, as to the remainder. 1 Rol. 887. l. 20. Dy. 69.

So, if a fine be executed as to a particular estate, it may afterwards be executed as to the remainder. 1 Rol. 885. l. 40.

Though the remainder be to him who has the particular estate. 1 Rol. 886. l. 5.

Yet, if a fine be executed, there shall not be another execution: and therefore, if a fine be to A., remainder to his right heirs; this is executed for the whole, and his son shall not have execution after his death. 1 Rol. 885. l. 32. Vide ante, (A 3.)

If it be to A. for life, remainder to B. in tail, remainder to A. in fee, and A. surrenders to B. who dies without issue, and then A. enters; his heir shall not have execution for the remainder in fee; for it was executed. 1 Rol. 885. l. 35.

If a remainder be limited by fine to husband and wife, and the heirs of their bodies, and one dies, then the particular estate determines, and the survivor enters; the issue shall not have execution afterwards, though he claims as of both bodies. 1 Rol. 885. l. 25.

If, to husband and wife, and the heirs of the husband, who survives; his heir shall not have execution. 1 Rol. 885. l. 50.

If a fine be executed by entry or *scire facias*, the execution extends only to the estate in possession; and not to the remainder.

Though the last remainder be to him who has the possession: as, if a fine be to A. in tail, remainder over to others for life, remainder to A. in fee, and the remainders for life cease, whereby A. has the tail and the fee together; if he sues execution, he can sue it only for the tail. 1 Rol. 886. l. 25.

But, if the fine or estate be avoided before execution, it shall never be executed; as, if tenant in tail takes a fine of A. and thereby renders to B. for life, in tail, or in fee, and dies before proclamations passed, or entry of the conusee; whereupon the issue enters; the conusee shall not have a *scire facias* against the issue to execute the fine, though the proclamations afterwards pass. Pl. Com. 437. b.

## (B) Execution for the king.

### (B 1.) By *capias pro fine*, or *capias utlagatum*.

When judgment is given that the plaintiff or defendant *capiatur*, &c. a *capias pro fine* lies for the fine due to the king. Vide Information, (D 7.) Vide post, (B 2.)

For *capias utlagatum*. Vide Utlagary. Vide post, (B 2.)

### (B 2.) When any in execution for the king shall also be so for the party.

If a man be taken by a *capias pro fine* within a year, and a *capias* lies in the same action for the plaintiff, the party taken upon the *capias pro fine* shall be also in execution for the plaintiff, if he pleases, without his prayer. 5 Co. 88. b. 1 Rol. 895. l. 50. Bridg. 7. 14 H. 7. 15.

So, if a *capias* does not lie for the plaintiff in the same action, but only a *feri facias*, &c. yet upon his prayer, the party taken upon the *capias pro fine* shall remain in execution for the plaintiff. 5 Co. 88. b. Bridg. 7.

So, if he be not taken upon a *capias pro fine*, till after the year when the plaintiff is put to a *scire facias*. 5 Co. 88. b.

And in such case he shall be in execution for the plaintiff, before that he be for the king. 2 Rol. 158. l. 7.

And though the fine, and process thereon be pardoned. 1 Leo. 51. Bridg. 7.

But where the party is not taken upon a *capias pro fine* within the year, or a *capias* does not lie in the same action for the plaintiff; the party shall not be in execution for him, without prayer. 5 Co. 88. b.

Or, if one only be taken, where the judgment was joint against many. 1 Rol. 896. l. 2.

So, if taken upon a *capias pro fine*, where the plaintiff takes execution by *elegit*. 1 Leo. 51.

So, if the defendant be taken upon a *capias utlagatum*, after judgment, within the year; he shall be in execution for the plaintiff, if he will, without prayer. R. 5 Co. 88. a. Mo. 566. Yel. 20. 1 Rol. 895. l. 20. Bridg. 7.

Though

Though his body never was brought into court, or committed in execution for the plaintiff. R. 5 Co. 88. b.

Though by the common law no *capias* lies for the plaintiff; if no laches be in him in the continuance of his process: for as the king has benefit by his suit, he shall have advantage by the king's suit. R. 5 Co. 88. a.

So, if he be taken upon a *capias utlagatum* after the year, if the plaintiff prays that he may be in execution for him; it shall be so. Adm. 5 Co. 89. b.

So, if taken upon a *capias utlagatum* out of B. R. where judgment was affirmed upon error. Cro. El. 706.

But a party taken upon a *capias utlagatum* shall not be in execution for the plaintiff, unless he so pleases. Per 2 J. Gawdy cont. Cro. El. 850. R. 1 Rol. 895. l. 30.

Or, if taken, after the year, he shall not be so, without the prayer of the plaintiff. Adm. 5 Co. 89. b. Semb. cont. Cro. El. 706. Dub. 1 Rol. 895. l. 25.

### (B 3.) Execution for a debt to the king:— To what thing it extends.

How a man becomes indebted to the king. Vide Dett, (G 1. 9.)

By the st. 33 H. 8. 39. All obligations and specialties for any cause concerning the king, shall be taken *domino regi*, and shall be of the same force and effect as a statute-staple.

And all process, judgments, executions on the same shall be of the same effect against all bound, their heirs, successors, executors, and administrators, and no other, as on a statute-staple.

By the common law, before that statute, the king had power to take execution against the body, the land, and the goods of his debtor, or accountant to him. 3 Co. 12. b. Vide Dett, (G 2, &c.)

In the hands of the heir, or of a stranger. Vide Dett, (G 5. 6.)

And the king shall be preferred before a subject, for his debt. Vide Dett, (G 8.)

But by the st. M. Ch. 8. *Nos non seisiemus terram aliquam aut redditum, pro debito nostro quamdiu cattalla debitoris sufficient, aut ipse paratus sit satisfacere.*

And therefore, if the goods of the king's debtor appear sufficient, the sheriff ought not to extend his lands in the hand of him, his heir, purchaser, or terre-tenant. 2 Inst. 19.

And if the executor, or heir, has assets, by the course of the exchequer, process does not go against the purchaser. Dy. 67. b. in marg.

### (B 4.) By what what process done. By *extendi facias*.

Since (f) the the st. 33 H. 8. 39. the usual process for the king's debt is (g) an *extendi facias*; (h) whereby the sheriff is commanded *quod per*

(f) See, for the doctrine relative to extents, tit. Statute-staple.

(g) 1. On a judgment for the king's debt, or for penalties in the court of exchequer, the regular process of execution is an extent against the body, lands and goods of the defendant. Tidd, 1015. — 2. In other cases, the ordinary method of proceeding for the



*per sacramentum, &c. inquirat (i) quæ et cujusmodi bona et cujus pretii habuit, &c. et si bona, &c. non sufficerent, &c. tunc per sacramentum inquirat quæ terras et tenementa et cujus valoris, &c. et ea extendi faciat, &c. et capiat prædictum debitorem, &c.* 2 Inst. 19. Vide post, (C 14.) Vide Statute-staple, (D 5.)

By the same statute suits in the several courts for the king's debts shall be under the seal of the several courts, by *capias*, *extendi facias*, *subpœna*, attachment, and proclamation, if need be, or otherwise as to the said courts shall be thought expedient for the recovery of the king's debts.

(B 5.) What land, &c. shall be extended.

After inquisition taken, all lands and tenements (i) found in the seisin of the debtor are to be extended by the sheriff. Vide post, (C 14.)

So a term for years also may be extended. Q. If it ought not to be sold? Lane 50. (k)

If goods are seized upon an execution for the king's debt, they ought to be appraised before sale. Mad. 670.

the recovery of the king's debt, is by *scire facias*. Ibid. — 3. But where the debt is founded on an obligation or speciality, an immediate extent may be had on an affidavit of its being in danger; and this is the common mode of proceeding against the *principal* debtor in case of insolvency; but against *sureties* it is more usual to proceed by *scire facias*. Bunb. 58. — 4. Though if a *scire facias* has issued on a bond, an immediate extent may afterwards issue, on an affidavit of danger; and the king may proceed either by *scire facias* or extent, or by both. Bunb. 74.

(h) 1. An extent for the debt of the crown issues from the equity side of the exchequer; and is either an extent *in chief* or *in aid*. — 2. The former is for the recovery of the king's debt. — 3. The latter of a debt due to the king's debtor. — 4. Which, however, issues of common right if well founded. 2 Price, 157.

(i) 1. Where the king's debt is due by simple contract, a commission issues out of the court of exchequer, upon which an inquisition is taken in order to ascertain it; and upon affidavit being made that the debt is in danger, the court or a baron will grant a warrant or fiat for an immediate extent. Tidd, 1016. — 2. So if it be found by inquisition, against a receiver-general, that he has paid over money to A., an immediate extent may issue against A., for this is the king's money. Bunb. 128. — 3. The inquisition should state how the debt to the king is constituted, and not merely that the party is indebted to the king. West. 25. — 4. And as it is the foundation of the subsequent *scire facias*, or immediate extent, (which may be demurred to if the debt do not sufficiently appear on the face of those proceedings,) should be nearly as certain as a declaration. Ibid. Vide Hard. 59. — 5. An inquisition returned, finding special matter, without drawing or stating some conclusion as a fact is bad, and will be quashed on motion. 3 Price, 269.

(k) 1. An equitable mortgage by deposit of title deeds by an accountant of the crown, in the hands of one who has an opportunity of knowing that the depositor is or may become a debtor of the crown, is not available against an extent. And quære whether such a deposit, without the means of knowledge, or under any circumstances, would be good against the crown. 1 Price, 216. — 2. D. by articles, in consideration of his intended marriage, bearing date in 1796, covenants to settle certain lands to be purchased with a certain sum of money to use (in strict settlement.) In 1808 he enters into bonds to the crown. In 1812 he purchases lands (generally) in fee, and a mortgage term is assigned to a trustee to attend the inheritance, and the estate is then settled (in strict settlement) to the uses declared by the said articles, under which D. himself takes only a life interest. Held that the term does not protect the inheritance of the fee against the crown debt due from B. on the bonds, the settlement being voluntary, and the particular estates not being specifically bound by the deed of 1796. 2 Price, 317. — 3. An equity of redemption may be taken under an extent. Forrest, 162.

(k) Where, under an extent, goods and chattels of the debtor have been seized to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the debtor's land cannot be sold. 3 Price, 40.

If

If the king has judgment in a *scire facias* upon a recognizance for surety of the peace, he may have execution against the body, as well as the land of the party. 1 Rol. 897. l. 20.

If a man pleads a title by extent, he ought to shew, when it issued, out of what court, and whether it was upon inquisition. 2 Rol. 11.

### (C) Execution for a common person: in personal actions.

#### (C 1.) What, by the common law.

By the common law, execution upon a judgment or recognizance for a common person was generally by *levari facias*, commanding the sheriff, *quod (l) levari faciat de terris et cattalis, &c.* the debt. (m) 3 Co. 12. a. 2 Inst. 394. (n)

Or,

(l) The form of judicial writs must be according to approved precedents in these cases. 3 Bac. Abr. 376. — 2. And therefore, where on a writ of *elegit*, which was *ideo tibi præcipimus quod bona et catalla* of the defendant, *quæ habuit die judicii prædicta redditi, deliberari facias*, omitting *et medietatem terrarum et tenementorum prædictorum*, the sheriff extended the lands and goods, and delivered the moiety of the lands, &c.; on motion the court refused to amend the writ, and held that the party must take out a new *elegit*; the inquisition herein being without warrant, the sheriff having no authority by this writ to extend the lands. Cro. Car. 162. — 3. Now, however, the practice is to amend the writ of execution by the judgment. Say, Rep. 12. 2 Blk. 836. 2 T. R. 737. — 4. Or by the award of it on the roll. 2 B. & P. 336. — 5. Hence it will be amended, that it may be conformable with the judgment. 6 T. R. 450. — 6. Though in the case of a joint judgment against three and separate execution by *fi. fa.* against one alone, who became bankrupt; an application by plaintiff to amend his *fi. fa.* by making it conformable to the judgment, was refused, since the rights of third persons, (the assignees as representatives of the creditors) had intervened; otherwise it would have been granted. 4 M. & S. 329. — 7. So a writ of execution may be amended in the style of the court; and therefore a *capias ad satisfaciendum* may be amended, even after it has been executed, by making it returnable before 'our justices,' instead of before 'us.' 2 Blk. 836. — 8. So likewise where a writ of *fi. fa.* directed the money to be returned before 'us' instead of before 'the king's justices at Westminster,' but was tested by the chief justice of C. B., the plaintiff was permitted to amend upon payment of costs. 1 Mars. 237. 5 Taunt. 605. — 9. So a writ of execution may be amended in the names of the parties; and therefore a *capias ad satisfaciendum* 'to satisfy A. the debt awarded to the said B.,' was amended after execution. 4 Taunt. 322. — 10. So in the return; hence the return of a *fi. fa.* will be amended from a king's bench to a common pleas return day. 2 B. & P. 336. — 11. So by inserting the *testatum* clause; and therefore where on a *fi. fa.* being sued into an improper county, another *fi. fa.* is afterwards issued into the county in which the venue is laid, and a return of *nulla bona* procured, the first writ will be amended by inserting the return of *nulla bona*, and the *testatum* clause, though the second writ be returnable several days before, but in the same term in which judgment was signed. 1 H. B. 541.

(m) 1. In debt or bond for a penalty, the levy may be for the sum secured by the condition, together with the damages and costs recovered by the judgment, and all subsequent costs of the execution, &c. Ca. Pr. C. P. 90. Pr. Reg. 213. — 2. Which direction is usually indorsed on the writ. Tidd, 982. — 3. And by st. 43 G. 3. c. 46. s. 5. in every *action* in which the plaintiff shall be entitled to levy under an execution against the goods of the defendant, such plaintiff may also levy the poundage, fees and expences of the execution, over and above the sum recovered by the judgment. — 4. A *mandamus* is an *action* within the statute, where the party pleads, and damages and costs are given to the prosecutor. 3 Smith, 8. — 5. But the act seems not to apply to cases, where the levy is made under an execution against the goods of the plaintiff, for costs on a judgment of *non pros*, &c. Tidd, 983. — 6. Nor where the defendant is taken in execution on a *capias ad satisfaciendum*. Ibid. — 7. And where defendant suffers judgment by default in debt on simple contract, the plaintiff is not entitled

Or, by *feri facias*, commanding the sheriff, (o) *quod feri faciat de bonis et catallis, &c.* 3 Cro. 12. a.

So, in actions *vi et armis*, execution might be made by a *capias ad satisfaciendum*. 3 Co. 12. a. Vide post, (C 9.)

So in an action against an heir, upon an obligation or other lien of his ancestor, execution would be against the lands and tenements which the heir had by descent. 3 Co. 12. b. Vide Assets.

### (C 2.) What not.

But, by the common law, execution never was against the lands or tenements of the party at the suit of a common person, except in the case of an heir. R. 3 Co. 11. b. &c. 1 Inst. 394.

Nor against the body of the defendant, except where he was charged with force by an action *vi et armis*. R. 3 Co. 11. b. 12. a.

What by statute. (p)

### (C 3.) Execution against goods and chattels:—By *levari facias*.

By the *levari facias* (q) the sheriff may levy the debt of all the goods and chattels of the defendants. Vide Process, (E 4.)

entitled to levy the expences of the execution notwithstanding those expences, together with the debt and costs of the action, do not exceed the sum confessed upon record. 3 B. & P. 362. et vide 2 Blk. 760. — 8. Where the prothonotary reported, that there was an excess in a levy of the expences of an execution, under 43 G. 3. c. 46. s. 5., the plaintiff was compelled to refund *pro tanto*, with costs. 2 Taunt. 174. — 9. And an execution for the penalty of a bond to secure an annuity on a judgment entered up under a warrant of attorney, authorising execution for the arrears only, will be set aside *in toto*, and not merely for the excess. 16 East, 163.

(n) 1. Every writ of execution, in case of a common person, must bear teste in term time; for being the process of that court in which judgment is given, they have no authority to award it at any other time; but original writs issuing out of chancery may bear teste at any time, because that court is always open. 3 Bac. Abr. 377. Co. Litt. 161. 2 Inst. 40. Latch. 11. T. Jones 150. Vent. 362. — 2. But if a writ of execution bear teste out of term, the sheriff is protected in executing it; for he is not judge of the validity of the process, provided the court, out of which it issues, has jurisdiction of the matter. 2 Salk. 700. 7 Mod. 29. — 3. But though he is justified in executing such process, yet, if he lets a person escape whom he has arrested on a *capias ad satisfaciendum* which bore teste out of term, no action lies against him, for the writ was void. Ibid. — 4. If judgment be entered as of Hilary term, the party may take out execution in the vacation following, by a writ tested the last day of the precedent term; for having run through the whole course of a judicial proceeding, and his cause being ripe for execution at that time, it would be unreasonable to oblige him to wait till the ensuing term, by which he might be disappointed of the effect of his judgment. 3 Bac. Abr. 377. — 5. As to whether it can be averred, that the writ did not issue till a day subsequent to the teste, vide Lev. 173. 1 Sid. 271. Lutw. 332. 2 Keb. 53. 2 Burr. 966. — 6. Where it appeared that an execution was levied before the judgment was signed, though after the first day of the term to which it related, and after the teste of the *feri facias*, it was held nought. 2 Show. 494.

(o) Who alone, unless in the case of a county palatine, is the officer of the court; and therefore a writ of *feri facias* directed in the first instance to the bailiff of the Isle of Ely, out of the king's bench, is erroneous and void; and the bailiff himself is a trespasser if he executes it. 3 East, 128. et vide 9 East, 342.

(p) By the stat. W. 2. 18. It may be by *elegit* to the sheriff to extend and deliver to the plaintiff all the goods of the party, (beasts of the plough excepted,) and one moiety of his lands. Vide post, (C 14.) — Or, by the stat. 11 E. 1. On a statute merchant execution may be against the body, if the goods, &c. are not sufficient. — And by the stat. W. 2. 11. Against the body in account. — And by the stat. 25 Edw. 3. stat. 5. ch. 17. in Debt.

(q) As to this writ, vide in Process, (E 4.)

So

So he may take the emblements, and all present profits of his land. 3 Co. 11. b.

So, the rents. Pl. Com. 441. a.

So goods attached, (where by custom goods at the commencement of the suit may be attached to answer to the plaintiff if he recovers,) may be taken in execution, subject to the attachment. R. 1 Rol. 893. l. 40..

But upon a *levari facias* the sheriff cannot take the defendant's lands to deliver in execution; though the writ says, *de terris et catallis*. Pl. Com. 441. a.

(C 4.) By *fieri facias*: — What things may be taken.

So by a *fieri facias* the sheriff may take all (*r*) goods and chattels of (*s*) the defendant, which he may take upon the *levari facias*: for the *fieri facias* includes the *levari facias*. 2 Inst. 394. Vide Process, (E 5. 7.)

So he may take and sell an annuity of 40*l.* per annum granted by the king for years, to be paid by the receiver of the court; for it is in the nature of a rent-charge. R. 2 Cro. 79.

So he may extend, or sell a term for years. 8 Co. 171. a.

So he may cut down, and sell corn growing on the land: for the lessee has an interest in it. 1 Sal. 368. (*t*)

So, utensils for trade erected by the defendant, though fixed to the land; as, coppers, fats, pavements, &c. R. 1 Sal. 368. Vide infra. (*u*)

And after sale the defendant shall not have his term again, though the plaintiff be satisfied his debt by the profits. R. Mo. 873.

So, if goods are taken in execution at the suit of B. and the sheriff returns *nulla bona*; they shall be afterwards taken at the suit of C. for the property is not vested in B. nor in the sheriff. 2 Ver. 238.

But the sheriff upon a *fieri facias* cannot take things fixed to the freehold, as doors, windows, &c. Vide Biens, (B).

Nor furnaces, coppers, &c. fixed. Dub. 1 Rol. 891. l. 50. R. cont. 1 Sal. 368. if erected by the defendant for the use of his trade. Vide supra.

Nor hearths, chimney-pieces, &c. put up by the defendant for the use of the house and not for his trade. R. 1 Sal. 368.

So the sheriff cannot take goods in pledge. (*x*)

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(*r*) 1. Neither money nor bank-notes can be taken. C. T. H. 53. 9 East, 48. — 2. And though the contrary was holden in Dougl. 231., yet that case was by consent. 9 East, 48. — 3. The court therefore have refused to order money in the sheriff's hands, being the surplus of money levied under a former execution against the defendant's goods, at the suit of the same plaintiff. 4 East, 510. — 4. So to direct the sheriff to pay over the proceeds of a judgment recovered against him by the defendant to the plaintiff in satisfaction of his *fi. fa.* 2 N. R. 376. — 5. So money levied under an execution at the suit of the defendant against a third person. 9 East, 48. Dougl. 231. contra. — 6. The reason why money and bank notes are not liable is, because they cannot be sold, and upon this principle therefore, any thing which cannot be sold is exempt; such as deeds, writings, &c. C. T. H. 53.

(*s*) 1. Except his necessary wearing apparel. — 2. Though if defendant has two garments, the sheriff may take one of them. Comb. 356.

(*t*) Gilb. Ex. 19.

(*u*) 1. 3 Atk. 13. — 2. Unless they go the heir. Gilb. Ex. 19.

(*x*) But goods pawned may be taken on an execution against the pawner, upon satisfaction of the pledge. Bro. Abr. Pledges, pl. 24.

Or,

Or, demised to another. Dy. 67. b. in marg. (y)

Nor goods taken, and in custody of the sheriff, upon a former execution. R. Sho. 173. R. 3 Mod. 236. (z)

So he cannot take the goods of a stranger (a): for he is to take (b) the goods of the party (c) only, at his peril. (d)

And

(y) 1. Bro. Abr. Pledges, pl. 24. — 2. But subject to the right of the pawnee or lessee, the goods may, it seems, be taken in execution. Ibid. Etiam Id. Execution, pl. 107.

(z) Nor goods distrained. Bac. Abr. Exec. 352. Et vide Willes, 131.

(a) An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value, that the incoming tenant had agreed to give for it. 1 Mars. 10.

(b) 1. If he doubt whether the goods shewn him are the defendant's, he may summon a jury *de bene esse*, to satisfy himself. Dalt. Sheriff, 146. Gilb. Exec. 21. Bac. Abr. Exec. 352. 4 T. R. 633. 648. 7 T. R. 177. — 2. This will justify the sheriff in returning, if it be so found, that the defendant has no goods within his bailiwick; or if it be found that he has, will mitigate damages in an action of trespass, provided the goods should afterwards turn out not to be the defendant's. Tidd, 995. — 3. And as this is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury summoned by the sheriff to inquire in whom the property of goods seized by him under in *fi. fa.* is vested. 6 T. R. 88. Tidd, *ibid.* — 4. But this proceeding of the sheriff is not conclusive in any case; for inquests of office are always traversable, and therefore an inquisition made by the sheriff's jury, to ascertain to whom the property of goods taken under a *fi. fa.* belonged, though found in favour of A., is not admissible evidence in an action of trover for the goods, brought by A. against the sheriff. 2 H. B. 437.

(c) 1. On a *fieri facias* against a husband, it seems that the sheriff cannot take in execution goods fairly vested in trustees, under a settlement before marriage, for the benefit of the wife. Cowp. 432. Et vide Co. Litt. 351. a. n. (1). Sed vide 2 Vern. 239. — 2. Therefore where a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her trade separately; it was holden, that if the husband did not intermeddle therewith, and there was no fraud, such effects, though fluctuating, were not liable to be taken in execution for his debts. 3 T. R. 618. Et vide *ibid.* 620. n. 8 East, 477. 479. — 3. And a settlement after marriage would, it seems, have the same effect, if made in consequence of a prior agreement. 1 Eq. Abr. 148. — 4. Or for a good and valuable consideration, and without fraud. 8 T. R. 521. Et vide 6 East, 257. — 5. It is no objection to the settlement in these cases that there is no inventory of the goods. 3 T. R. 618. Sed vide Cowp. 439. 6 East, 257. — 6. And the possession of that husband, if consistent with the deed, will not subject them to an execution for his debts, provided it be satisfactorily proved, that they were really and *bona fide* conveyed to a third person, as a trustee for his wife, and possession taken by such third person. 2 Esp. C. 574. Cowp. 432. 3 T. R. 620. n. — 7. But where the settlement is fraudulent the goods are not protected. 6 East, 257. — 8. So where the husband is suffered to carry on the trade intended for his wife; and his possession is not consistent with the deed. 3 T. R. 618. 8 T. R. 82. — 9. And it is settled, that a term vested in the wife before marriage, and which the husband is entitled to in her right, may be taken in execution for the husband's debt. 4 T. R. 638. 9 Tidd, 996, 997. — 10. Where a woman has passed as a married woman, and given herself out as such, and been accordingly reputed, and has goods in the house of the man with whom she cohabits, and is ostensibly his wife, and the goods ostensibly his, neither he nor she shall say, upon the goods being taken in execution by a creditor for a just debt, that she is not his wife, and the goods not his. Lofft. 782. — 11. Goods of the testator in the hands of the executor are not the executor's own property, and therefore cannot be taken in execution for his debt. 4 T. R. 621. — 12. But if an executor treat the goods of his testator as his own property, they may be taken under an execution against him individually. 1 B. & P. 293. — 13. So if the husband of an executrix treat goods belonging to the estate as his own, they may be taken in execution for his debt. 1 B. & P. 293.

(d) 1. And though there has been a fraudulent sale of defendant's property, yet if it has



And if there are joint partners, and execution against one; the sheriff can take (*e*) only his (*f*) share. R. Sho. 174. Can sell only his part, (*g*) though he ought to seize (*h*) the whole. R. 1 Sal. 392.

So, if execution be upon a judgment against a corporation, he cannot take the goods of a member of the corporation, which he has in his natural capacity; but the goods of the corporation only. 1 Rol. 920. l. 50.

(C 5.) How the sheriff shall proceed upon it.

After a *fiery facias* delivered to him, the sheriff may enter the house of the defendant, when the door (*i*) is open, and seize (*k*) the goods of the defendant there found. R. 5 Co. 92. a.

has afterwards been sold *bonâ fide* to another, it cannot be touched in the hands of the second vendee. Godb. 161. — 2. But otherwise the sheriff may take any goods which have been fraudulently sold, or conveyed away by the defendant; and a principal badge of fraud is, the defendant's continuing in possession. Gilb. Ex. 15. — 3. For if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as against creditors. Pr. Ch. 286, 287. — 4. So if a creditor by *fi. fa.* seize the goods of his debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution, it has been determined often, that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. Ibid. 1 Ves. 245. 456. — 5. So where it was proved, in an action for a false return, that the warrant upon a *fiery facias* was directed to three persons as special bailiffs; that the plaintiff's attorney was present at the time of executing it, and ordered one of the persons to use the defendant kindly, and not to take away any of his household goods, for that his landlord would soon be in the county, and pay the debt, and thereupon another of the persons rode round the farm and grounds, and said 'I seize all this corn and cattle,' and took some account thereof for the use of the plaintiff; afterwards the landlord sued out a *fiery facias*, and the sheriff's bailiff not being in possession of the goods under the former writ, nor having left any body for them, he got his execution executed; and there was no proof, that he promised to pay the plaintiff: it was left to the jury, upon this evidence, whether the first execution was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff which was afterwards confirmed by the court, on a motion for a new trial. 1 Wils. 44. Et vide 1 H. Bl. 543. Tidd, 992. — 6. A debtor, however, unless prohibited by the bankrupt laws, may, from whatever motive, prefer, by assignment or payment, one creditor or particular creditors, if he does so in payment of his or their just demands, and not as a mere cloak to secure the property to himself. 5 T. R. 235. 420. — 7. And goods of which the defendant is ostensible owner, with the real owner's consent, cannot be taken under an execution against him. 3 Taunt. 256. — 8. If the party at whose suit a sequestration out of chancery is issued, take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of eighteen months, a writ of *fi. fa.* is directed against the goods of the party defendant in the suit in chancery, for not executing such writ, and selling the goods; the plaintiff in the sequestration having at all events lost his priority by such laches; and therefore the sheriff, who had seized goods under the *fi. fa.*, having on notice of such supposed obstacle, returned *nulla bona*, was held liable to the plaintiff in an action for a false return. 4 East, 323.

(*e*) He must seize all the joint property, because the moieties are undivided. 1 Salk. 392. Et vide Comb. 217. Comb. 277. 1 Ves. 239. Cowp. 449. 1 East, 367. 4 Ves. 396.

(*f*) 1. Where three partners (two of whom resided abroad and one in England) were sued for a partnership debt, and the partner resident in England appeared to the action, but refused to appear for the partner who resided abroad, the sheriff, under a *distringas* against the two partners, might have taken partnership effects, though paid for by the partner resident in England alone, to whom the partnership was largely indebted. 3 B. & P. 354. — 2. Vide 51 G. 3. c. 124. s. 2., as to a *distringas*.

(*g*) Ld. Ray. 871. 1 Show. 169. Dougl. 650. 3 B. & P. 288.

(*h*) Supra.

(*i*) That is, the outer inlet to the house; as a door or window opening to the street. 18 Edw. 4. Raster, 19. pl. 4. Moore, pl. 917. p. 668. W. Jones, 429.

Or,

Or, the house of a stranger. Semb. 5. Co. 92. 2 Cro. 486. Cro. EL 759. 909. Vide post, (C 12.)

And this, by night or by day, if the door be open. Semb. 5 Co. 92. 2 Cro. 486.

But if it be the house of a stranger, he ought to aver that the goods were there. Semb. Lut. 1434.

If the house be open, and the sheriff enters, he may afterwards break (l) an inner door to take the goods. R. Pal. 54. (m)

And he need not aver that the goods were there. Pal. 54. (n) (o)

So, if the goods of A. are conveyed into the house of B. to avoid an execution, the sheriff upon a *fiery facias* against A. may break the house to make execution. R. 5 Co. 93. a.

So, if the sheriff, &c. enters, and takes goods in execution, and the party locks up and imprisons the bailiffs, &c. in the house; the sheriff may break the house to deliver the bailiffs. R. 2 Cro. 556. Pal. 53. 2 Rol. 137.

So the sheriff may make sale of goods in execution, without any appraisement of them.

So he may, though a *supersedeas* be delivered to him after the goods were seized into his hands. Per 2 J. Mo. 542.

If, upon sale by the sheriff, money remains in his hands beyond the debt, the sheriff may keep it till the defendant demands it, and need not deliver it to the defendant before request. R. Noy, 59.

But the sheriff cannot break a house to make execution upon goods, or body. R. 5 Co. 92. Cro. EL. 909. Mo. 668. Yel. 28. (p)

Neither can he open the door, though it be only latched.

Or knock, and when the door is a little opened, thrust in with violence. R. Hob. 62.

Nor use a *capias utlagatum* to execute a *latitat*. R. Hob. 263.

(k) 1. A. seizure of part of the goods in a house in name of the whole, is a good seizure of all. Ld. Ray. 725. — 2. Where a sheriff after a *fi. fa.* delivered to him, pays the plaintiff out of his own money, it is made a question by Hobart, whether the sheriff may levy the money on the defendant. Hob. 207.

(l) Trunks, &c. 2 Show 87.

(m) 1. 1 Brownl. 50. 2 Rol. Rep. 137. — 2. So that he may force open the door of a lodger's apartment opening to the stairs or passage. Cowp. 1. — 3. And it has been held, that a sheriff having entered at the open door of a house, may, without a previous demand of admission, force open the inner doors in order to seize goods which are within them. 4 Taunt. 619. — 4. However there is an ancient case which seems to oppose this doctrine, and which was not quoted in the argument in the more recent one. Hob. 263. Vide 3 B. & P. 229.

(n) This was the house of the defendant himself.

(o) 1. 2 Rol. Rep. 137. 3 B. & P. 223. 4 Taunt. 619. 2 H. Bl. 120. — 2. The sheriff under a *fiery facias* against one deceased, may enter the house of his executor, on reasonable grounds for believing that testator's goods are within, though they are not. 1 Mars. 333. 5 Taunt. 765. — 3. But, generally speaking, an entry into the close of one man to seize the property or person of another, will not be justifiable, unless it turns out, that they were concealed therein at the time. Cro. Eliz. 759. Vide 2 Wils. 291. — 4. Though if one man has allowed another to use his house as his own, by residing therein, it may be accounted the house of the latter. 2 H. Bl. 120.

(p) 1. 18 Edw. 4. 4. pl. 19. Gilb. Ex. 17. 18. Cowp. 1. — 2. Though it has been closed for the express purpose of excluding him. Cro. Eliz. 908. — 3. And the reason assigned for thus privileging an outer inlet is, that otherwise the family within doors would be left naked and exposed to robbers from without. Cowp. 1.

Nor

Nor take several different chattels, when one is sufficient for the debt. R. Noy, 59.

So the sheriff ought not to deliver goods taken in execution to the plaintiff himself; but ought by sale to levy the debt. R. Cro. El. 504.

So he ought not to redeliver them to the defendant, if he pays only part of the debt. Semb. 2 Vent. 94.

So he cannot detain them till the money to be levied, and also the charge of keeping them, be paid; for though the sheriff may make immediate sale, and the keeping is in favour of the defendant, for which he ought to make amends, yet this should be by agreement, and not by detainer till satisfaction. Semb. Lut. 1446.

Yet after the money levied, the sheriff may pay it to the plaintiff. Dub. 3 Lev. 204.

### (C 6.) How he shall sell.

When the sheriff has taken goods in execution, he may, (q) sell them, without other direction. Mod. Ca. 295.

Though his office be determined before the sale. Mod. Ca. 299. R. 1 Rol. 893. l. 50. (r)

So he may sell a term (s) for years. 4 Co. 74. (t)

And it is sufficient (u) to recite, that the party was possessed *de termino diversorum annorum*, without shewing the commencement, or end of the term. R. 4. Co. 74. a. (x)

And if he mistakes the date of the term, if the bill of sale has general words, viz. All the defendant's interest, &c. it is sufficient. R. 4 Co. 74. a.

And a sale by the sheriff continues good, though the judgment be afterwards reversed. R. 5 Co. 90. b. R. 2 Cro. 246.; for the money

(q) 1. Upon a *fi. facias* the sheriff cannot deliver the goods, though he may sell them, to the plaintiff. Ld. Raym. 346. Cro. Eliz. 504. Lutw. 589. Comb. 452. Carth. 419. — 2. And in the case last cited, it was admitted to be the practice to make a bill of sale of the goods to the plaintiff. — 3. But though such be the practice, it is not part of the duty of the sheriff to execute a bill of sale to the plaintiff at an appraised value, nor is he compellable to do so, though he even promised it; for this might be very inconvenient, and highly injurious, if it were allowed. Cowp. 406. — 4. The sheriff, though he pays the plaintiff out of his own money, cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. Noy, 107. Lutw. 589.

(r) And this without a *venditioni exponas*. Cro. Jac. 73. Yelv. 44. Salk. 323. 1 Ves. 196.

(s) 1. An equitable interest in a term cannot be taken under a *fi. fa.* 8 East, 467. 2 N. R. 461. — 2. Not therefore an equity of redemption. 3. Atk. 200. 739. — 3. And plaintiff's only remedy is to file a bill for redemption, by paying off incumbrances. Ibid. — 4. Though to entitle him to redeem he must first take out a writ of execution against defendant. 3 Atk. 200.

(t) 1. It is said that if a sheriff on a *fi. fa.*, sell a lease or term of a house, he cannot legally put the party out of possession, and the vendee in; but the vendee must bring his ejectment. 2 Show. 85. — 2. This, however, must be understood of a forcible expulsion; for it has been determined that under a *fi. facias*, the sheriff may justify expelling the defendant peaceably. 3 T. R. 292. — 3. If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment creditor need not bring a suit in equity to come at the estate, by setting aside the assignment; but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment. 3 Atk. 739. Tidd, 990.

(u) And the better course, since if he attempt to state the interest particularly and fail, the vendee will not have a good title. 4 Co. 74. Cro. Eliz. 584. 3 T. R. 294.

(x) Cro. Eliz. 584. 3 T. R. 292. 8 East, 475.

only shall be restored. R. Dy. 363. a. If the sale was to a stranger. Yel. 180. Otherwise, if the sale be upon an *elegit*. Vide post, (C 14.)

But a sale of a term by the sheriff, who mistakes the date, &c. shall be void. R. 4 Co. 74.

(C 7.) How he shall make the return.

The sheriff need not (*y*) return a writ of *feri facias*. Vide Retorn, (F 1, &c.)

But if the sheriff returns, (*z*) goods seised to the value of the debt, he shall answer (*a*) for such value to (*b*) the plaintiff. Mod. Ca. 299. 1 Sal. 323. R. 1 Sid. 407.

Or debt (*c*) lies against him for the money. Vide Dett, (A 9.)

Though they be afterwards rescued from him; for he cannot return the *rescous*. Mod. Ca. 296. 299. R. 2 Rol. 57. (*d*)

(C 8.) *Venditioni exponas*.

If the sheriff returns, *remanent pro defectu emptorum*, (*e*) the plaintiff

(*y*) 1. This means, that making a return to a *fi. fa.* unlike the case of *mesne process*, is not essential to enable the sheriff to justify under it. Vide supra. — 2. For upon the return-day of the *feri facias*, the sheriff may be called upon by rule to return the writ; which if he neglects, without offering a reasonable excuse, he is liable to an attachment. 1 H. Bl. 543. — 3. If, however, the property of the goods be disputed, which frequently happens on a commission of bankrupt, &c., the court on the suggestion of a reasonable doubt, will enlarge the time for the sheriff's making his return, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity. *Semple v. Lord Newhaven*, Tidd, 1000., et vide 2 Blk. 1064. 1181. — 4. And accordingly the court, upon the sheriff's application, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seised under the writ were not covered by an extent, afterwards issued at the suit of the crown for malt duties; for the purpose of inducing the plaintiff to go into the court of exchequer, and there contest the question of right with the crown, in a more eligible manner than in the king's bench. 7 T.R. 174. — 5. So the return to a *fi. fa.* will be enlarged, where an extent having issued at the suit of the crown, the sheriff is in doubt which execution is entitled to priority, and is litigating the question in the exchequer. 1 Taunt. 120.

(*z*) The returns commonly made by the sheriff to a *feri facias* are *first*, *nulla bona*, which is either general, that the defendant has no goods in his bailiwick whereof he can cause to be made the sum directed to be levied, or any part thereof; or special, with this addition, that the defendant is a beneficed clerk, having no lay fee within his bailiwick; or being an executor or administrator, that he has wasted the goods of the testator or intestate. *Secondly*, *feri feci*, or that the sheriff has caused to be made, of the defendant's goods, the whole or a part of the money, which he has ready to be paid to the plaintiff. *Thirdly*, that he has taken goods of the defendant to a certain amount, which remain in his hands for want of buyers. Or *fourthly*, that he has made his mandate to the bailiff of a liberty, who has given him no answer, or returned *nulla bona*. Tidd, 1001.

(*a*) By rule of court.

(*b*) 1. The money it is said, should, in strictness, be brought into court, 3 Bac. Abr. 391. — 2. For it is not of record without. Godb. 147. — 3. But the law seems otherwise; for though the writ be *ita quod habeas*, &c. yet the sheriff may return that he hath paid the money to the plaintiff. 2 Show. 87. 3 Lev. 204.

(*c*) Account, or assumpsit; even though no return be made. Cro. Car. 539. 2 Show. 79. 281. Gilb. Ex. 25.

(*d*) 1. As to *testatum* writs, vide in Process, (E 7.) — 2. On a return of *nulla bona* to the first *fi. fa.* the plaintiff may have an *alias*, &c. into the same county.

(*e*) 1. The sheriff may sell a leasehold estate, which he has seised under a *feri facias*, after the return of the writ, and without any writ of *venditioni exponas*. For the property of the sheriff continues till the execution is completed, which cannot be till sale of the things taken in execution, and payment of the money to the plaintiff. This indeed

plaintiff shall have a *venditioni exponas*. 1 Sal. 323. 1 Sid. 407. (f).

If the former sheriff made such return, the new sheriff ought to make sale upon the *venditioni exponas*. 1 Rol. 894. l. 5. 4 Leo. 20.

Though the writ be to the new sheriff that he cause the former sheriff to sell. R. 1 Rol. 894. l. 5. but semb. that upon a *distringas nuper vicecomitem quod venditioni exponat*, (g) the old sheriff may sell. Mod. Ca. 295. 299. 1 Sal. 323.

There are two forms of the *distringas nuper vicecomitem*; the one, (h) that the old sheriff shall sell, and bring the money into court. Mod. Ca. 295. (i)

The other, (k) that he sell, and deliver the money to the new sheriff. Mod. Ca. 295. 299. 1 Sal. 323. 2 Rol. 57.

And both are compulsive (and do not give authority) to sell. Mod. Ca. 295.

For he cannot return upon a *distringas nuper vicecomitem quod remanent pro defectu emptorum*. Mod. Ca. 296.

But if a *supersedeas* comes to the sheriff, he cannot afterwards sell without a *venditioni exponas*; for the sale shall be void. R. 1 Rol. 894. l. 10.

Yet a *venditioni exponas* shall go for the sale of goods levied before the *supersedeas*. Dy. 99. a. Yel. 6. R. Cro. El. 597.

And he may sell before a *supersedeas*, though he be out of his office, without a *venditioni exponas*. Per Holt, Mod. Ca. 295.

If a sheriff levies money, but does not return his writ at all; the sale after a *venditioni exponas* to the new sheriff shall be good. R. 1 Rol. 893. l. 50.

If the sheriff levies money of the defendant to the value of the debt, the defendant shall be discharged against the plaintiff, though the money never comes to his hand. Mod. Ca. 297. 299. R. 2 Rol. 57.

And he may plead such matter for his discharge, in debt afterwards upon the judgment. 2 Lev. 203.

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indeed is shewn by the common course of proceeding; the sheriff not being bound to make a return of the writ of execution, unless the party requires it. And as to the writ of *venditioni exponas*, that writ, though a proper writ, yet is not of necessity, being rather to compel the sheriff, when guilty of laches, to do what he has authority to do, than to give him any new authority. 1 Ves. 195. Sed vide Yelv. 44. 1 Lutw. 589. 3 Bac. Abr. 377.

(f) 1. Cowp. 406.—2. For the form of this writ, see Tidd's Practical Forms, chapter 41. sect. 64.—3. If goods have not been taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *fieri facias* for the residue, in the same writ. Thes. Brev. 305. Tidd's Practical Forms, chapter 41. sect. 65.—4. And it is said, that if a sheriff seize goods to the value and return it, he is bound to find buyers. 6 Mod. 293. Ld. Raym. 1075.—5. But where the sheriff returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands, for want of buyers, the court of C. B. refused an attachment against him. 1 B. & P. 359.

(g) Where the old sheriff returns, that he has taken goods which remain in his hands for want of buyers, the usual way of proceeding in the King's Bench, is by writ of *distringas* to the new sheriff, commanding him to distrain the old one, till he sell the goods. Tidd, 1006.

(h) Which is the most usual. 6 Mod. 299.

(i) See the form in Tidd's Practical Forms, chapter 41., sect. 66. Vide 2 Ld. Raym. 1074, 1075. 1 Salk. 323.

(k) Which is the most antient. Gilb. Exec. 21.



(C 9.) By *capias ad satisfaciendum*: — when it lies.

So execution may be by *capias ad satisfaciendum* (l) against the body of the defendant, in all cases where a *capias ad respondendum* lies in process. 3 Co. 12. a. (m)

And therefore, in all actions *vi et armis*, as in trespass, &c. for there a *capias* lies in process at the common law. 3 Co. 12. a. Vide ante, (C 2.) (n)

If the principal offers himself in discharge of the bail, and the plaintiff doth not accept him, yet he may afterwards have a *capias ad satisfaciendum* against him; for the refusal was not a discharge, but a forbearance. 1 R. 898. l. 45.

So, at common law, the king may have execution by *capias*. Vide ante, (B 3, &c.)

So, by the course of the court, a *capias* lies upon a judgment against bail in a *scire facias* upon a recognizance in *B. R.* Vide Bail, (R 11.)

But a *capias* does not lie against bail by recognizance in *C. B.* (o) or in an inferior court. Vide Bail, (R 11.)

Or against bail in *B. R.* on a writ of error in the exchequer. Vide Bail, (R 11.)

So a *capias ad satisfaciendum* does not lie upon a recognizance in chancery; for no *capias* is given on a *scire facias*, by any statute; and it does not lie by the common law. R. 1 Rol. 897. l. 30. R. Dy. 306. a. Dub. 2 Bul. 63.

So a *capias* does not lie upon judgment against a garnishee in *detinue*: for he is no party to the suit. 1 Rol. 896. l. 50.

So, if a woman recovers damages in dower, she shall not have execution by *capias ad satisfaciendum*; for no *capias* lies in process. 1 Rol. 898. l. 2.

So in all cases, where a *capias* does not lie in process, no execution shall be by *capias ad satisfaciendum*: as, in an assise of nuisance. Sho. 74.

So a *capias* did not lie against a prior, &c. in trespass, or other action. 1 Rol. 898. l. 20. (p)

So, if the plaintiff sues a *scire facias* within the year, (though he need

(l) 1. See the form, Tidd's Practical Forms, chapter 41. sect. 88., &c. — 2. Where the defendant is already in custody, there is no occasion for this writ.

(m) 1. The rules respecting its form, &c. have been already given. — 2. As the defendant can only be once taken, it seems that there may be several writs running against him at the same time, in different counties. Tidd, 1028.

(n) 1. A *capias ad satisfaciendum* lay, for a subject, at common law, in actions of trespass *vi et armis* only; but has since been given in other actions by a variety of statutes. Hob. 56. — 2. But the Annotator to 3 Bac. Abr. 383., acknowledging that the authority is very great, doubts whether the *capias* which, at common law, issued in trespass with force, was any other than the *capias pro fine*, which was imposed for the breach of the king's peace; and whether the *capias ad satisfaciendum eo nomine* was then known. He supports the conjecture in the continuation of his note. And though he hints that on satisfaction of the king's fine, the defendant was entitled to his discharge; yet quære if the doctrine was not, that he could not procure his enlargement until he had satisfied, not only the fine to the king, but likewise the damages assessed to the plaintiff. See 11 H. 7. Hil. 11. p. 15. accord. etiam supra. (B 2.)

(o) 1. 2 Taunt. 113, 114. — 2. But it lies against bail in the King's Bench, without any previous *fieri facias*, or return of *nulla bona*. 2 Str. 822. 1139.

(p) 1. So it does not lie against peers, or members of the house of commons, except upon a statute-merchant, or statute-staple. 1 Crompt. 345. — 2. Nor against executors or administrators, unless a *devastavit* be returned. 3 Blk. Com. 414. — 3. An infant seems to be liable to this process. 2 Str. 1217. et vide, 1 B. & P. 480.

not,) he cannot afterwards have a *capias* before judgment in the *scire facias*. R. 1 Rol. 900. l. 25.

(C 10.) When the defendant shall be in execution.

If defendant renders himself, and afterwards brings error, and has a *supersedeas*, but does not thereupon find bail, the court, upon the prayer of the plaintiff, may commit him in execution, though the record be removed. 1 Rol. 896. l. 10.

So, if a man be arrested upon a *capias ad satisfaciendum*, he shall be in execution before the return of the writ. 1 Rol. 901. l. 30.

If the defendant be in custody of the sheriff, and another writ of *capias ad satisfaciendum* is delivered to the sheriff, against him, he shall be in execution immediately upon the second writ, without actual arrest. R. 5 Co. 89.

So, if the defendant be in prison for a crime, by leave of the court he may be charged in execution. Ray. 58. 1 Sid. 154.

And though he be charged without leave, which he ought not to be, yet he shall not be discharged. R. Ray. 58. 1 Sid. 90.

If the defendant be in prison before judgment, in the prison of the same court where the judgment is; the plaintiff may pray, that he may be in execution, and a *committitur* shall be entered on the roll, and then he shall be in execution. 1 Rol. 895. l. 5.

Or, if he be in another prison, he shall be brought up by *habeas corpus*, and committed in execution. 1 Rol. 895. l. 40.

So, if there be judgment in a *scire facias* against him, and three or four years afterwards he is in prison for another cause, he may be brought into court by *habeas corpus*, and charged in execution. 1 Rol. 896. l. 5.

If a defendant be taken upon a *capias pro fine*, or a *capias utlagatum*, he shall be in execution for the party, if he will. Vide ante, (B 2.)

(C 11.) When not.

But, without prayer, or a *habeas corpus* and a *committitur* upon the roll, he shall not be in execution, though the judgment was in B. R. and the defendant at the same time was prisoner in the Marshalsea of the marshal for another cause. R. 1 Rol. 895. l. 5.

Or, if the judgment was in C. B. and he at the time was prisoner in the Fleet.

Though he was prisoner at the suit of the plaintiff, in the same action, for want of bail. R. 1 Rol. 894. l. 52.

Though the warden of the Fleet informs the chancellor, or C. B., that he is a prisoner there, and the court commands him to detain him till judgment satisfied. R. 1 Rol. 895. l. 15. 40. Dy. 306. a.

Though a *habeas corpus* be granted for him, and the warden returns, that he is *languidus*. 1 Rol. 894. l. 45.

Though a special writ be directed to the warden, to detain him: for he ought to appear in court upon the *habeas corpus*, and shall be opposed, whether he be the same person. R. 1 Rol. 894. l. 40.

So, if a defendant be committed in execution upon a writ to the sheriff of Middlesex, he shall not afterwards be charged in execution upon another writ to the sheriffs of London: for they are different counties,

and distinct prisons, though the same persons are sheriffs of both, and Newgate is the prison for both. R. 1 Rol. 894. l. 25.

So, if a defendant taken upon a *capias ad satisfaciendum* be brought into court by the sheriff, he shall not be committed in execution, if the plaintiff does not pray it. R. 1 And. 118.

And he shall be discharged out of the custody of the sheriff also, if the sheriff does not pray the contrary. 1 And. 118.

(C 12.) An arrest, what shall be.

If a bailiff, &c. puts his hand, &c. upon the party, saying that he arrests him; it shall be a sufficient arrest, without shewing him the warrant, and without saying, at whose suit he was arrested, if he does not ask it. R. 2 Cro. 485. Semb. cont. 6 Co. 54. 9 Co. 69. a.

So, though the bailiff has the warrant in his pocket. R. 2 Cro. 486.

Or has two warrants in his pocket, and does not say upon which he arrests him; for he shall be arrested upon both. R. 2 Cro. 486.

So, if a bailiff gives a warrant to his servant, who by his command and in his presence, puts his hand upon him, and says, "I arrest you." Dub. per Holt, Mod. Ca. 211.

So, if the servant goes into another room out of the presence of the bailiff, who waits at the door, and there arrests him. Dub. per Holt, Mod. Ca. 211.

So, if the bailiff only touches him, and says, that he arrests him. 1 Sal. 79.

So, if B. be arrested, and in custody of the sheriff, upon a mesne process, and afterwards a *capias utlagatum* be delivered to the sheriff against B. without an actual arrest, he shall be in custody upon the *capias utlagatum*; and if he escapes, the declaration shall say, that he was arrested upon it. R. 5 Co. 89. a.

But if the party requires it, he ought to shew the warrant, tell at whose suit, for what cause, by what process, and in what court returnable the arrest is made; otherwise it will be wrongful. R. 6 Co. 54. 9 Co. 69. a.

So words only do not make an arrest: and therefore, if a bailiff says, I arrest, and does not touch him, though he be beat off by a sword or other weapon, it is no arrest. R. 1 Sal. 79.

The sheriff may enter the house of another where the party is, (q) if (r) the door be open, to make an arrest. R. 2 Cro. 486. R. 5 Co. 92. a. Vide ante, (C 5.)

Though it be at six o'clock at night. R. 2 Cro. 486.

So, upon an attachment against him, he may break the house to take him. R. 1 Rol. 336.

(q) 1. Generally speaking, an entry into the close of one man to seize the property or person of another, will not be justifiable, unless it turns out, that they were concealed therein at the time. Cro. Eliz. 759. Vide 2 Wils. 291.—2. But if one man has allowed another to use his house as his own, by residing therein, it may be accounted the house of the latter. 2 H. Bl. 120.

(r) The outer inlet of a man's house is privileged for himself alone, and will not screen the person of another, who, with the owner's assent, flies to the house for protection, against a civil process, nor his goods, which, under the same circumstances, have been removed therein. But the case will be otherwise, if the stranger or his property are there *bonâ fide*, and without fraud or covin. 5 Rep. 93.

So, if a man arrested escapes into a house, he may break the house to retake him. R. Pal. 53.

So, if a window be open, and the bailiff arrests him at the window, and then the party escapes; the bailiff may break the house to take him. R. Pal. 53. 2 Rol. 138.

But upon information that his prisoner fled into the house of B. he cannot enter, and, upon denial of the keys of a chest, break it open, if he be not in the chest: for he takes it upon him at his peril. R. 2 Rol. 564. l. 15.

(C 13.) When the defendant shall be discharged.

If a man taken upon a *capias ad satisfaciendum* satisfies the debt, the sheriff may discharge him. Dub. Cro. El. 404. If the payment be to the sheriff. Dub. 2 Lev. 203.

So, if a *supersedeas* of the process comes to the sheriff.

So, if a *capias ad satisfaciendum* comes to the sheriff, and before an arrest upon it, the defendant pays the debt to the sheriff; he ought not to be afterwards arrested. Semb. Cro. El. 404.

But a man in execution shall not be discharged upon affidavit, though there be cause: but ought to have a *supersedeas*, or other matter of record. Pr. Reg. Tit. Execution.

So, if a *supersedeas* be delivered to an officer, he may detain the party, till he takes a reasonable time to be informed of the import of it. Dub. Cro. El. 404.

So, if he pays the debt to the marshal, being committed to him, he shall not be discharged. Per 2 J. Wild, cont. 2 Mod. 214. R. 2 Lev. 203.

So, if the plaintiff dies, and the defendant has right of administration to him, he shall not be discharged till satisfaction acknowledged, which he cannot do himself, but another must take out administration, and acknowledge satisfaction upon the judgment. R. 2 Mod. 315.

(C 14.) By *elegit*.

So now, by the st. W. 2. 18. Upon judgment or recognizance *sit in electione* of the plaintiff *quod vicecomes fieri faciat de terris et catallis, vel quod liberet omnia catalla (exceptis bobus et afris carucæ) et medietatem terræ quousque debitum fuerit levatum per rationabile pretium et extentum.* Co. L. 289. b. 2 Inst. 394. (s) Vide Process, (E 6.)

If the plaintiff prays an *elegit*, (t) the entry shall be, (u) *quod elegit sibi executionem de omnibus catallis, et medietate terræ.* 2 Inst. 395.

Execution by *elegit* may be by an executor or administrator, as well as by the plaintiff himself. 2 Inst. 395.

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(s) Dyer, 100. Cro. Eliz. 584.

(t) See the form in Tidd's Practical Forms, chap. 41. s. 70.

(u) 1. An *elegit* may be sued out after a year, without a *scire facias*, upon awarding an *elegit* on the roll, and continuing it down by *vicecomes non misit breve.* Carth. 283. Tidd, 1009.—2. And the plaintiff may have *elegits* awarded into as many different counties as he pleases, without being under the necessity of suing out *testatum* writs. 1 Crompt. 346. Law of Executions, 208.—3. But it is said, that if he award an *elegit* into one county, and extend the lands upon that writ, and afterwards file it, he is barred, and cannot sue out an *elegit* into another county. 1 Crompt. 346. 352. Law of Exec. 287. See vide Gilb. Exec. 53. 2 Saund. 68. b. Tidd, 1009.

By the successor of the conusee, where a recognisance is made to a corporation; as, to the chamberlain of London. 2 Inst. 395. R. 4 Co. 65.

So it may be upon a precept to a serjeant at mace in London, or other officer of any court of record, who does execution, as well as upon process to the sheriff. 2 Inst. 395. R. 4 Co. 65.

So, upon a mandate by the sheriff to the bailiff of a franchise, which has execution and return of writs. R. Cro. Car. 319.

So it lies against (x) an executor or administrator upon a *devastavit*, R. 2 Leo. 188,

If an *elegit* upon a judgment, and another upon a statute, be delivered to the sheriff at the same time, execution shall be first made upon the judgment; for that is upon a record. Br. Jud. 79.

But an *elegit* against an heir does not lie during his minority; though he be charged as terre-tenant. Co. L. 290. a. (y)

Nor, against the wife of the defendant, endowed by the heir within age. Co. L. 290. a.

If an *elegit* be prayed, the sheriff shall (z) take an inquisition; (a) for there shall be a reasonable appraisement of the goods, and extent of the lands; which shall be made by an inquest of twelve men. 2 Inst. 396. Dy. 100. Cro. El. 584. (b)

And the inquisition ought to find the lands with certainty; (c) for to find no certain estate will be insufficient. Clift 877. Vide Statute Staple, (D 5.)

It ought to shew the place and county, where the inquisition is taken, and where the lands lie. Semb. Dy. 208. b.

After the inquisition found, the sheriff shall deliver (d) the moiety; (e) but the jury need not divide it. R. Cro. Car. 319.

So the sheriff ought to deliver the lands (f) described with certainty;

(x) Peers of the realm. 1 Crompt. 346. Tidd, 1009.

(y) And therefore, in a *scire facias* brought against him, the parol shall demur, because he may have a good plea to bar the execution, which might be mispleaded. Gilb. Exec. 58.

(z) No notice is given of executing an *elegit*. 1 Crompt. 363.

(a) If there be no lands, the sheriff need not take or return an inquisition. 2 Str. 874.

(b) Co. Litt. 389. b. 5 Co. 74.

(c) 1. Moor, 8.—2. See the form in Tidd's Practical Forms, chapter 41. s. 71.

(d) The goods themselves are to be delivered to the plaintiff at the price at which they have been appraised. Gilb. Exec. 33. T. Raym. 346. et vide 1 Sid. 184. 1 Lev. 92. 1 Keb. 105. 261. 465. 556. 691.

(e) The sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. Dougl. 472.

(f) 1. If the execution were laid upon lands which did not belong to the conusee, or had been sold before the judgment, antiently, the *elegit* would have put the party out of possession, and driven him to his assise or ejectment; because, being a stranger to the judgment and execution, he could not traverse. But, as it was thought hard on such executions to turn strangers out of possession, the practice was altered, and the sheriff, instead of *actual*, delivers only *legal* possession of the moiety of the lands; and if the plaintiff do not enter, as, it seems, he may by virtue of the *elegit*, he must proceed by ejectment. Gilb. Exec. 44. 2 Eq. Abr. 381. 3 T. R. 295. 6 Taunt. 202. 1 Mars. 542.—2. In which action he must not only prove the judgment, and, by the judgment roll, that an *elegit* issued and was returned; he must also prove the writ of *elegit*, by a true copy thereof, and the inquisition thereon; for it is the *elegit* and inquisition upon it, which carve out the term, and give the right of entry, the judgment roll



tainty, for, to say that he delivered a moiety, is not sufficient. 1 Vent. 259. (g)

Described by metes and bounds. Hut. 16. (h) Distinctly. 2 Brownl. 38. But it need not be by metes. Dal. 26.

He ought to deliver a moiety only; for if he delivers more, it will be void for the whole. 1 Sid. 91. 239. (i)

If the defendant be joint-tenant, or tenant in common, it ought to be specially mentioned in the return. Hut. 16. 1 Brownl. 38.

The sheriff shall make execution of all (k) the goods.

And if it appears that the goods are sufficient for the debt, the sheriff ought not to extend the land. 2 Inst. 395. (l)

If the goods are not sufficient, he ought to extend a moiety of all the lands, which the defendant or conusor had at the time of the judgment, &c. 2 Inst. 395.

If there are divers conusors, a moiety of the lands of all. 2 Inst. 396.

If the defendant has aliened after judgment, a moiety of the land in the hand of the purchaser, as well as of the defendant. 2 Inst. 396.

If the lands lie in several vills, a moiety of the land in all; and not the whole in one vill. R. 1 Lev. 160. Cont. Bro. Elegit, 14. (m)

And he may extend a term for years, though it be a chattel. 2 Inst. 396. (n)

And lands, which the conusor or defendant has by extent upon a statute-merchant, &c. 1 Rol. 887. l. 52. R. 4 Co. 65. b. Vide infra.

So, lands which are antient demesne. 2 Inst. 397. R. 1 Rol. 888. l. 5. (o)

So, a reversion of land upon a lease for years; and the conusee shall have a moiety of the rent. 1 Rol. 894. l. 12. 3 Leo. 118. Mo. 36. (p)

So, all tenements, as well as land, of the defendant; as, a rent, &c. Bro. Elegit, 13. Mo. 32.

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roll being no more than a memorandum that the *elegit* issued and was returned. Tidd, 1013. Gilb. Evid. 10, 11. Run. Eject. 330. 2 Saund. 69. c. Lib. Pr. Reg. 689.—3. Since the record of a court of competent jurisdiction imports incontrovertible verity as to all the proceedings which it sets forth, an examined copy of the judgment roll, containing the judgment, the award of *elegit*, and return of the inquisition, is conclusive evidence in an action for use and occupation, by one claiming under an *elegit*, against the defendant's former landlord, that an *elegit* has issued and been returned; and a copy of the *elegit* and inquisition need not be produced. 2 M. & S. 565.

(g) 1. If he do not, the return is ill, and may be quashed for uncertainty. Carth. 453.—2. And if the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return. Hut. 16. etiam infra.

(h) Dalt. Sher. 135.

(i) 2 Salk. 563, 564. 1 Vent. 259. 12 Mod. 355.

(k) Except beasts of the plough. 3 Bac. Abr. 379.

(l) But an *elegit* executed upon goods only, is not a *feri facias*; for a *feri facias* is executed by sale by the sheriff, but the *elegit* by appraisement of the goods by a jury, and delivery to the party. Sid. 184. Lev. 92. Keb. 105. 261. 465. 566. 692. 1 Ld. Raym. 346.

(m) Vide Sid. 239. et supra.

(n) 1. 8 Co. 171.—2. Or he may sell, and therefore *semble* deliver it as part of the personalty. Ibid.—3. If it be extended the plaintiff is accountable for all the profits he receives out of the term, upon such extent; and if he receive the debt out of such term, before it expires, the defendant shall be restored to the term itself. Gilb. Exec. 35.—4. But otherwise he shall keep the term, and not account for the profits of it. Gilb. Exec. 33.

(o) So the wife's lands which the husband has during the coverture. Dalt. Sheriff, 136.

(p) Gilb. Exec. 38.

So two-thirds of a rent may be extended, though the defendant has the whole. R. Cro. El. 742.

So he may extend upon an *elegit* lands before in execution upon a statute. R. 4 Co. 65. b. Vide supra.

So now (*q*) by the st. 29 Car. 2. 3. lands, tenements, &c. of which any shall be seised or possessed in trust for him, against whom execution is sued, (*r*) of such estate as the trustee was seised at the time of execution sued.

But upon an *elegit* the sheriff cannot extend a copyhold. R. 1 Rol. 888. l. 1. Vide Copyhold, (R 18.) (*s*)

Nor a term for years of a copyhold made by the licence of the lord. R. 1 Rol. 888. l. 3.

Nor lands of which the defendant is disseised, whilst they are in possession of the disseisor. R. 1 Rol. 888. l. 7.

Or, of which he has only the trust, and not the estate in law. R. 1 Rol. 888. l. 12. But this is altered by the st. 29 Car. 2. 3.

Nor, since the st. 29 Car. 2. 3. lands which the trustee has aliened before execution; for they are not bound by the judgment. R. per C. B.—An. inter Johnson and — cited per Tracy. (Vide Comyns's Rep. 227. S. P. adjudged.)

Nor the land of a villein upon an *elegit* against the lord; for it is the land of the villein, till the lord seises it. 1 Rol. 888. l. 20. (*t*)

Nor a tenement which cannot be granted, or assigned over: as, the office of philizer; for it is an office of trust. Dy. 7. b.

So a bare rent-seck without land cannot be extended. R. Cro. El. 656. (*u*)

So, if two have judgment, and one sues an *elegit*, and has a moiety, and afterwards the other sues an *elegit*; the sheriff shall deliver but a moiety of the residue. R. Cro. El. 482. Cont. Fitz. Execution, 137.

(*q*) At common law, if a man was seised of the legal estate in lands, to the use of, or in trust for another against whom a judgment had been obtained, or who had entered into a statute or recognizance, these lands were not liable to execution, upon the judgment, statute, or recognizance, of *cestui que* trust. Co. Litt. 374. b. 2 Wms. Saund. 11. (17).

(*r*) 1. "Like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued, had been seised," &c.—2. An equity of redemption, therefore, though legal assets, cannot be taken in execution on this statute. 3 B. C. C. 478. 1 Ves. J. 431. 3 Atk. 739.

(*s*) 3 Blk. Com. 419.

(*t*) 1. If upon an inquest taken upon an *elegit*, the jury find that the party was possessed of a term, which commenced the 2 & 3 Ph. & Mar., when in truth it commenced the 3 & 4 Ph. & Mar., and the sheriff sells the term according to the value found by the jury, the execution is void, for the sheriff has only authority to sell or extend such things as are found to be the party's; but in this case the inquest finding one thing, and the sheriff selling another, the inquest does not warrant the sale. Cro. Eliz. 584. 4 Rep. 74.—2. But if the inquest had found, that he was possessed of such land for terms of divers years *adhunc vent.* which they had appraised at so much, without showing the certain beginning or determination thereof, it had been well enough; for they shall not be compelled to find a certainty, not having means to be informed thereof. Cro. Eliz. 584. See Gilb. Exec. 35.

(*u*) 1. Nor an advowson in gross. Gilb. Exec. 39. But see Wms. 401. Cro. Eliz. 359.—2. Nor glebe belonging to a parsonage or vicarage. Ibid. 40. Jenk. 207. pl. 36. 3 B. & P. 327.—3. It is said, however, that the lands of a bishop may be extended on an *elegit*. Dalt. Sheriff, 136.—4. A rent-charge may. Gilb. Exec. 38. Moor, 32.—5. Yet it cannot be delivered as a *liberum tenementum*. Cro. Eliz. 656.

but

but there said, *quod mirum*. R. M. 32 & 83 El. in C. B. Br. Jud. 78. Hard. 25, 26. R. 2 Brownl. 97.

Yet if both judgments are of the same term, which is but one day in law, each may take a moiety of the whole. R. Per 3 Bar. Hard. 27. (x)

If the judgment be reversed, the sale and delivery of a term extended upon the *elegit* shall be void. R. 2 Cro. 246. Dy. 363. a. in marg. Yel. 180.

After inquisition taken by the sheriff, it shall be returned and filed. Dy. 100. in marg.

And after it is filed, it shall not be avoided upon surmise that more is extended than a moiety. 2 Inst. 396.

Or, that it was extended at a small value. 2 Ca. Ch. 183.

And though the extent was at an under-value, the plaintiff shall account only for the value at which the extent is. R. 2 Ca. Ch. 183.

But before inquisition filed, the court may examine it, and if they find fraud, partiality, &c. may stop the filing, and award a new *elegit*. 2 Inst. 396.

So, if they find an extent made at an under-value. 2 Ca. Ch. 183.

So, if the whole due upon the judgment be brought into court. R. 2 Ca. Ch. 183.

So, if the inquisition appears to be void, it may be quashed after it is filed. Semb. 1 Vent. 259.

And in ejectment advantage may be taken of the nullity. R. 1 Lev. 160. Per Hale, 1 Vent. 259. R. Sal. 563.

As, if more than a moiety appears to be extended. 1 Vent. 259. Sal. 563.

Or, all in one vill, and nothing in another. R. 1 Lev. 160. (y)

The entry of the *elegit* upon the record, should not, in prudence, be made till the return filed. 2 Cro. 339. Godb. 257.

After the inquisition returned, there shall be a *liberate*, if the plaintiff will. Vide Statute-staple, (D 6.)

Yet before the *liberate*, or inquisition returned, the plaintiff may enter. R. 1 Rol. 738. l. 10.

And if the sheriff returns that he has delivered, when he has not, an action on the case lies for a false return; though the plaintiff may enter without it. R. 1 Rol. 738. l. 15.

Tenant by *elegit* has but a chattel. 2 Inst. 396.

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(x) 1. If A. acknowledges two judgments to B., and in the same term he takes out two *elegits*; on the one he may have one moiety of A.'s lands delivered to him, and on the other the other moiety, and he is not restrained to a moiety of a moiety, for in judgment of law the whole term is but one day. Hard. 23, &c. And. 27.—2. On lending money, therefore, if the lender take two several bonds and warrants of attorney, one for part and the other for the residue of the money, and enter up two several judgments therein of the same term, he may take the whole of the defendant's lands under them. Gilb. Exec. 56.

(y) 1. In a word, if the inquisition be void for uncertainty, or because more than a moiety has been delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the land under it, the court, on a suggestion thereof, or on *h scire facias*, will order the writ to be vacated, and grant another, and amerce the sheriff. See the form in 1 Towns. Judgm. 129.—2. So where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ. 2 Inst. 396.—3. And according to the opinion of Lord Hale, which seems to be well founded, they will grant another writ in either of the above-mentioned instances, whether of defect or fraud, after the first has been filed. 2 Wms. Saund. 69. c. 1 Vent. 259. L. R. 718. 12 Mod. 355. 3 Bac. Abr. 379.

Yet he shall hold *ut liberum tenementum*; and he, his executor, or administrator shall have an assise. 2 Inst. 396. (z)

After the debt satisfied upon record, or by the annual rent, at which the extent is made, the defendant may enter. 2 Inst. 396. 2 Vent. 236.

But if the debt be satisfied by a casual profit, he ought to have a *scire facias* before entry. 2 Inst. 396.

So, if he brings a *scire facias*, and tenders all that remains satisfied, he shall have his land. 2 Ca. Ch. 183.

### (D) To what time an execution relates.

#### (D 1.) As to land.

By the common law, the lands of the defendant were bound by the judgment; and therefore, before the st. 29 Car. 2. 3. The plaintiff might have had his execution of lands, which the defendant had at the time of the judgment given, or afterwards. 30 Ed. 3. 24. Dy. 306. b. 1 Rol. 892. l. 37. 2 Inst. 395.

Or, at the first day of the term, in which judgment was given; for the term is but one day. R. 42 Ass. 17. Bro. Elegit, 17. 19. 1 Rol. 892. l. 40.

Though the judgment was signed after the term. 2 Mod. Ca. 310.

Or, at the day of the inquest taken; for this is but one day with the day in bank. 21 Ed. 3. 51. b. Adm. Dy. 149. a.

And the plaintiff shall have execution of lands, which the defendant had at the time of the judgment, though he had aliened them *bonâ fide* before execution sued. 30 Ed. 3. 24.

Though a statute be afterwards acknowledged, and execution upon it. 1 Brownl. 37, 38.

So the demandant shall have execution against the vouchee of lands, which he had at the time of the voucher; for this is in lieu of an action. Co. L. 102. a.

And in a *warrantia chartæ*, of land, which the defendant had the day of the writ purchased. Co. L. 102. a.

By the st. *de merc.* 13 Ed. 1. (to which the st. 27 Ed. 3. and 23 H. 8. 6. relate) the conusee of a statute shall have execution of the lands, which the conusor had at the time of the conusance.

And if it be acknowledged before a judge out of term, when entered upon record, it relates to the time of the acknowledgment. R. Hob. 195. 1 Rol. 892. l. 35.

So, if after a statute, a judgment be against him, and execution by *elegit*, the land at the time of the conusance shall be extended, and the execution by *elcgit* avoided. 1 Brownl. 37.

If a judgment be in Trinity term, which relates to the first day, (which was 20th June,) and a statute be acknowledged 20th June, execution upon the judgment shall precede the statute. Lat. 53.

So, if there be a *capias ad satisfaciendum*, and then an extent, and before an inquisition taken, the defendant sells his goods, they shall be liable to the extent. R. Mo. 21.

But a judgment in a personal action binds lands only from the day of the judgment given. Co. L. 102. a.

And therefore, by the common law, the plaintiff shall not have exe-

cution of land, which the defendant had the day of the writ purchased. 42 Ed. 3. 11. R. 2 H. 3. 14. 6 Ed. 3. 15.

Or, at the time of his plea, if it be in the same term, before judgment. 42 Ed. 3. 11. R. 42 Ass. 17.

Or, at the day of the inquest returned, or inquest taken, if it was afterwards adjourned; for then it is not one with the day in bank. 21 Ed. 3. 51. b. 1 Rol. 892. l. 7.

So, now, by the st. 29 Car. 2. 3. The officer shall set down the day of the month and year of his signing judgment on the paper, &c. he signs, which shall be entered on the margin of the record, where the judgment is entered: and such judgments shall relate, against purchasers *bonâ fide* for valuable consideration of lands, &c. only to the time of signing; and not to the first day of term when entered, return of the original, or filing bail.

And by the same statute, the day of enrolment of a recognizance shall be entered on the margin of the roll; and no recognizance shall bind lands, &c. in the hands of a purchaser *bonâ fide* for valuable consideration, but from the time of such enrolment.

And therefore, if judgment be pronounced, but not entered upon the roll till several terms afterwards; it ought not to be entered without continuances to the term when entered: for it ought not to bind a purchaser, till that term. Mod. Ca. 184. 191.

Yet if it be entered in the vacation before the essoin-day of the next term, it binds a purchaser after the term, before entry. Per Holt, Mod. Ca. 191.

### (D 2.) As to goods.

By the common law, goods and chattels are bound by the award (a) of execution; and if they are afterwards sold *bonâ fide*; yet they may be taken in execution. R. 2 H. 4. 14. 1 Rol. 893. l. 10. R. Mo. 873. R. Cro. El. 174. D. 8 Co. 171. a. 2 Cro. 451. Cro. Car. 149.

So, if the defendant dies, they might be taken in the hand of his executor or administrator. R. 1 Rol. 893. l. 23. R. Cro. El. 181. 1 Leo. 144.

But a sale after the original, and before judgment shall be good. R. 9 H. 6. 57. b. 1 Rol. 893. l. 5.

And now by the st. 29 Car. 2. 3. No *feri facias*, or other writ of execution, shall bind the property of goods, but from the time such writ shall be delivered to the sheriff, &c. to be executed, who, on his receipt of it, shall endorse the day of his receiving the same.

And therefore, if a writ of execution be sued, it does not (b) bind, till it be delivered to the sheriff.

If it be delivered to him, and no warrant prayed upon it, and afterwards another execution is delivered, and execution prayed, he may

(a) 1. That is, *teste*. Gilb. Exec. 13. 14. Cro. Eliz. 440. 2 Vent. 218. 7 T. R. 21, 22. Sed vide 1 Lev. 174. — 2. The *property*, however, was not changed, but continued in defendant till execution executed. 2 Eq. Ca. Abr. 381. et vide L. R. 252. — 3. Nor has the statute of Charles, *infra*, made any difference in this respect. Ibid. — 4. The effect of the goods being *bound*, is to prevent an assignment unless in market overt. Ibid.

(b) 1. Unless in the king's case, who not being named in the statute, is not bound by it. 3 Atk. 739. 1 Ves. 196. — 2. And therefore an extent at his suit still binds from the *teste*, or *fiat* of the baron on which it issues. Bunb. 39. Gilb. Rep. 222: 2 Str. 757. 2 Blk. 1251.



execute the last first. R. M. 9 W. 3. B. R. inter Smalcomb and Buckingham, 5 Mod. 377. 1 Sal. 320. (c)

If it be upon a subsequent judgment, and executed upon goods, it shall be good, though an execution upon a former judgment or statute afterwards comes to the sheriff. R. 1 Brownl. 37. (d)

Yet it binds the goods (as to the party himself, though not as to a purchaser or stranger) from the *teste* (e) of the writ, as before that statute. R. P. 3 W. & M. in B. R. Skin. 257. 2 Mod. Ca. 310.

And therefore, if a *feri facias* be tested before the death of the defendant, (f) and delivered to the sheriff after his death; it may be executed (g) upon goods in the hands of the executor, or administrator. Semb. 2 Vent. 218. R. Skin. 257. (h)

So, if two writs are delivered to the sheriff the same day to make execution, without assent of delay, he ought in the first place to make execution upon the first. R. 1 Sal. 320. (i)

(c) 1. Ld. Raym. 252. Carth. 419. et vide, 1 T. R. 731. in notis. 4 East, 523. — 2. So though a warrant is prayed upon the first. Ibid. — 3. In which case, however, the plaintiff in the first writ has his remedy against the sheriff. Ibid. — 4. And where no sale has been made, the writ first delivered must have the priority, though the seizure was made under the other. 1 T. R. 729. Vide 4 East, 544.

(d) 1. Vide supra, that where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed. 4 East, 523.

(e) 1. The writ must be tested and returnable in term time. 2 Salk. 700. — 2. And upon a day after the judgment is, or may be supposed to have been given. Tidd, 986. — 3. Though it may be tested on any day in the term in which judgment is signed, since the judgment has relation to the first day. 1 Crompt. 372. — 4. It must be signed as well as sealed. R. E. 1659. K. B. R. E. 12 Jac. 1. s. 3. C. P. R. M. 1654. s. 6. C. P. — 5. It is void, or at least erroneous, if tested out of term, and may be quashed or set aside on motion, together with the proceedings that have been had under it. 2 Salk. 700. — 6. So if returnable. Davey v. Hollingsworth. Tidd, 986. — 7. Or in an action by bill, be returnable on a general return day. 1 Wils. 515.

(f) So if plaintiff die after a *feri facias* sued out, it may be executed notwithstanding. Cro. Car. 459. 1 Sid. 29. 2 Ld. Raym. 1073. 1 Salk. 322. Noy, 73.

(g) 1. So if execution be tested in defendant's life time, it may be taken out after his death. Ld. Raym. 695. Cowp. Rep. 117. Bunb. 271. 12 Mod. 5. 2 Ld. Raym. 850. 7 Mod. 95. Vide 3 P. Wms. 399. et in notis. Willes, 131. 7 T. R. 20. 1 B. & P. 571. 3 Anst. 680. — 2. *Secus*, if the execution be tested after the defendant's death. 6 T. R. 368. Vide 3 Anst. 680. — 3. Error in parliament on judgment in B. R.; plaintiff in error dies in vacation; plaintiff in B. R. sues out execution, tested in the term preceding; and held irregular, because at the *teste* of the writ there was error pending, and execution could not be taken out in that case without leave; and where in the next term after, the defendant in B. R. having died, the plaintiff moved for leave to sue out execution tested of the term preceding, it was refused, because the error must appear upon the record. 3 Smith, 280. 7 East, 296. — 4. The reason of the general rule already stated, is this: Since a judgment has relation to the first day of the term in which, or preceding the vacation in which it is signed; if a defendant die in term time, and judgment is regularly signed afterwards, either in that term or the following vacation, it has relation back to a day before the death. And since an execution may be taken out in term time, or in vacation, tested as of the first day in term, and as an execution taken out after the defendant's death, if tested before, is regular; it follows that a *fi. fa.* may be sued out, either in the term in which such judgment was signed, or in the following vacation, tested as of the first day of term, and therefore of a day previous to the death, and the defendant's goods in the hands of his executor or elsewhere, taken under it. 7 T. R. 20.

(h) Gilb. 15. 16 Law of Executions, 46. Cro. Eliz. 181. 1 Mod. 188. Comb. 33. Pr. Reg. 215. 7 T. R. 20.

(i) 1. 1 T. R. 729. — 2. Except it be fraudulent, and then he ought to execute the other. 1 Wils. 44 et vide, Peake's C. 66. 4 East, 523.

**(E) By whom it shall be sued.**

Execution ought to be sued by him, who is party or privy to the record. Vide Pleader, (3 B 9. 10.)

In a real action, if the demandant dies, his heir shall sue execution.

In personal actions, the executor, or administrator shall sue execution by *scire facias* upon a judgment by his testator, or intestate. 2 Inst. 395.

When an executor, or administrator shall have a *scire facias* or not, Vide in Administration, (G) — Pleader, (3 L 5.)

So, in annuity, the executor shall have execution, and not the heir; for by recovery the arrearages are a chattel vested. 1 Rol. 889. l. 25.

So, in a mixt, or real action, where damages are recovered, though the heir has execution of the land, the executor shall have execution for the damages: as, in waste, assise, &c. 1 Rol. 889. l. 30.

But it does not lie by him, who is not party or privy, generally. Vide Pleader, (3 L 5. 7.)

Nor by him, who has no interest in the thing recovered, though he be privy, or party: as, it does not lie by a husband upon a judgment by him and his wife as executrix. R. 1 Rol. 889. l. 10. Vide Baron and Feme, (Z) — Pleader, (3 L 7.)

**(F) Against whom.**

So execution ought to be sued against him, who is party or privy. Vide ante, (A 2.)

If one of the defendants dies, it may be sued against the survivor and him who is dead. R. 1 Sal. 319. Vide infra.

So, if judgment be against husband and wife, and one dies, execution may be against the wife if she survives. 1 Rol. 890. l. 27.

So, if a *scire facias* be against all the defendants, and one is returned *nihil*, execution may be for the whole (*k*) against the others. 1 Rol. 890. l. 10. 50.

So, if a defendant dies, execution may be by *scire facias* against his executor, or administrator. Vide Pleader, (3 L 6.)

And, if the writ be tested before his death, it may be executed against his executor, or administrator, without a *scire facias*. Vide ante, (D 2.)

So, if the plaintiff dies, execution may be made without a *scire facias*. Dy. 76. b. in marg. Vide Pleader, (3 L 1.)

But execution taken out after the death of the defendant, against his executor or administrator, without a *scire facias*, is void. Dy. 76. b.

So, if it be taken against the survivors, where one of the plaintiffs in error dies, without entry of the death on the roll, and award of execution against the survivors. R. 5 Mod. 339. R. 1 Sal. 319.

So execution may be against a party to a judgment, though he be misnamed in his addition, or degree: for he is estopped by the record to say, that he is not of such degree. R. 1 Rol. 890. l. 45.

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(*k*) 1. Where several actions are brought against different parties for the same debt, as upon a bail bond, promissory note, or bill of exchange, each party is liable to an execution for the whole debt, and the costs of the action against himself; but neither of them is liable to the costs of the actions against the other defendants. Tidd, 982. — 2. And in suing out execution in actions upon a bail bond, it is usual to apportion the debt and costs in the original action amongst the different defendants, so as to levy a part on each, together with his own costs. Ibid.

## (G) By whom it shall be done.

Execution, regularly, ought to be directed to the sheriff of the county, where the action was brought. 1 Rol. 891. l. 15. Vide Bail, (R 2.) — Pleader, (3 L 3.) (l)

And the sheriff makes a warrant to his bailiff to do execution pursuant to the writ.

So the sheriff may do execution after his discharge is tested, or sealed, if he has not notice. R. Cro. El. 440. Vide County, (B 3.)

But upon a return, that the defendant has nothing in his county, a writ of execution may be to the sheriff of another county. 1 Rol. 891. l. 17. Vide Process, (E 7.)

Yet, if a *testatum*, goes where a former writ was not actually issued; though it be recited in the *testatum*, it will be error. R. 2 Cro. 246. Yel. 179.

## (H) When execution may be after a former execution.

If a former execution be not effectual, (m) the plaintiff, generally may have another execution: as, if the defendant escapes, he may be retaken by the sheriff, or the party himself, and shall be in execution again. Vide Escape, (E). (n) Vide ante, (A 3.)

*A fortiori* if he escapes, when taken upon a *capias utlagatum*, or *capias pro fine*; for the plaintiff need not allow, that he shall be in execution for him. 1 Rol. 901. l. 15. Vide ante, (B 2.)

If a man in execution be bailed by the court, he may afterwards be taken in execution again. Per Co. 1 Rol. 903. l. 1.

So, by the st. 11 H. 6. 5. If he brings an *audita querela*, and finds mainprize thereon, but afterwards does not prosecute with effect. 1 Rol. 902. l. 50.

So, if he be delivered out of execution by privilege of parliament,

(l) 1. Except in a county palatine. — 2. As a consequence of the principal doctrine, a writ of *feri facias* directed in the first instance to the bailiff of the Isle of Ely, out of the king's bench is erroneous and void; and the bailiff is a trespasser if he executes it. 3 East, 128. et vide 9 East, 342.

(m) 1. The plaintiff having sued out one writ of execution, may, *before it is executed*, abandon that writ, and sue out another of a *different* sort; or he may have several writs of the *same* sort, running against the defendant or his goods at the same time, in different counties: But after the *execution of one writ*, the plaintiff cannot sue out or proceed upon another of the same or a different sort, unless that which has been executed is returned; and then if a part only be levied upon a *feri facias*, the plaintiff may have an *alias feri facias*, or other execution; for the remainder; or if the *capias ad satisfaciendum* be rendered ineffectual, by the death or escape of the defendant, the plaintiff may have a new writ for the whole; and he may sue out and execute several *elegits*, for lands in different counties. Tidd, 985. — 2. If two writs of different kinds are issued at the same time, thus a *capias ad satisfaciendum* and a *feri facias*, both will be set aside. Lofft, 248. — 3. Where the sheriff seised goods under a *feri facias*, and left a man in possession, and a second *feri facias* issued under which a warrant was granted, and left with the man in possession, the court held that the second writ operated in favour of the first, and refused to set it aside as irregular. 2 Mars. 375. 7 Taunt. 56. — 4. Where however the sheriff has taken goods in execution under a *fi. fa.*, the plaintiff cannot sue out a *ca. ad sa.* till the *fi. fa.* has been returned, though he should have withdrawn his execution under the first writ. 2 Mars. 78. 6 Taunt. 370.

(n) And if the defendant escape from the King's Bench or Fleet prison, the plaintiff, on application to a judge, may have an escape warrant, in order to retake him, which shall be in force throughout England. St. 1 Ann. c. 6.

being

being a burgess, &c. he may afterwards be taken in execution again. R. 1 Rol. 903. l. 20. Godb. 373.

So, if the former execution be defeated by error. R. Godb. 272. Lat. 193. (o)

So, by the st. 21 Jac. 24. If a man dies in execution, it may afterwards be sued of his land or goods.

So, before that statute: for the body was not a satisfaction, but a pledge only for the debt. R. 5 Co. 87. R. cont. Cro. El. 850. 2 Cro. 136. 143. R. cont. per 3 J. Hob. 60. Mo. 858. 1 Rol. 903. l. 40.

So, since that statute, shall it be without question.

So, if one of the defendants escapes, the plaintiff may afterwards sue execution against the other, though he has a remedy against the sheriff. R. 5 Co. 86. b. Cro. El. 555. 573. Cont. Mo. 459. R. acc. 2 Cro. 532. R. Cro. Car. 75. Vide Escape, (E)

So, if the conusor upon a statute or recognizance escapes, the conusee shall have execution against his lands and goods. R. 5 Co. 86. b. 87. b.

So, if only part of the debt be levied, there may be another execution for the residue. (p)

If, upon an extent, *non inventus est* is returned, *quoad* the body of the party, and, land in right of his wife; though he take the land he shall afterwards have a *capias* against the person. R. 15 H. 7. 15.

So, if part of the debt be levied by a *fieri facias*, he may afterwards have an *elegit*. 1 Sid. 91.

So, if an *elegit* be returned *nichil*, or nothing can be extended upon it, there shall be another (q) execution. Vide infra.

So, if only part of the debt be levied by *elegit*, on the goods only, he may have debt upon the judgment for the residue. R. 1 Lev. 92.

So the plaintiff after judgment may have a *capias ad satisfaciendum* and a *fieri facias* together, and execute the one or the other: but if he takes the defendant upon the *capias ad satisfaciendum*, the *fieri facias* shall be quashed. 2 Mod. Ca. 302. (r)

But, if the plaintiff has full execution and satisfaction, he shall never afterwards have a new execution for the same cause. Mo. 29. (s)

Though the execution be afterwards defeated by the act of God: as, if a villein be delivered in execution for a debt, and he afterwards dies without issue. 5 Co. 87. a. (t)

So,

(o) A void *elegit* or inquisition, being as none, will not prevent the plaintiff from having a new *elegit* without a *scire facias*, though it be after the year. Gilb. Exec. 54.

(p) 1. As if part be levied by *fieri facias*, he may have a *fieri facias* for the residue, or an *elegit*, or a *ca. ad sa.* Tidd, 1005. — 2. So he may bring an action on the judgment for the residue; wherein the defendant may be arrested, if he was not arrested in the original action. 1 N. R. 133. 2 Smith, 39. — 3. But the first writ must be returned before the second can be taken out. Supra, et Barnes, 213.

(q) As a *capias ad satisfaciendum*. 1 Str. 226. 2 L. R. 1451.

(r) Vide supra.

(s) 1. As where he has taken the defendant in execution by a *capias ad satisfaciendum*. Hob. 59. — 2. And therefore a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt. 8 T. R. 123.

(t) 1. *A fortiori* if defeated by the act of the party himself. — 2. As where the plaintiff, having the defendant in execution, consents to his discharge, though it be on terms which are not afterwards complied with. 4 Burr. 2482. 6 T. R. 526. 527.

So, if the sheriff levies the debt of the goods, or extends the lands of the defendant, and delivers (u) them to the plaintiff; for then the plaintiff accepts the goods and lands in satisfaction. 5 Co. 87. a.

So, if the plaintiff had execution and satisfaction against one of the defendants, he shall not afterwards have execution against the other. R. 2 Cro. 338. 1 Rol. 9. Vide Action, (K 4.) (x)

Though it be in debt, where they are bound jointly and severally. 1 Rol. 896. l. 20. 25.

Though several actions are sued against each severally. 1 Rol. 896. l. 25.

So, in trespass against several, if the plaintiff has execution and satisfaction against one, he shall not afterwards have execution against the others. R. 1 Rol. 896. l. 30.

Though he recovers by several actions in several courts. 1 Rol. 896. l. 35.

Yet where the defendant cannot plead, as, where there is a recovery by several actions, the defendant cannot be relieved but by *audita querelâ*. R. 1 Rol. 896. l. 40. 45.

So, if the plaintiff has judgment against the principal, and also against the bail, and execution against the principal, he shall not afterwards have execution against the bail. 2 Cro. 320. Vide bail, (R 11.)

So, if he has the principal in execution, though he be not satisfied; for he has made his election. 1 Rol. 897. l. 10. R. cont. 2 Jon. 75. 1 Vent. 315.

So, if he takes execution against the bail, and has satisfaction, he shall not afterwards have execution against the principal.

Otherwise, if he has not satisfaction against the bail; for then he may resort to the principal. Cont. 1 Rol. 897. l. 7. 2 Cro. 320. 2 Bul. 68. R. acc. 2 Cro. 549. R. 1 Sid. 107. 1 Vent. 315. Vide bail, (R 11.)

So, though he has execution against one of the bail, if he be not satisfied, he may have execution against the other. 1 Rol. 897. l. 15. R. 1 Lev. 226. Vide Bail, (R 11.)

So, if a man has execution by *elegit* returned, served, upon record, he shall not afterwards have execution by *capias ad satisfaciendum*; for he has made his election. R. Hob. 2. in marg. 30 Ed. 3. 24.

7 T. R. 420. — 3. Or upon giving a fresh security, which afterwards becomes ineffectual. 1 T. R. 556. — 4. Even though the discharge was upon an express undertaking, that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. 2 East, 243. Barnes, 205. — 5. However, though a defendant be taken and charged in execution, the debt may still become the subject of a set off in a cross action. 1 Taunt. 426.

(u) After an *elegit* if lands be duly extended, and delivered to the plaintiff, he cannot afterwards have any other species of execution, unless in case of eviction; when he may proceed in the method pointed out by Westm. 2.; or if he be evicted out of all the lands, he may sue out a *scire facias* upon the st. 32 H. 8. c. 5. to have a new writ of execution for what remains unsatisfied. But if he be evicted out of part only, or of the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute. Tidd, 1013. Co. Litt. 289. b. Gilb. Exec. 57. 58.

(x) 1. If the plaintiff consents to discharge one of several defendants, taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake him, or take any of the other defendants. 6 T. R. 525. — 2. But if one of two defendants, taken on a joint writ, be discharged under an insolvent debtor's act, this will not operate as a discharge of the other; the discharge of the former not being with the actual consent of the plaintiff. 5 East, 147.



2 Inst. 395. 1 Lev. 92. R. 2 Cro. 338. 1 Rol. 9. R. 15 H. 7. 15.  
2 Bul. 97.

Nor, by *feri facias*, or other execution. 1 Lev. 92.

Otherwise, if the *elegit* be returned *nichil*. Q. Hob. 2. D. Hob. 57.  
1 Lev. 92. 1 Leo. 176. And it be entered on the roll. Br. Jud. 78.

Or, the land cannot be extended, by reason of a prior extent. R.  
Cro. El. 160. 1 Leo. 176.

Or if the writ be imbeziled. 1 Rol. 8.

So, if upon an *elegit* an extent be made, but the *liberate* not returned,  
and the entry upon record is, *vicecomes nihil inde fecit, nec misit breve*,  
another *elegit* may be sued. R. 2 Leo. 13. (y)

### (I 1.) By what court execution shall be granted.

Regularly, execution ought to be granted by the same court where  
the judgment was given.

If an attaint be in B. upon a judgment in B. R. and judgment  
affirmed; execution ought to be in B. R. and not in B. where they have  
only *tenorem recordi*. R. 1 Rol. 887. l. 40. (z)

If a man recovers in a *scire facias* upon a recognizance in B. R. and  
in debt upon that judgment in C. B.; he may afterwards sue execution  
out of the record in B. R. Dy. 306. a. in marg.

But if a record comes into B. R. by writ of error, and the judgment  
be affirmed, (a) execution may be sued there. 1 Rol. 884. l. 32. R.  
1 Lev. 134. Vide Pleader, (3 B 20.) (b)

So, if it comes into B. upon a writ of false judgment, execution may  
be sued there. 1 Rol. 884. l. 35. (c)

So, if a record comes into B. R. by error out of an inferior court,

(y) 1. When the judgment is satisfied by any of the above writs of execution or  
otherwise, the defendant has a right to call on the plaintiff for a warrant or authority  
directed to some attorney of the court wherein the judgment is recovered, autho-  
rising such attorney to enter up satisfaction on the judgment roll, which being obtained,  
a satisfaction piece is made out in the king's bench, on a slip of unstamped parchment,  
in the form of a bail piece, and taken with the warrant of attorney, to the clerk  
of the judgments, who will make an entry thereof in his book of remembrances, and  
deliver it over to the clerk of the treasury, who enters the same on the roll. Tidd,  
1033. — 2. In the common pleas, the clerk of the treasury brings the judgment roll  
into court, in *term time*, and the secondary enters satisfaction thereon. In *vacation*,  
a judge's *fiat* is obtained for that purpose, by the clerk of the judgments, who enters  
satisfaction on the roll. Ibid. — 3. And on entering satisfaction on the roll, it is usual  
for the plaintiff to pay one shilling for every hundred pounds recovered, to the  
secondary, who pays it over to the *junior* judge's clerk, by whom it is distributed  
among the prisoners in the Fleet prison. Ibid.

(z) 1. When judgment is affirmed in the exchequer chamber, to which a transcript  
only is removed, the execution issues out of the court of K. B. Palm. 186, 187. — 2. So  
where it is affirmed by the House of Lords. Cowp. 843.

(a) 1. Cowp. 843. — 2. Or plaintiff in error is non-prossed. 3 T. R. 657.

(b) If, after a record has been removed by error from the court of a county palatine  
into K. B., the writ is non-prossed, or the judgment affirmed, the course is, not to re-  
mit the record, but for K. B. to award execution. 3 T. R. 657.

(c) 1. If proceedings are removed out of the county court; or other court not of re-  
cord, by writ of false judgment, and the plaintiff is non-prossed, the execution shall issue  
out of the court above Bro. Abr. tit. Execution, 112. tit. Faux Judgment, 6. Tidd, 984.  
— 2. But in the latter case a *scire facias* seems to be necessary. Id. Bro. Brev. Jüd.  
206. 318. 320. Tidd, 984. — 3. So the execution issues out of the superior court,  
when the record or transcript of the proceedings is removed from the courts in Wales  
or the counties palatine, or from an inferior court, by *certiorari*, under st. 19 G. 3. c. 70.  
or 33 G. 3. c. 68. Tidd, 985. — 4. And the st. 19 G. 3. c. 70. extends to the case of  
a defendant in actual custody. 1 H. Bl. 532.

whereby the recognizance of bail, being upon the roll, is also removed thither; a *scire facias* lies against the bail out of B. R. R. 1 Sid. 213.

So, if judgment in C. B. be affirmed upon error in B. R. a *certiorari* lies to remove the recognizance of bail to B. R. by which a *scire facias* may issue against the bail out of B. R. R. 4 Mod. 104. Sho. 344.

Yet if judgment in Ireland be affirmed in B. R. here, and costs here; there shall not be execution out of B. R. directed to the sheriff in Ireland; but there shall be a writ, reciting the whole proceeding here, directed to the judges of B. R. in Ireland, commanding them to issue execution; by which the cause is remanded to them. R. 1 Sal. 321. 5 Mod. 421.

So a judgment cannot be removed out of an inferior court, by *certiorari* and *mittimus* into B. R. to have execution by *scire facias* there. R. Hut. 117. 1 Lev. 134. (d)

### (I 2.) By an inferior court.

In a court-baron the plaintiff may distrain the goods of the defendant, and detain them; till the condemnation be satisfied; though he cannot levy it of the goods of the defendant. 1 Rol. 887. l. 35.

So judgment in an inferior court shall not be executed upon land or goods out of the jurisdiction.

If there be a recovery in antient demesne, it shall not be levied of land, held of the manor, which is frank-fee; for that is out of the jurisdiction. 1 Rol. 894. l. 17.

So a judgment in an inferior court of record shall not be removed by *certiorari* into B. R. to have execution of it there. Dub. 1 Rol. 887. l. 45. 1 Lev. 134.

### (I 3.) How it shall be awarded.

Execution ought to be sued conformable to the judgment (e); and therefore,

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(d) 1. In a case where a judgment of an inferior court was removed into K. B. by *certiorari*, and the party sued a *scire facias* to have execution, he was obliged to shew, in his *scire facias*, that it was the judgment of an inferior court removed hither by *certiorari*, and point out the particular limits of the inferior jurisdiction, and pray execution within those limits. Lord Raym. 216. 3 Salk. 320. Carth. 390. et vide 3 T. R. 657. Sed vide F. N. B. 242. C. Gilb. Repl. 117. — 2. But in case of affirmance on removal by error, execution might be in any part of England; for by the affirmance the judgment had become that of K. B. Ibid. — 3. Now the st. 19 G. 3. c. 70. s. 4., reciting that persons served with process issuing out of inferior courts, where the debt is under ten pounds (since extended to fifteen pounds by st. 51 G. 3. c. 124. s. 3.) may, in order to avoid execution, remove their person and effects beyond the limits of the jurisdiction of such courts, enacts that in all cases where final judgment shall be obtained in any action or suit, in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at Westminster, upon affidavit made and filed of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior court, to cause the record of the said judgment to be removed into such superior court and to issue writs of execution thereupon, to the sheriff of any county or place, against the defendant's person or effects, in the same manner as upon judgments obtained in the said courts at Westminster. — 4. This provision is extended by 33 G. 3. c. 68. s. 1. 33. to the courts in Wales and the counties palatine; but from these courts a transcript of the record is to be removed, and not the record itself; and the latter act extends to all judgments, for the defendant as well as the plaintiff. Tidd, 458. — 5. The statute 48 G. 3. c. 43. has a similar provision with that of 19 G. 3., applicable to the court of requests for Manchester. Tidd, 458. — 6. And the latter statute extends to the case of a defendant in actual custody. — 1 H. Bl. 532.

(e) A general judgment will not by itself warrant a special execution. If, therefore, from

therefore, if the judgment be joint against divers persons, execution ought to be against altogether. R. 1 Rol. 888. l. 30. 35. (f)

Though it be in an assise, &c. where damages are not the principal, a man cannot sue execution for damages against one only, when the judgment was against several. R. 1 Rol. 888. l. 25.

So he cannot take a *capias* against one, and an *elegit* against another. 1 Rol. 888. l. 35.

So, if there be an information for recusancy, on which judgment is given for 100*l.* though the king shall have two parts and the informer one, yet there shall be but one execution, and not several, viz. one for the king and another for the informer. R. 1 Rol. 888. l. 45.

But, if judgment be against bail, the execution may be against each of them severally, without naming the other; for each bail is bound severally. 1 Rol. 888. l. 40. R. 1 Lev. 226. Vide Bail, (R 11.)

If the defendant confesses the action as to part, and joins issue as to the residue; the plaintiff shall not have execution for the part confessed, except where he releases his damages for the residue. 1 Rol. 898. l. 35.

But, if the plaintiff releases his damages, he may have execution for the part confessed immediately. 1 Rol. 898. l. 37.

Or, if he be nonsuited upon the issue. 1 Rol. 898. l. 40.

So the plaintiff may have execution immediately after judgment pronounced and signed by the clerk, though it be not entered upon the roll. 1 Rol. 899. l. 5. (g)

(I 4.) *Scire facias quare executionem non, &c.*

By the common law, a plaintiff could not have execution upon a judgment or recognizance after a year and a day passed; but ought to commence an action of debt upon the judgment, or recognizance. 2 Inst. 469. Co. L. 290. b. Vide Pleader, (3 L 1, &c.)

But now, by the st. W. 2. 13 Ed. 1. 45. he may have a *scire facias quare executionem non, &c.* and if the defendant *non venerit, aut nihil sciat dicere, quare executionem non, &c. præcipiatur vicecomiti quod exequi faciat.* Vide 2 Inst. 469.

And after a year and a day he ought to have a *scire facias* before execution; for if he sues a *capias ad satis faciendum, &c.* after the year, it is not only erroneous, but void. R. 4 Leo. 197. Semb. Lat. 193. Cont. Semble for the defendant was put to his *audita querela.* 2 Rol. 42.

So, within the year, he ought to have a *scire facias*, where the recovery is of a reversion or remainder after a term for years. 1 Co. 94. b.

But there needs no *scire facias*, if error be brought of the judgment within a year after the judgment, till a year and a day after the error or judgment thereon affirmed. R. 5 Co. 88. a. Vide Pleader, (3 L. 4)

So, if a recognizance be to be paid at a future day within a year, there needs no *scire facias* till a year and a day after the time of payment. 1 Rol. 899. l. 52.

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from circumstances subsequent to the judgment, the plaintiff has become entitled to a special execution only, as where the defendant has been discharged under an insolvent act, which provides that his future effects only, and not his person, shall be chargeable, there must either be, 1<sup>o</sup>. A *scire facias* against the defendant, who, on coming in, will either plead the act or waive it; when if he waives it or neglects to appear, the execution will be general; if he pleads it, the reason of the special execution will be shewn upon the record: 2<sup>o</sup>. or the plaintiff may suggest the act himself, and take execution under it. 1 T. R. 80. b.

(f) And a separate execution upon a joint judgment is irregular. 6 T. R. 525.

(g) Gilb. C. P. 24. Law of Executions, 43.

So, if there be a judgment in annuity, execution may be without a *scire facias* upon every payment, which accrues, though it be above a year after the judgment. 1 Rol. 900. l. 5.

So, if a *feri facias*, or *elegit*, be sued, and no execution thereon, there may be another *feri facias*, or *elegit* several years after, without a *scire facias*, if continuances are entered from the first *feri facias*, or *elegit*. 1 Sid. 59.

So, if judgment be with *cesset executio*, by agreement, till such a time, there needs no *scire facias* till a year and a day after the time agreed; though such *cesset*, &c. is not entered upon the roll. Mod. Ca. 288.

So, where the entry of the demandant is *congeable*, there needs no *scire facias*. Dy. 376. b. in marg.

So, in ejectment, there needs no *scire facias*: for the st. W. 2. extends only to personal actions. Skin. 427. R. 1 Sid. 351. R. cont. Sal. 258. 600.

Execution in accompt. Vide ACCOMPT, (E 16.)

Execution in annuity. Vide ANNUITY, (H.)

Execution against bail. Vide BAIL, (R 11.)—Ante, (C 9.—G.—I 3.)

Execution in a county-court. Vide COUNTY, (C 13.)

Execution in covenant. Vide PLEADER, (2 V 18.)

Execution in a court-baron. Vide COPYHOLD, (R 18. 19.)

Execution of a decree. Vide CHANCERY, (Y 4.)

Execution for a fine at the sessions. Vide JUSTICES OF PEACE, (D 15.)

Execution of a foreign sentence. Vide ADMIRALTY, (E 17.)

Execution against an heir. Vide PLEADER, (2 E 6.)

Execution of a peer. Vide PARLIAMENT, (L 45.)

Execution of a power. Vide CHANCERY, (4 H 5, &c.—4 O 6.)—  
POIAR, (C 1, &c.)

Execution in a quo warranto. Vide QUO WARRANTO, (C 7.)

Execution in replevin. Vide PLEADER, (3 K 31.)

Execution of orders of commissioners of sewers. Vide SEWERS, (H 3.)

Execution upon a statute or recognizance. Vide STATUTE-STAPLE, (D 1, &c.)

Execution of a trust. Vide CHANCERY, (4 W 9.)

Execution pleaded to debt upon judgment. Vide PLEADER, (2 W 36.)

Remedy for rent by payment of the sheriff upon an execution.  
Vide RENT, (D 8.)

## EXECUTOR.

Vide ABATEMENT, (E 13.—F 10.)—ADMINISTRATION—ADMINISTRATOR, (C 1, &c.)—BIENS, (C)—CHANCERY, (3 G 1, &c.—4 A 9.)—COVENANT, (B 1.—C 1.)—OBLIGATION, (I 1.)—PLEADER, (2 D 1, &c.—3 L 12.)—PROHIBITION, (G 21.)

EXECUTORY

## EXECUTORY DEVISE.

Vide DEVISE, (N 16, 17.)

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## EXEMPLIFICATION.

Vide EVIDENCE, (A 2.)—FINE, (G 3.)

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## EXEMPTION.

Vide CHALLENGE, (A 4.)—DISMES, (H 15.) — LONDON, (L 1, &c.) —  
PRÆROGATIVE, (D 33.)

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## EXIGENT.

Vide PLEADER, (2 W 4.)—UTLAGARY.

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## EXIGENTER.

Vide COURTS, (C 5.)

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## EXILE.

Vide CHANCERY, (2 M 15.)—PARLIAMENT, (H 7.)

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## EX-OFFICIO.

Vide INFORMATION, (A 2.)—VISITOR, (A 12.)

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## EXOINE.

(A) Exoine, or essoine : — The several kinds. infra.

(B) In what actions it lies. p. 248.

(B 2.) By what persons. p. 248.

(B 3.) At what time. p. 248.

(B 4.) In what manner it shall be cast. p. 249.

(C) When an essoine does not lie. p. 249.

(D) When a man shall have only one essoine. p. 250.

(E) The proceeding after essoine. p. 251.

(A) Exoine or Essoine : — The several kinds.

An exoine or essoine signifies an excuse for non-appearance at the return of process, 2 Inst. 125. (a) Lut. 861. b.

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And it lies in real actions for the demandant, or tenant; or in mixt. 2 Inst. 125.

So, in personal actions for the plaintiff, or defendant. 2 Inst. 125.

There are five kinds of essoins. 1. *De servitio regis*. 2. *In terram sanctam*. 3. *Ultra mare*. 4. *De malo lecti*. 5. The common essoin *de malo veniendi*. 2 Inst. 125.

In all, except the common essoin, the demandant shall be delayed for a year and a day. 2 Inst. 137. 252.

And the party ought to swear to the truth of his essoin: for the st. Marlb. 19. is to be understood only of the common essoin. 2 Inst. 137.

### (B 1.) In what actions it lies.

An essoin lies, regularly, in all actions real, and mixt. 2 Inst. 125.

As, in writs of right, and entry.

So, if an assise abates by the *non venue* of the justices, &c. upon a re-attachment the tenant may be essoined. 2 Inst. 249.

So, upon a resummons in an assise of *mort d'ancestor*. 2 Inst. 249.

Or, if an assise be adjourned from Chester, upon a foreign plea, to C. B.: for the plea there is not the plea of assise. 2 Inst. 249.

So, though the essoin in personal actions was an abuse, yet it was allowed. 2 Inst. 125. 1 Brownl. 193. (b)

### (B 2.) By what persons.

An essoin, by the common law, was allowed for the demandant or plaintiff, as well as for the tenant or defendant. 2 Inst. 125.

So, for the vouchee upon the return of the summons *ad warrantizandum*.

And for the prayee in aid, upon the return of the summons *ad auxiliandum*.

So the attorney of the tenant or defendant may have the common essoin, but none other. 2 Inst. 394.

And if he has two attornies, one may be essoined without the other; for their power is joint, and several.

If the tenant casts an essoin for him and his attorney, it is only surplusage as to one of them. Hob. 47.

### (B 3.) At what time.

An essoin, by the common law, may be cast at every day of appearance.

Before appearance, or afterwards, before plea.

Before issue, or afterwards upon the return of the *venire facias jur. &c.*

After voucher, at the day given for the appearance of the vouchee. R. Hob. 46.

At the day given by the roll for the return of the *venire facias*, though no *venire* be sued. Hut. 69.

But the tenant cannot be essoined after the vouchee has entered into warranty: for the matter is then finished by him with the demandant, and also with the vouchee. R. Hob. 47.

So no essoin shall be after issue in dower. R. Hut. 69.

Nor in any real action upon the return of the *habeas corpora*.

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(b) Now it is not. Vide (C) in notis.

Nor in personal actions upon return of the *hab. corp.* or *distringas*.

(B 4.) In what manner it shall be cast:

In all, except the common essoin, the tenant or defendant ought to swear to the truth of the essoin: for the st. Marl. 52 H. 3. 19. that none *juret pro essonio suo*, extends only to the common essoin. 2 Inst. 137.

If he be assoined *de servitio regis*, at the day to which it is adjourned, he ought to bring his warrant under the great seal. Dy. 154. b. Vide post, (E)

And the essoiner ought to appear in person in court, that he may be sworn, and have a day for his warrant. 2 Inst. 314. (c)

If the essoin be *de malo lecti*, he shall have two essoiners, one who casts the essoin, the other who swears that he is sick. 2 Inst. 393. Vide post, (E).

And it shall be cast only at a day certain: for he ought to appear the first day, and cast the essoin the third day. 2 Inst. 393.

The other essoins ought regularly to be cast upon the first day, which is the essoin-day. Dal. 3.

And if it be not, a *ne recipiatur* may be entered the next day, which is the day of exceptions.

But if a *ne recipiatur* be not entered, the essoin may be cast on the fourth day of the return.

Yet to prevent a *ne recipiatur*, it must be entered upon the essoin-day, though the writ be not returned till *quartum diem post*. Dal. 3.

When an essoin is cast, if it be not challenged, day shall be always given to the demandant and tenant, upon the common essoin, at the fifth return after. Lut. 862. (d)

And in other essoin, for a year and a day.

If the demandant does not appear at the day to which it is adjourned, he ought to be non-suited. R. 2 Vent. 117.

So, if his attorney does not adjourn the essoin. (e)

The essoin shall be cast between the demandant and tenant, though granted in respect of the plea, that may arise between tenant and vouchee. R. Hob. 47.

(C) When an essoin does not lie.

But, by the common law, an essoin was not allowed in an assise of *novel disseisin*, for the plaintiff, or tenant. 2 Inst. 249. 418.

Neither was it allowed in B. R. for the plaintiff in any assise. 2 Inst. 249.

Nor, for the tenant in an assise of *mort d'ancestor*. 2 Inst. 249.

By the stat. W. 2. 12. An essoin shall not be allowed for the appellant in an appeal of death.

Neither shall it be allowed for the plaintiff, or defendant, in a *scire facias*. By the stat. W. 2. 45. 2 Inst. 470.

(c) If an attorney appear on the face of the entry to have cast an essoin for a defendant, it is void. 2 Wils. 164.

(d) Cro. Eliz. 367. Gilb. C. P. 13.

(e) Where an essoin is cast, and neither quashed nor adjourned to a particular day, the plaintiff in the king's bench, may declare the first day of the next term, and the defendant is not entitled to an imparlance. 2 T. R. 16.

Nor in other judicial writ: as, upon a *grand*, or *petit cape*, or resummons. R. Jon. 331.

So, by the stat. W. 1. 42. In an assise of *mort d'ancestor*, attain, or *juris utrum*, the tenant shall not be essoined after appearance. 2 Inst. 248. Though he be only tenant in law; as, a vouchee, &c. 2 Inst. 249.

Nor the demandant. By the st. W. 2. 28. 2 Inst. 418.

The tenant, or demandant, shall not have the common essoin; for every statute, which speaks in general, shall be understood of the common essoin only. 2 Inst. 249.

So an essoin *de servitio regis*, or any other than the common essoin shall not be allowed in dower. 2 Inst. 124.

Nor in a *quare impedit*, or *darrein presentment*. 2 Inst. 124. 125.

So an essoin *de malo lecti* shall not be allowed in a writ of right, in its nature, but in a writ of right right only. 2 Inst. 394.

Nor, by the stat. W. 17. Between parceners, who claim by the same descent. 2 Inst. 493. 394.

So an essoin shall not be allowed after appearance by attorney, except where the attorney is removed. R. Carth. 45. (f)

And if there be a challenge of the essoin in such case, there is no need to say *quod attornatus non fuit amotus*. Per Holt, Carth. 48. (g)

### (D) When a man shall have only one Essoin.

So, by the stat. Marl. 52 H. 3. 13. After issue to be tried by inquest, there shall be only one essoin.

And by the stat. W. 2. 27. The essoin shall be at the next day.

And therefore, in all personal actions, the defendant, after issue joined by him, to be tried by an inquest, shall have only one essoin, and at the next day of appearance. 1 Sal. 216. 454.

Or, if the first process is not served, or abates, it may be upon the alias: for the first was null.

If the first process was not actually sued, as in the case of a *venire facias*, it shall be at the day given by the roll. Hut. 69.

So, in personal actions, if the defendant was essoined before issue, he shall not have any essoin after issue. Godb. 235. 6.

So, by the stat. W. 1. 3 Ed. 1. 43. Parceners or joint-tenants cannot fourch; but shall have only one essoin.

And therefore, where each has one essoin after appearance, they cannot afterwards *vicissim essoniare*. 2 Inst. 250.

So, by the st. Glo. 6 Ed. 1. 10. Husband and wife after appearance cannot fourch, viz. in real actions. 2 Inst. 321.

So, in a personal action against several, they all shall have but one essoin. 1 Brownl. 193.

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(f) 1. And therefore as a corporation cannot appear except by attorney, they are not entitled to an essoin. Bro. Abr. Corporation, 28. Ca. Pr. C. B. 8. 2 T. R. 16 — 2. And as at this day the defendant is in general at liberty to appear by attorney, no essoin is allowed in any *personal* action whatever, even where a peer or member of parliament is defendant. 2 T. R. 16.

(g) 1. No essoin was ever allowed in personal actions, on the return of a *copias* 2 Str. 1194. — 2. Nor even on a summons, where the defendant was seen in court, or appeared by attorney. 2 Wils. 165. supra

But the plaintiff is not restrained by the stat. Marl. or W. 2. but that he may have all essoins, as at common law. 2 Inst. 126.

So, if there are several tenants or defendants, each may have one essoin. 2 Inst. 126. 250. R. 2 Vent. 57.

So, if the defendant or tenant in an inferior court be essoined after issue, and then the plaint is removed; he may have another essoin at the day in bank; for the proceeding before is not of record there. 2 Inst. 127.

So, if a prayee in aid, or to be received, after issue be essoined at the day of the return of the summons, he may have another essoin afterwards; for the statute says, *siquis posuerit se in inquisitionem*, &c.

So, if issue be joined not to be tried by an inquest, the defendant shall have another essoin; as, if issue be upon the custom of London, which shall be tried by the certificate of the recorder. 2 Inst. 126.

So, before appearance, parceners or joint-tenants may have each one essoin: for the stat. W. 1. 43. relates to essoins after appearance. Semb. 2 Inst. 250. 251. 2 Vent. 57.

So, if the tenant be essoined after a view, he may afterwards have an essoin in another respect; as, at the day given for the appearance of the vouchee: for the tenant may say, that the vouchee is not the same person. R. Hob. 46.

So, in a real action, if the tenant be essoined upon a process, which is of no effect, he may be afterwards essoined; for the first essoin was null: as, if he be essoined upon a summons which was returned *tardè*, wherefore an *alias* summons issued, he may be essoined upon the *alias*. Dy. 252. a.

So, if the first summons was not well returned, so as that a *grand cape* might issue by the stat. 31 El. 3. by reason whereof an *alias* summons is taken. R. Hut. 43. Jon. 7.

Though the first essoin was adjourned. Hut. 43.

So, in a real action, the tenant shall have an essoin after issue, though he had an essoin before: for the stat. Marl. does not extend to real actions. R. Godb. 235, 236.

### (E) The proceeding after essoin.

After the essoin cast, if all the defendants appear, except him who cast the essoin, the same day shall be given to the other defendants, to which the essoin was adjourned. Jon. 331.

If the other defendants do not appear, the same day cannot be given; but there shall be a default, and a resummons shall be awarded returnable the same day, if they may save their default. R. Jon. 331.

If the tenant casts an essoin of *ultra mare* (which comprehends *in terram sanctam*,) or *de servitio regis*, by the course of the common law, the demandant or plaintiff shall have a writ out of chancery, reciting that the tenant, &c. is not *ultra mare*, &c. and commanding the justices to proceed; whereupon the essoin shall be immediately quashed. 2 Inst. 253.

And by the stat. W. 1. 44. If the essoin *ultra mare* be adjourned, and the demandant avers by the country that the tenant was within the realm on the day of the summons and three weeks after, it shall turn to a default.

So,

So, if the demandant or plaintiff, essoined *de servitio regis*, does not bring his warrant under the great seal, testifying that he is in the king's service, he shall be non-suited. 2 Inst. 314.

And it must be by a writ under the great seal, directed to the justices, which testifies his employment in the king's service: which is most commonly done upon a certificate of the captain, under whom he serves, to the chancellor. 2 Inst. 314. Dy. 154. b.

So, if the tenant in a real action does not bring his warrant at the day, it shall turn to a default. 2 Inst. 314.

And by the st. Gloc. 6 Ed. 1. 8. in personal actions, if the defendant does not bring his warrant, he shall render twenty shillings or more, at the discretion of the justices, to the plaintiff for his journey, and shall be in the king's mercy.

And if it be after issue, the inquest also shall be taken by default. 2 Inst. 314.

So, by the common law, if an essoin *de malo lecti* was cast, four knights were returned by the sheriff to inquire *si fuerit languidus*, and if found that he was not, he had fifteen days for his appearance; if found that he was, then he should have a year and a day, and before his appearance there was to be a writ *de licentia surgendi*. 2 Inst. 393.

But now, by the st. W. 2. 17. the demandant may insist *quod non est languidus*, and if found by inquest that he is not, it shall turn to a default. 2 Inst. 393.

So, in all cases, where an essoin ought not to be allowed, the demandant may challenge it. Lut. 862.

If the challenge be for such cause as appears to the court to be true, the essoin shall be adjudged immediately. Lut. 862. b.

If a demurrer be to the challenge, and the challenge is allowed, it shall be a default in the tenant. Carth. 48, 49.

And there shall be judgment against the tenant upon his default without a *petit cape*: for when he has relied upon that matter by demurring to the challenge, he cannot afterwards save his default; and then the *petit cape* would be vain. R. Carth. 48.

But where the party can show good cause for maintaining his essoin, it shall not be adjudged immediately, but ought to be adjourned. Lut. 862. b.

And if it be not adjourned, it will be error. Lut. 862. b.

At the day to which it is adjourned, the tenant may disavow. Lut. 865.

Or may demur to the challenge, and if it be adjudged for him, the plaintiff shall be nonsuited. Semb. Hut. 69.

If it be not adjudged for him, it shall be a default. R. Lut. 865.

If an essoin be disallowed, when it ought to be granted, it will be error. Hob. 47.

Otherwise, if granted when it need not. Hob. 47.

So, if an essoin be adjourned, and judgment at the day given by default, when no essoin was entered, it will be error. Dy. 330. a.

Though the entry of the essoin be upon the plea-roll; if, upon a certificate of the essoin-roll, it appears that no entry was there. Dy. 330. a.

Vide Copyhold, (R 10.)



## EXPOSITION OF WORDS.

Vide AGREEMENT, (C)—CHANCERY, (3 A 8.—3 Y 1, &c.)—COVENANT, (D 1, 2.—G 2.)—DEVISE, (N 1, &c.) PARDON, (C—D)—PARLIAMENT, (R 10, &c.)—PAROLS, (A 1, &c.)—POIAR, (B 1, &c.)—USES, (N 12.)

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## EXTENT.

Vide EXECUTION, (B 4, 5.—C 14.)—STATUTE STAPLE, (D 5. 7. 8.)

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## EXTINGUISHMENT.

Vide CHANCERY, (4 N 6. 8. 9.)—COMMON, (L)—CONFIRMATION, (D 3.)—RELEASE, (B 6.)—SEIGNIORY, (B)—SUSPENSION, (B—C—G)—USES, (L 6.)

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## EXTORTION.

(A) What shall be.

(A 1.) By the common law. *infra*.

(A 2.) By statute. p. 254.

(B) What not. p. 256.

(C) The penalty for extortion. p. 256.

(D) What fees are allowed. p. 257.

(E) What not. p. 258.

(A) What shall be.

(A 1.) By the common law.

Every oppression, by colour of justice or right, is extortion. Co. L. 368. b. Vide Officer, (H)

But the proper signification of the word is, where an officer *colore officii* (a) unlawfully takes (b) money, or other valuable thing from ano-

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(a) Where a person was appointed collector of certain duties under st. 43 G. 3. c. 99. by the proper constituted authorities, and considered himself, and was considered by those authorities to be such collector, but whose appointment was informally made, it was decided, that he could not be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties though the money were fraudulently collected and misapplied by him; because he was in fact appointed collector, and in that character received the money. 7 East, 218.

(b) 1. To constitute the crime of extortion, there must be an actual taking. *Ld. Raym.* 149.—2. A mere agreement to take will not be sufficient. *Ibid.*

ther,

ther, which is not due, or more than his due, or before it be due. Co. L. 368 b. Hut. 53.

And this was a great misprision and offence by the common law. Co. L. 368. b. 2 Rol. 263.

And therefore, by the common law, an indictment or information for extortion lies against an officer, who takes a fee *colore officii*, where nothing is due; as, if a judge of an inferior court takes a fee for his judgment. Semb. per 2 J. 1 Leo. 295.

If a sheriff refuses to execute process till his fee be paid. R. 1 Sal. 330, 331. (c)

Or takes a bond for his fee, before execution sued. R. Hut. 53. (d)

So, if a clerk of a market takes a fee for the view of vessels, &c. for there may be nothing due. R. Mo. 523. (e)

So, if any judge or officer takes more than the usual fee. 2 Rol. 263. Vide officer, (G. 15.)

So, if a ferryman takes more for a ferry, than is due by prescription. Semb. 4 Mod. 101. (f)

If a commissary takes 11s. 6d. for absolution, where he ought to have only 2s. 6d. 3 Leo. 268.

If the judge of an ecclesiastical court takes a fee, &c. for assessing the goods of an intestate to charitable uses, or for commutation of penance, &c. 4 Inst. 336. Vide Administration, (B 8.) (g)

But an indictment or information *contra formam statuti*, where it was an offence only by common law, shall be quashed. 1 Leo. 295. 2 Rol. 263.

### (A 2.) By statute.

So, by the st. (h) W. 1. 26. *Nul viscount ne auter minister le roy ne*

(c) Or a coroner refuse to take the view of a dead body, until his fees are paid. 3 Inst. 149.

(d) 1. So if a sheriff's officer bargains for money to be paid him by A., to accept A. and B. as bail for C., whom he has arrested. 2 Burr. 924.—2. Or arrest a man in order to obtain a release from him. 8 Mod. 189.—3. So in a gaoler to obtain money from his prisoner by colour of his office. Trem. P. C. 111.

(e) 1. If the owner of the soil of a market covers the market-place so completely with stalls, that the market people are obliged to use them; and takes rent or fines for the use of them, it is extortion. Ld. Rd. 149.—2. But if he leave sufficient room for the market people to stand and sell their wares, taking rent or fines for the use of stalls he may have erected upon the spare ground, it is not extortion. Ld. Rd. 148.—3. In a recent case it was decided that the question of exemption from toll could not be tried on an indictment against a turnpike keeper for extortion in taking the toll, the general right to demand toll not having been denied, nor the ground of exemption notified at the time when the toll was taken. 4 Camp. 379.

(f) 1. Where custom has ascertained the toll of a mill, it is extortion to take more than the custom warrants. Ld. Rd. 149.—2. But where the toll is not ascertained, the taking of any toll, however high, will not be extortion. Ibid.

(g) 1. It is extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the defendant knew that it had been proved before in the prerogative-court. 1 Str. 73.—2. And it is extortion in a churchwarden to obtain a silver cup or other valuable thing, by colour of his office. 1 Sid. 307.

(h) Confirming the fundamental maxim of the common law — that no officer, whose office relates to the administration of justice, can take any reward for doing his duty, but what he is to receive from the king. Co. Litt. 368. 2 Inst. 176. 208, 209.

*preigne reward pur faire son office mes sont paies de ceo que ils purnont del roy.* Vide Mad. 641. (i)

And this statute, which begins with a sheriff, extends to every inferior minister, or officer of the king, whose office concerns the administration or execution of justice, the common good of the subject, or the king's service: as, to an escheator, coroner, &c. 2 Inst. 209. Vide Officer, (G 15.)

To a bailiff, gaoler. 2 Inst. 209.

Clerk of a market, aulnager. 2 Inst. 209. Mo. 523.

So, to the heralds: for they are officers of the king, and were before the statute. Semb. 2 Inst. 209.

And such officer cannot prescribe to take a fee for doing his office. 2 Inst. 210.

So, by the st. W. 1. 30. *Lou multz se pleignent des serjeants, criours de fee, & les marshals des justices in eyre, et dauters justices quelles pernent a tort deniers de ceux queux recoveront, &c. et de fine levie, et des jurors, prisoners, &c. Roy defende que cestes choses ne soient faits: et si serjeant de fee le face, office soit prise en main le roy; si marshal, soit punie a volunt le roy; & l'un & l'auter rendra al plaintife treble de ceo quels aver' prise.*

By the st. 3 Geo. 15. If a sheriff, &c. take any sum, &c. for levying a debt to crown, or forbearing to levy it, &c. he shall be guilty of extortion, and being convict, &c. shall forfeit treble damages and costs to the party aggrieved, and double the sum extorted; to be decreed by the barons in two years after offence, upon complaint in a summary way. (k)

So, if a statute allows a fee to any officer, it will be extortion to take above that which the statute allows. 2 Inst. 210. Co. L. 368. b. 2 Rush. 267.

Or, in any other case. Co. L. 368. b.

So, where the st. 11 H. 7. 4. allows a fee to the clerk of the market for sealing, it will be extortion if he takes 1d. for his view of vessels, when he does not seal them, nor find them faulty. R. Mo. 523.

So he cannot prescribe to take a fee, for the view, when he does not seal them, nor find a defect. R. Mo. 523. (l)

So, if the clerk of the crown-office demands 13s. 4d. for a fee for every defendant who pleads to an information, when it is not due, it will be extortion. Semb. 3 Mod. 247.

(i) 1. It is holden by Lord Coke, that within the words of the st. 34 E. 1. which are "*Nullum tallagium vel auxilium, per nos vel per hæredes nostros, in regno nostro, ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium et aliorum liberorum com. de regno nostro,*" no new offices can be erected with new fees, or old offices with new fees; for that is a tollage upon the subject, which cannot be done without common consent by act of parliament. 2 Inst. 533.—2. An antient fee, however, may attach on a modern act of parliament; such, for instance, as a fee on an oath, taken before a justice of the peace, or a judge at chambers. 2 H. Bl. 223.

(k) The 33 G. 3. c. 52. s. 62. enacts, that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his majesty, or the company in the East Indies, shall be deemed to be extortion, and a misdemeanour at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value; but the court may order such present to be restored to the party who gave it; or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

(l) 4 Inst. 274. 2 Inst. 209. 2 Ro. Abr. 226.

Or, if he takes, where several are in the same indictment for the same felony or trespass, above 2s. for the *venire* and entry of the plea for all of them. 3 Inst. 150. Vide post, (E).

So the chirographer in C. B. shall not take above 4s. for making and writing any fine. 3 Inst. 150. Vide post, (E).

Nor the auditor in the exchequer, or dutchy of Lancaster, above 3s. 4d. for inrolment of a patent, decree, grant, or indenture of lease. 3 Inst. 150.

Vide Post, (E).

### (B) What not.

But it is no extortion, if an officer takes a fee allowed by statute. 2 Inst. 210.

So it will not be extortion, if a minister, or attendant of courts of justice takes such reasonable fees as have been antiently (*m*) allowed. Co. L. 368. b.

So a sheriff, &c. may prescribe to take a fee for a thing, which is not an act within his office: as to take 20d. for a bar-fee of every prisoner acquitted: for that is not given for doing his office. 2 Inst. 210. (*n*)

Vide Post, (D).

### (C) The penalty for extortion.

Extortion is an odious crime, and accompanied with perjury. Co. L. 368. b.

And the penalty upon a conviction for extortion, by the common law, was fine and imprisonment. Co. L. 368. b.

By the st. W. 1. 26. a sheriff, or other minister of the king, who shall do, &c. shall render double to the party, and shall be punished at the king's pleasure.

And thereon an action lies for the double value.

So an indictment against several for extortion *colore officiorum* is good: (*o*) for they might take so much, and afterwards divide it. 3 Leo. 268. (*p*)

An indictment or information for extortion, where nothing is due, ought to (*q*) say, that nothing was due. R. 3 Leo. 268.

(*m*) 1. An office erected for the public good, though no fee is annexed to it, is a good office; and the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as for a fee, yet as for a competent recompense for his trouble. Moore, 808. Hard. 351.—2. A. was libelled against in the ecclesiastical court for fees, and upon motion a prohibition was granted; for no court has a power to establish fees; the judge of the court may think them reasonable, but that is not binding; but if in a *quantum meruit* a jury think them reasonable, they then become established fees. Salk. 333.

(*n*) 21 H. 7. 17.

(*o*) Ld. Rd. 1248. 1 Salk. 382.

(*p*) In a case where the indictment was against the chancellor, and also against the register of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker C. J., this would be an exception if they were indicted for taking more than they ought; but it is only against them for continuing to get money where none is due, and this is an entire charge. For there are no accessaries in extortion; but he that is assenting is as guilty as the extortioner, as he that is party to a riot is answerable for the act of others. 1 Str. 75. 1 Russell, 224.

(*q*) 1. It has been said that an indictment for extortion may be laid in any county. by 31 Eliz. c. 5. s. 4. 1 Hawk. P. C. c. 68. s. 6. n. (3); 2 Burn's Just. 344. *Extortion*; Stark. Crim. Pl. 585. n. (k).—2. But this position has been questioned. 2 Hawk. P. C. c. 26. s. 50. 2 Chitt. C. L. 294. in notis.

So,

So, if it was for taking more than was due, it ought to show how much was due. (r) R. 3 Leo. 268. (s)

(D) What fees are allowed.

The tables of fees allowed by law, (t) or antient usage, to the ministers of all the courts of Westminster, and to the cursitors, clerks of assise, and of the peace, delivered to parliament, vide annexed to the Compleat Attorney. — [Vide also the Order of Chancery of 28 Nov. 1743, as to the officers of the court of chancery.]

For the fees of clerks, &c. of justices in Eyre, vide the st. W. 1. 3 Ed. 1. 27. 29. and the st. W. 2. 13. Ed. 1. 42. (u)

Of justices of assise, vide the st. 13 Ed. 1. 44.

By the st. 27 Ed. 3. 9. for setting seal to a statute-staple shall be paid an halfpenny per pound, or if above 100l. only a farthing per pound.

By the st. 12 R. 2. 10. Justices of peace shall have 4s. *per diem* at the sessions, and the clerk 2s. — So, 5s. to a justice of peace for execution of the st. 5 El. 4. (x)

For fees of the Marshalsea, vide the st. 2 H. 4. 23.

By the st. 17 Ed. 4. 4. searchers of tiles may take one penny per 1000 of plain tile, one halfpenny per 100 rough, one farthing gutter tile.

By the st. 11 H. 7. 4. Mayor, &c. may take 1d. for marking every bushel. Vide ante, (A 2.)

By the st. 23 H. 8. 5. Commissioners of sewers are allowed 4s. *per diem*, and the clerk 2s.

By the st. 23 H. 8. 6. Mayor, &c. for recognizance shall take but 3s. 4d., the clerk 3s. 4d. and for certifying it 20d. on pain of 40l.

Fees for grants of the king, vide the st. 27 H. 8. 11.

For inrolment of deeds, vide the st. 27 H. 8. 11.

By the st. 5 & 6 Ed. 6. 25. For the recognizance of an alehouse-keeper shall be taken but 12d.

By the stat. 1 & 2 Ph. & M. 12. Not above 4d. for impounding a distress.

(r) But it need not specify the exact sum taken extorsively. Ld. Rd. 149.

(s) 1. By st. 32 G. 2. c. 28. s. 11. for the more speedy punishing bailiffs, &c. for extortion and other abuses in their respective offices and places, on the petition of any person arrested by any process complaining of exaction or extortion by any gaoler, &c. "unto any of his majesty's courts of record at Westminster, from whence the process issued," such court is authorised "to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses, &c. and for punishing such officer, &c. and for making reparation to the party injured as they shall think just, together with the full costs of every such complaint." — 2. If however by the abuse of the process of one of the courts at Westminster, a sheriff's officer extort a promissory note from a suitor, and then declare on that note in another of the courts at Westminster, the latter court cannot interfere summarily to punish the officer under this statute. 2 B. & P. 88.

(t) 1. All fees allowed by act of parliament become established fees, and the several officers entitled to them may have debt for them. 2 Inst. 210. — 2. And if an act of parliament recognizes a right to a fee, the quantum may be ascertained by usage, though not of antient date. 2 H. Bl. 226.

(u) 1. By 19 G. 3. c. 74. The clerk of assize on each circuit is entitled to receive a certain fee for every person convicted of a transportable offence, (except petty larceny,) and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted, who afterwards have received the king's pardon on condition of being transported or imprisoned. — 2. Such fee on the Norfolk circuit is one guinea. 2 H. Bl. 220.

(x) Vide etiam 26 G. 2. c. 14.; 27 G. 2. c. 16.; 57 G. 3. c. 91.



By the stat. 5 El. 12. a clerk of the peace shall have 12*d.* for licence of a kidder, &c. 8*d.* for a recognizance, and 4*d.* for the register. (*y*)

### (E) What not.

It is extortion in a collector of fifteenths to take 18*d.* from a town for an acquittance. 3 Inst. 149.

In a coroner, to take beyond his fee. Vide Officer, (G 15.)

By the stat. M. Ch. 9 H. 3. 26. Nothing shall be taken for inquisition of life, or member.

By the stat. 52 H. 3. 11. Nothing shall be taken for beau-pleader: — nor, by the stat. 17 Car. 2. 6. for damage-cleer.

By the stat. 4 Ed. 3. 10. Sheriffs and goalers shall receive felons without fee.

By the stat. 20 Ed. 3. 1. Justices of the realm shall take no fee, nor robe, but of the king.

By the stat. 5 R. 2. 16. The clerk shall take but 2*s.* for making a commission or record of *nisi prius* in the exchequer.

By the st. 2 H. 4. 8. A chirographer, &c. shall not take more than 4*s.* for a fine, on pain of losing his office, suffering a year's imprisonment, and treble damages. — Nor, by the stat. 5 H. 4. 14. the 22*d.* for inrolment. Vide ante, (A 2.)

By the stat. 2 H. 4. 10. The clerk of the crown, though many defendants, shall have but one 2*s.* for a *venire facias*, or plea, in felony, or trespass. Vide ante, (A 2.)

By the st. 23 H. 6. 10. A sheriff, &c. shall not for an arrest, forbearance to arrest, or bail, take more than 20*d.* to the sheriff, 4*d.* to the bailiff, and 4*d.* to the gaoler for an arrest; 4*d.* for a return or copy of the panel; 4*d.* for bail.

By the stat. 21 H. 8. 5. The ordinary, official, &c. shall not take for probate, sealing, registering, inventory making, or other cause concerning a will not above 5*l.* value, so as the same be exhibited in writing with wax ready to be delivered, above 12*d.* nor above 3*s.* 6*d.* if above 5*l.* and under 40*l.* value, nor above 5*s.* if it exceed 40*l.* value; and nothing for an administration if the goods be under 5*l.* but 2*s.* 6*d.* if under 40*l.* and but 1*d.* for a copy of a sheet of 10 lines, on pain of 10*l.* and the loss of the money taken. Vide Administration, (B 8.)

By the stat. 22 H. 8. 4. A corporation for entering an apprentice shall take but 2*s.* 6*d.* and when out of his time but 3*s.* 4*d.* on pain of 40*l.*

By the stat. 29 (*z*) El. 4. A sheriff, bailiff, &c. shall not take on an execution (*a*) more than 12*d.* in the pound, (*b*) if not above 100*l.*: if above,

(*y*) 1. The usual fee allowed a bailiff for an arrest is one guinea; and if he take more he will be guilty of extortion. 3 T. R. 417. — 2. The justices of peace in sessions have no authority to fix these fees under 32 G. 2. c. 28. Ibid.

(*z*) In the printed statutes the act is called the 29 Eliz.; but by the parliament roll it is the 28., and so ought to be recited. Salk. 331. Skin. 363.

(*a*) Where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right. The sheriff's right therefore to poundage rests upon the positive enactment of some statute, within which he must bring himself in every case where he claims poundage for executing a writ. A *capias utlagatum* on mesne process in a private suit is not 'an extent or execution' within this statute; for in its original form it is for the punishment of the party's

above, but 6*d.* in the pound, on pain of treble damages and 40*l.* a moiety to the king, a moiety to the prosecutor: (c) but this shall not extend to fees on execution in a corporation. (d)

By the stat. 1 Jac. 10. Nothing shall be taken on a reference by the courts of Westminster, on pain of 100*l.*

It is extortion in a churchwarden to take money *colore officii*. 1 Sid. 307.

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## E Y R E.

Allowance in Eyre. Vide Franchises, (C).

Justices in Eyre. Vide Justices, (E 1.), &c.

Justices in Eyre of the forest. Vide Chase, (Q 1.) — Justices, (F).

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## FACTOR.

Vide MERCHANT, (B).

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## FACULTY.

Court of faculties. Vide Courts, (N 5.)

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## FAIR.

Vide MARKET.

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## FAIT.

### (A) What is essential to a deed.

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(A 2.) Sealing. p. 261.

(A 3.) Delivery: — What shall be a delivery. p. 262.

(A 4.) What not. p. 263.

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### (B) What is not essential.

(B 1.) The name of the party. p. 264.

(B 2.) Reading. p. 264.

(B 3.) Date. p. 265.

(B 4. a.) Witnesses. p. 266.

[(B 4. b.) Consideration. p. 266. n.]

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party's contumacy, and not for the payment of a debt, and there are no means of estimating the sheriff's right to poundage under it, for the whole of the defendant's goods are to be taken, and not property to such an amount. Therefore the sheriff is not entitled to poundage under this statute for executing such writ. 2 M. & S. 294.

(b) Poundage is the only fee to which the sheriff is entitled under this statute. 2 T. R. 148.

(c) Vide in Abatement.

(d) See in tit. Viscount, for points here relative

- (B 5.) When a second delivery makes a deed effectual. p. 268.
- (C) Deed indented. p. 268.  
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- (F) When a deed shall be avoided.  
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(A) What is essential to a deed.

(A 1.) Writing.

A deed (*a*) is a writing containing a contract, (*b*) and signed, sealed, and delivered by the party. Co. L. 35. b.

And

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(*a*) 1. All deeds were formerly called charters, *chartæ*, from their materials. — 2. But most usually when applied to the transactions of private persons, a deed is called a deed; in Latin, *factum*; because it is the most solemn and authentic act that a man can perform in the disposal of his property. — 3. It is probable that every alienation of land was very soon accompanied with some written evidence; though in the time of the Saxons, a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Thus, Ingulphus in his history of the abbey of Croyland, says, '*Conferebantur multa prædia nudo verbo, absque scripto vel charta; tantum cum domini gladio, galea, vel cornu, vel cratera; et plurima tenementa cum calcari, cum strigili, cum arcu; et nonnulla cum sagitta.*' Deeds or charters were, notwithstanding, in use at that time. These were generally called *gewrite* or writings; the particular deed, by which a free estate might be conveyed, was called *landboc*, *libellus de terra*, a donation or grant of land; and the land thus granted was called *bockland*. 4 Cruise, 9. 10 Madox, Formull. 285.

(*b*) 1. It is a common practice for persons to enter into an article of agreement preparatory to the execution of a formal deed of land, whereby it is stipulated that one of the parties shall convey to the other certain lands, or release his right to them, or execute some other disposition of them. An article, therefore, is considered as a memorandum

And therefore, every deed must be wrote (*d*) on parchment, or paper. Co. L. 35. b. 2 Rol. 21. l. 40.

If it be wrote upon cloth, linen, leather, &c. it is not good. Co. L. 35. b. 229. a. (*e*)

If a blank be signed, and sealed, and afterwards written, it is no deed. Perk. S. 118. (*f*)

### (A 2.) Sealing.

Seals were used temp. reg. Edgar, though they were not common in the time of the Saxons. Co. L. 7. a. Seld. Off. Chan. 3. Dub. Mad. Form. Int. 27. Vide Patent, (C 1. &c.)

And afterwards in the time of Edward the Confessor, and William the Conqueror. Co. L. 7. a. For it seems, that being used by Edward the Confessor, after his residence in Normandy, they were introduced into common usage by William the Conqueror. Mad. Form. Int. 27. (*g*)

The seal is essential to the deed. Co. L. 6. a. 7. a.

And therefore, regularly, it is not the deed of him, who has not sealed it. 2 Rol. 23. l. 25.

And, *per scriptum suum*, is not sufficient, without saying, that it was sealed, or, was his deed. Vide Pleader, (2 W 9. 14.)

But it is not material with what seal (*h*) it is sealed; for the seal of a stranger is sufficient. 2 Rol. 23. l. 35. Perk. S. 130. 132. 2 Rol. 22. l. 1.

And, if twenty seal with the same seal, (*i*) it is the deed of all. 2 Rol. 23. l. 30. Perk. S. 134. (*k*)

And it need not be mentioned in the deed, *sigillum apposui*. R. 2 Co. 5. a. 2 Rol. 21. l. 50. 22. l. 3.

And if a corporation seals, there is no need to say, *sigillum nostrum commune*. 2 Rol. 21. l. 45. (*l*)

morandum or minute of an agreement to make some future disposition or modification of real property; and such an instrument will create a trust or equitable estate, of which a specific performance will be decreed in chancery. 4 Cruise, 12, 13. — 2. Articles are usually entered into for the purchase and sale of lands; for the taking and granting of leases; for making mortgages and settlements on marriage. Ibid.

(*d*) 1. Or printed. — 2. Though it may be in any language or character whatever.

(*e*) Wood and stone, says Sir William Blackstone, may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than in any other way, both these desirable qualities; for there is nothing else so durable, and, at the same time, so little liable to alterations. 2 Comm. 297.

(*f*) 1. Touch. 54. — 2. A deed of revocation, and a new settlement made by that deed; though after the sealing and execution thereof, blanks were filled up, and not read again to the party or re-sealed and executed; was held good. 2 Ch. Rep. 187. — 3. A deed made with blanks, and afterwards filled up and delivered by the agent of the party is good. 1 Anst. 229.

(*g*) Upon the establishment of the Normans in England, the practice of authenticating all written instruments by waxen seals only, was introduced. And in the reign of Edward the First, every freeman, and even some of the most substantial villeins as were fit to be put upon juries, had their particular seals. 2 Comm. 306.

(*h*) 'Or instrument.'

(*i*) Perkins says, that it is not requisite, that there be for every grantor, &c. who is named in the deed, a several piece of wax; for one piece of wax may serve for all the grantors, &c. which are named in the deed, if every one of them put his seal upon the same piece of wax, or if another does so for them, if the words of the deed imply so much; that is, if it be said in the deed, *in cujus rei testimonium sigilla nostra apponimus*, or words to that effect. Perk. s. 134.

(*k*) And if a person execute a deed for himself and partner, and in his presence, it is a good execution, though sealed only once. 4 T. R. 313. 10 Jones, 268.

(*l*) If a person pretending to be mayor of a corporation, put the corporation seal to a deed, yet is it not, by that, the deed of the corporation. 13 Mod. 423.

Before the conquest, and since, till the time of Rich. I. the king's seal was not arms, but any impression, varying at the king's pleasure. Co. L. 7. a. 2 Rol. 180. A. Vide Patent, (C 1.)

Rich. I. first used two lions rampant, combatant. Co. L. 7. a. 2 Rol. 181. l. 25.

And after his return from Jerusalem, three lions passant. 2 Rol. 181. l. 25. but Coke says K. John first used them. Co. L. 7. a.

So, if an indenture be between A. of the one part, and B. and C. of the other; whereby A. demises to B. and C. who covenant with A. If B. seals the counterpart, but C. does not seal, yet if C. agreed to the lease, it shall be his deed, and he shall be bound by the covenants. Co. L. 231. a. Vide post, (C 2.)

So, if there are mutual covenants between A. and B. of the one part, and C. and D. of the other, and B. does not seal; yet covenant lies by him, against C. and D. upon this deed. R. 2 Rol. 22. l. 35. For he is named a party to the deed, and C. and D. covenant with him.

### (A 3.) Delivery : — What shall be a delivery.

So delivery is essential to a deed; for it is not a deed without delivery, though it be sealed. Co. L. 35. b. 2 Rol. 23. l. 40. 45. When a second delivery avails. Vide post, (B 5.)

But a delivery may be made without any words : (*m*) as, if he actually delivers a writing, after sealing it, to the party, without saying any thing. Co. L. 36. a. 2 Rol. 24. l. 28. 45. Per 2 J. Dal. 104. (*n*)

If he throws it upon the table, with an intent that the party shall take it; and he takes it accordingly. R. Ow. 95. (*o*)

If he delivers it as his deed into the hands of a stranger. 2 Rol. 24. l. 42. (*p*)

If it be wrote in a book, and he delivers the book. 2 Rol. 25. l. 20.

If a deed be to A. for the benefit of B. upon a marriage, a delivery to B. upon the day of marriage, saying, this will serve, and B. delivers it to A. shall be a good delivery to A. R. Dy. 192. b. 2 Rol. 24. l. 15. (*q*)

So a delivery may be by words only, without an actual delivery : as, if the writing lies upon the table, and the obligor says to the obligee, take it up, it is sufficient for you. Co. L. 36. a.

(*m*) That is, where the delivery is to the party himself, or his authorised agent, for if delivered to a stranger, without declaring that it is for and in behalf and to the use of him to whom it is made, it seems that such delivery will not be sufficient. 4 Cruise, 34. Touch. 57.

(*n*) Lofft. 340. 4 T. R. 314. 9 Rep. 136.

(*o*) A lessee for years granted his term by deed, and sealed it in the presence of the grantee and several other persons. The deed at the same time was read but not delivered; nor did the grantee take it, but it was left behind in the same place. The opinion of all the judges was that it was a good grant; for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery; and it being left behind them, not countermanded, it should be said to be a delivery in law. Cro. Eliz. 7.

(*p*) 1. A deed may be delivered in the absence of the party who is to take under it. L. R. 233. Vide 2 P. Wms. 359. — 2. Therefore it is no excuse for not re-assigning an estate, that the party to whom it was to be re-assigned never requested it.

(*q*) 1. A joint obligation executed once only by one obligor for himself and the other, in the presence and with the authority of that other, binds both. 4 T. R. 313. — 2. If A., without authority, execute a joint and several bond for himself and B., and sign it 'A. and B.', it is available as a several bond against himself. 2 B. & P. 338.

Or,



Or, take it as my deed. Co. L. 36. a.

So, if it be once delivered as his deed, it is sufficient, though he afterwards by words explains his intent otherwise: as, if an obligation be made to A. and delivered to A. himself as an escrow to be his deed upon performance of a condition: this is an absolute delivery, and the subsequent words are void, and repugnant. Dub. Dy. 34. b. Cont. Cro. El. 835. R. acc. Cro. El. 520. 884. Mo. 642. Semb. cont. Mo. 697. 27 H. 8. 12. b. Acc. 19 H. 8. 8. a. R. acc. Hob. 246. 2 Rol. 26. l. 45. R. 9 Co. 137. Co. L. 36. a. R. Noy, 6. (r)

If it be delivered as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently, and if the party obtains it, he may sue before the condition performed. 2 Rol. 25. l. 30. R. per 3 J. 1 Leo. 152.

So a common seal fixed to the deed of a corporation is tantamount to a delivery. R. 2 Rol. 23. l. 50. Dav. 44. (s)

So a delivery by a stranger, with the assent of the maker of the deed, is sufficient. Perk. Fait, 137.

#### (A 4.) What not.

But if a man throws a writing on a table, and says nothing, and the party takes it; this does not amount to a delivery, unless it be found to be put there with intent to be delivered to the party. R. 1 Leo. 140. Ow. 95. (t)

So, if he delivers a writing to A. to the use of B.; it is not a delivery to B. if it was not delivered as his deed. 2 Rol. 24. l. 99.

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(r) 1. The delivery of a deed may either be *absolute*, that is, to the grantee, or to some person for him; or *conditional*, that is, to a third person, to keep it till something is done by the grantee; in which last case it is not delivered as a deed, but as an escrow, that is, a scrawl writing, which is not to take effect, till the condition is performed; when it becomes a good deed. 4 Cruise, 35. — 2. Where a deed is delivered as an escrow, it is of no force till the condition is performed, and although the party to whom it is made, should get it into his possession, before the condition is performed, yet he can devise no benefit from it. Ibid. Touch. 59. — 3. But if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed becomes good, and will take effect from its first delivery; for there was *traditio inchoata* in the life time of the parties; *et postea consummatio existens*, by the performance of the condition. 4 Cruise, 35. 3 Rep. 35. b. — 4. Where a person who delivers a deed as an escrow, has not power or ability in law at that time to make the deed, and before the second delivery he attains such power, there the deed is void. But where the person, at the first delivery, has power and ability in law to contract, but cannot perfect it till an impediment be removed; there, if the impediment be removed, before the second delivery, the deed is good. Ibid. — 5. If an unmarried woman delivers a deed as an escrow, and before the second delivery, she marries or dies; in such a case, for necessity, *ut res magis valeat quam pereat*; by fiction of law, this shall be a good deed *ab initio*. — 6. In the delivery of a deed as an escrow, two things must be attended to: first, that the form of the words used in the delivery be apt and proper; which are, "I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he deliver to you 20*l.* for me," or upon any other condition then mentioned; which mode of delivery ought to be taken notice of in the attestation. 4 Cruise, 36. Touch. 58. — 7. Secondly, that the delivery of the deed as an escrow, be to a stranger; for if a person delivers a deed to the party himself, to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately; nor will the party to whom it is delivered, be bound to perform the conditions. Ibid. 1 Inst. 36. a. 9 Rep. 137. a. Infra, (A 4.)

(s) Cro. Eliz. 167.

(t) Vide supra (A 3.) citing Cro. Eliz. 7.

So, if an obligation made to two, be delivered but to one, without saying any thing, this will not avail as to the other. 2 Rol. 24. l. 12.

So, if a lease and letter of attorney be fixed together, and a delivery be of the letter of attorney only; this does not amount to a delivery of the lease, though it be actually put with the letter of attorney into the hands of the party. R. 2 Rol. 25. l. 5.

So, if it be delivered to a stranger as an escrow to be his deed upon performance of conditions; it is not his deed till the conditions performed, though the party happens to have it before. 2 Rol. 25. l. 25. 45, Co. L. 36. a.

Or be delivered to a stranger to keep till conditions be performed. 2 Rol. 25. l. 40.

Or, to be delivered to the party, as his deed, upon performance of a condition.

But a delivery cannot be to the obligee, as an escrow. 2 Cro. 85. 86.

So a deed, by a corporation out of possession, containing a lease of land and a letter of attorney, is not good under the common seal, if the attorney does not deliver it upon the land. R. 2 Rol. 24. l. 5. R. 1 Vent. 257. (u)

## (B) That is not essential.

### (B 1.) The name of the party.

It is not essential to a deed, that the party subscribe his name. 2 Cro. 640. Vide post, (E 3.) — Capacity, (B 4. 5.) — Grant, (A 2.)

And therefore, a variance in the name subscribed from the name of the defendant, does not prejudice, if it be found that the defendant executed it: as, if the defendant be R. Erlin, and subscribed his name Erlwin. R. Sal. 462.

### (B 2.) Reading.

So it is not necessary that the deed be read before sealing and delivery: for if the party executes it without hearing, or desiring that it may be read, yet it binds him. Dub. 44 Ed. 3. 23. a. 44 Ass. 30. 2 Rol. 28. l. 15. Mo. 184. 2 Co. 9. b.

But an illiterate man need not execute a deed before it be read to him. R. 2 Co. 3. Manser. R. 2 Co. 9.

Or, if it be in Latin. &c. before it be read to him in a language which he understands. 2 Co. 9.

So, a blind man, though he be well learned. 11 Co. 28. a.

So, if it be agreed to execute a release of a trespass, and the party, instead of it, executes a release of the land; it does not bind him. 44 Ed. 3. 23. 44 Ass. 30.

Or, if he executes a general release. 2 Rol. 28. l. 10.

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(u) (A 5.) *Form of words.* — 1. Another circumstance necessary to a deed is, that there be words sufficient to specify the agreement and bind the parties, legally and orderly set forth; that is, there must be words sufficient to signify the terms and conditions of the agreement, and to bind the parties; which sufficiency must be left to the law to determine. 4 Cruise, 30. — 2. A deed may refer to any collateral authenticated writing; when the term of such writing will be considered as incorporated with the deed. 1 H. Bl. 254. — 3. Vide infra, (2).

So,

So, if an illiterate man executes a deed which is falsely read (*x*), or the sense declared different from the truth, it does not bind him: Amd. 9 H. 6. 59. b. 2 Rol. 28. l. 5. R. 2 Co. 9. b. Mo. 148. 184.

As if it be read to be upon a condition, when it was absolute. 2 Rol. 28. l. 25.

Or, to be of 5*l.* penalty, when it was of 10*l.* 2 Rol. 28. l. 32. 11 Co. 27. b.

Or, to be a gift in tail, when it was a feoffment. 2 Rol. 28. l. 27.

So it does not bind, if the false reading be by a stranger, any more than if by the party to whom the deed is given. R. 2 Co. 9. b.

So, though it be by a friend of him, who executes it, without covin. R. 2 Co. 9. b.

So, if a man lettered, but blind by age, &c. executes a deed falsely read, it does not bind him. R. 2 Rol. 28. l. 20.

If a feoffment, with a letter of attorney, is falsely read; it is void for both. 2 Rol. 28. l. 27. 11 Co. 27. b.

But if two deeds are on the same parchment, and the one is truly read, and the other falsely; it binds for the deed which was truly read. 2 Rol. 28. l. 35. 37. 11 Co. 27. b.

So, if there are two distinct clauses in the same deed, and one is truly read, and the other not, it shall be good as to the one. 11 Co. 27. b.

### (B 3.) Date.

So the date is not essential to a deed: for if it has no date (*y*), or a false, or impossible date, the deed shall be good, and shall take effect from the time of the delivery. Co. L. 6. a. R. 2 Co. 5. a. 2 Rol. 21. l. 41. P. Q. 3 Leo. 100. Kelw. 34. b. R. Yel. 193. Vide Mad. Form. Int. 30. (*z*)

So, if it has the day of the month, but no year is mentioned: for that is a void date. 2 Rol. 27. l. 22.

So, if the delivery be found before or after the date, the deed shall be good: for though the party is estopped to plead the deed to be delivered before the date, yet the jury may say the truth. R. 2 Co. 4. b. 3 Leo. 100.

So, where a deed has a void date, it may be pleaded, that it was delivered at some other day than that mentioned in the deed. 2 Rol. 27. l. 25. Yel. 194.

So, if it be delivered after the date, it may be pleaded, *quod per factum geren' dat' 1<sup>o</sup>. Maii, et primo deliberat' 9<sup>o</sup>. Maii*. R. 3 Lev. 348. R. Cro. El. 890.

So a deed with the date of the month, and year of the king, shall be good, though A. D. be mistaken. Mod. Ca. 45.

(*x*) Unless it be agreed, by collusion, that the deed should be read false, on purpose to make it void; for in such a case it will bind the fraudulent party. 2 Atk. 327.

(*y*) In former times deeds were not dated, because the limitation of prescription, or time of memory often changed; and then it was held for law, that a deed bearing date before the limited time of prescription, was not pleadable. But it became customary, about the time of Edward II., to insert the date in all deeds, which has been practised ever since. 4 Cruise, 313.

(*z*) If two deeds bear date the same day, and are manifestly but one agreement, that shall be presumed to be executed first, which will support the clear intent of the parties. 1 Burr. 60.

So,

So, if the year of the king be mistaken. R. Sal. 462, 463.

So the clause *in cujus rei testimonium* is not necessary. Co. L. 6. R. 1 Leo. 25.

(B 4. a.) Witnesses.

So witnesses are not essential to a deed. (a)

Though the clause of, *hiis testibus*, continued in the deeds of subjects till the time of H. 8. 2 Inst. 78. (b)

And was used in the king's patents Temp. H. 3. Ed. 1. 2. and 3. and before. 2 Inst. 77. Vide Patent, (B). (c)

(B 5.)

(a) 1. Their use is to constitute evidence of the authenticity of the deed. — 2. It is not necessary that the witness should actually see the party execute the deed; for if he be in an adjoining room, and the party after executing the deed brings it to him, tells him that he has done so, and desires him to subscribe his name as a witness, that is sufficient. 2 B. & P. 217.

(b) In the reign of Queen Elizabeth, deeds were often without witnesses. In 13 Car. 2., a counterpart of an old lease without witnesses, was allowed to be good evidence; and Mr. Justice Windham said, that he had seen several deeds made in Queen Elizabeth's time without witnesses. 4 Cruise, 36. 1 Lev. 25.

(c) (B 4. b.) *Consideration*. — 1. At common law, a consideration was not essentially necessary to the validity of a deed. — 2. Thus, in Plowden, it is said *arguendo*, that, by the law of England, there were two ways of making contracts for lands or chattels; the one by *words*, the other by *writing*; and because words were often spoken inadvisedly, and without deliberation, the law had provided that a contract by *words* should not bind without consideration. But where the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made. Plowd. 308. Bac. Read. 13. — 3. Thus where a person promised by deed to give another twenty pounds, it was held that an action of debt lay upon the deed; and that the consideration was not examinable; for in the deed there was a sufficient consideration, namely, the will of the party who made the deed. 17 Edw. 4. 4. b. — 4. And modern opinions agree with this doctrine. 3 Burr. 1670. 7 T. R. 350. n. 475. — 5. Yet though a deed entered into without any consideration is valid at law between the *parties*; yet in many cases, it is void as to *strangers*. And therefore it may be laid down generally, that a consideration is necessary to render a deed valid against all persons. 4 Cruise, 27. — 6. The court of chancery too will not lend its aid to carry a deed into execution, unless it is supported by some consideration. For equity is remedial only to those who come in upon an actual consideration. So that although a voluntary conveyance which is good in law, is sufficient likewise in equity; yet a voluntary defective conveyance, which cannot operate at law, is not helped in equity, in favour of a bare volunteer; where there is no consideration expressed or implied. Treat. Eq. b. 1. c. 5. s. 2. 2 P. Wms. 245. 1 Ves. J. 54. Vide in Chancery. — 7. There must be not only a consideration in equity as a motive for relief, but it must be a stronger consideration than what is on the other side. For if it is only equal, then the balance will incline neither way, and the court will not interfere. Treat. Eq. Id. s. 2. — 8. Thus where there are two conveyances, without consideration, of the same lands, the court of chancery will not relieve the latter against the former; so that in such case, he who has the legal estate will hold it. 1 Ch. Rep. 173. — 9. There are likewise some deeds deriving their effect from the statute of uses; namely, a bargain and sale, and a covenant to stand seised to uses; to the first of which a pecuniary consideration, and to the second a good consideration, is absolutely necessary; otherwise they are void. 4 Cruise, 27. — 10. Considerations are of two kinds, civil and moral; the first which is usually called a *valuable consideration*, is money, or any other thing that bears a known value; marriage also forms a valuable consideration. 4 Cruise, 28. — 11. The second, which is called a *good consideration*, arises from an implied obligation; such as that which subsists between a parent and child; for children are considered in equity as creditors, claiming a debt, founded on the moral obligation of the parent to provide for his child. Ibid. — 12. The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews and neices, and heirs at law; and the desire of preferring and preserving

(B 5.) When a second delivery renders a deed effectual.

If a deed be intirely void at the time of delivery, for want of capacity in him, who makes it, and afterwards the same person attains a capacity to make it, and then delivers the deed *de novo*, the second delivery makes it good: as, if a *feme covert* delivers a deed, and after the death of her husband delivers it *de novo*. Vide Capacity, (D 2.) Vide ante, (A 3.)

So, if a deed be cancelled, and afterwards executed and delivered *de novo*, it shall be good. 2 Rol. 26. l. 7.

So, if a man, who has a capacity to make a deed, but for some impediment cannot at that time make it effectual, delivers the deed as an escrow, to be afterwards delivered as his deed, and after the impediment removed, it be delivered as his deed, it shall be good: as, if a disseisee makes a lease for years, being out of possession, and delivers the deed as an escrow, to be afterwards delivered as his deed, and after possession obtained it be delivered as his deed; it shall be good. Co. L. 48. b. Cro. El. 446. 3 Co. 35. b.

But if a man delivers a deed as his deed, and at the time of the delivery has not power to make it effectual, it shall not be good by a second delivery after the impediment removed: as, if a disseisee makes a lease, being out of possession, and delivers it as his deed, it cannot be a good lease by a new delivery after the possession recovered.

So, if a deed of confirmation of the estate of the lessee be delivered before a lease executed; it cannot be good by a delivery *de novo* after a lease made.

So, if a man, who has not capacity to make a deed, delivers it as an escrow to be afterwards delivered as his deed, and afterwards attains a capacity, and then the deed is delivered; it shall not be good, for this relates to the first delivery: as, if an infant, *feme covert*, &c. delivers a deed as an escrow, and after full age, death of the husband, &c. it is delivered as a deed. R. Cro. El. 446. 3 Co. 35.

So, if it was delivered at first as his deed, by one whose deed is not void, but voidable only, as, by an infant, by duress, &c. it shall not be good by a delivery *de novo* at full age, when at large, &c. 2 Rol. 26. l. 10. 15.

(C 1.) Deed indented.

Every deed is indented, or poll.

When a deed is indented it shall be said to be an indenture, though the words, this indenture, &c. are wanting. Co. L. 229. a. (d) 2 Inst. 672. R. 5 Co. 20. b.

But

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preserving his name and family, are also held to be good considerations. Ibid. — 13. The payment of a man's debts is deemed a good consideration; as every man is under a moral obligation of satisfying his lawful creditors. Ibid. — 14. A consideration too is either express or implied. An express consideration is where the motive or inducement of the parties to a deed, is distinctly declared. Treat. Eq. b. 1. c. 5. s. 1. — 15. A consideration is implied, where an act is done or forborne at the request of another, without any express stipulation; in which case the law presumes an adequate compensation for the act of forbearance, to have been the inducement of the one party, and the undertaking of the other. Ibid.

(d) The Annotator subjoins, that before the indenting of deeds came into use, when



But the words, this indenture, &c. do not make an indenture, if the deed be not indented. Co. L. 229. a. 143. b. (e)

Indented deeds began to be used Temp. R. 1. John, or H. 2. and were common Temp. H. 3. Mad. Form. Int. 29. (f)

An indenture may be indented at the top or side. Co. L. 299. a.

An indenture is bipartite, tripartite, quadrupartite, &c. Co. L. 229. a. (g)

And every part of the indenture is of as great effect as all the parts together. Lit. S. 370. (h)

And

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when there were more parties than one interested in them, there were as many parts of them taken, as there were parties interested, and one part was delivered to each of the parties: these multiplied parts were called *chartæ pariclae*, or *paricolæ*. The *chartæ pariclae*, or *paricolæ*, were superseded in a great measure, by the *chartæ partita*. One part of the *chartæ partita* was written on a piece of vellum or parchment beginning about the middle and continuing to the end of each side. This prevailed as early as the times of the Saxons, as appears by the will of Æthelwyrd, a nobleman of Kent, dated in 958; by that of prince Æthelstan, eldest son of king Ethelred the second; by a charter of archbishop Eadsi, made about the year 1045; and by other Saxon documents preserved in the library of Mr. Astle; in all which the parchments are cut in straight lines. Straight lines continued to be generally used, till the latter end of the reign of king Henry the third. Afterwards the cut through the parchment was made in a waving or undulating line; and the practice of writing an intermediate sentence, or drawing an intermediate figure, was generally disused, and the word *cyrographum* adopted. In process of time it became the practice, to indent this line in small notches or angles. This practice began with the lawyers, as early as the reign of king John; but was not adopted by the ecclesiastics till a much later period. This made the intermediate writing or drawing unnecessary; and it seems to have been abandoned about the reign of Edward the third. But the practice of indenting deeds in the intermediate line, remained in use till the close of the fourteenth century; it then seems to have declined: yet the practice of cutting a waving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever since continued. If the deed contains more than one skin of parchment, only the first skin of parchment is indented. Foreign diplomatists contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a straight line, it is properly called *chirographum*; that when it is cut through the intermediate word or figure in a waving line, it is properly called *charta undulatoria*; and that it is then only properly called *charta indenta*, or *indentura*, when it is cut through the intermediate word or figure in a waving line, and that waving line is indented or notched in the manner abovementioned. But with us, every deed, the top of which is cut in the undulating or waving manner abovementioned, is called an indenture. He refers to Mr. Madox's preface to his *Formulare*, and the *Nouveau Traité de Diplomatie*, tom. i. 331.

(e) 1. Accordingly in Stiles's case, where a deed was produced as an indenture, which was not indented, beginning with the words *hæc indentura*, it was adjudged, that it was not an indenture, although it was in two parts; for the words of a deed cannot make it indented; but to the making of an indenture there ought to be a manual act of indenting the parchment or paper. 5 Rep. 20. — 2. It is affirmed by Sir Henry Gwillim, that if only the form of indenting the parchment or paper be wanting, this is not material; since it might even be done in court. 4 Bac. Abr. 51.

(f) Some deeds must be indented, to be valid for the purposes for which they are used, as bargains and sales by the stat. 27 H. 8. c. 16.; leases by persons seised in tail in right of their wives, or ecclesiastical persons, by 32 H. 8. c. 28.; a bargain and sale of a bankrupt's estate by 13 Eliz. c. 7. Vide etiam, 43 Eliz. c. 18

(g) 1. And that part or copy which is executed by the grantor, is usually called the *original*: the rest are called *counterparts*. 2 Comm. c. 20. s. 1. — 2. Though the use now is for all the parties to execute every part, which makes them all originals. Ibid.

(h) 1. The counterpart of a deed has been admitted to be sufficient evidence of such deed;

And all the parts are but one deed in law. Lit. S. 370.

(C 2.) Who are parties to it.

If one party (i) executes his part of an indenture, it shall be his deed, though the other does not execute his part. R. Cro. El. 212. Co. L. 229. a. Vide post, (D 2.)

So, if an indenture be between A. and B. of the one part, and C. and D. of the other, whereby an estate is granted to C. and D. and there are covenants to A. and B. by them; though D. does not seal, if he agrees to the deed, he shall be bound by the covenants. Vide ante, (A 2.)

So, though B. does not seal, A. and B. may have covenant; for B. is named a party. Vide ante, (A 2.)

So, if a deed between A. on the part of B. of the one part, and C. of the other, and C. agrees to pay so much to B. without saying with whom he agrees; B. though a stranger, may maintain an action thereon against C. Dub. 3 Lev. 139.

So, if a deed does not mention any parties in the beginning, but says, it is agreed, that a horse shall run, &c. In witness whereof we have set our hands and seals, and A. and B. sign and seal it; they are parties to it, and the one shall have covenant against the other. R. 1 Sal. 214.

So, if a deed be between A. and B., whereby it is agreed, that D. shall do all on his part, and D. seals and delivers it, he is a party; and if he does not do all agreed on, covenant lies against the covenantor. Semb. Sho. 59.

So, if a demise be by A. to B. by deed between A. and B., and afterwards C. adds, that he covenants that B. shall pay his rent, &c. and signs the deed; covenant lies against C., though he was not a party to the original deed. R. Carth. 76.

But if a charter-party be between A. and other owners of a ship, of which B. is master, of the one part, and C. of the other, whereby A. covenants with B. and C., and also C. covenants with A. and B. Though B. executes the deed, yet he is not a party, and cannot release covenant by A. against C. R. 2 Rol. 22. l. 20. (k)

So a man cannot be party to a deed, if he be not named therein: as,

deed; and a conveyance decreed accordingly. Prec. Ch. 116. — 2. If there happens to be any variance between the indenture and counterpart, it shall be taken as the deed of the grantor happens to be, and the other shall be intended only the misprision of the writer. Finch's Law. 109.

(i) 1. The parties to a deed are either active or passive. Those who grant, demise, or release, are the active parties, and are called the grantors, lessors, and releasors, those to whom the subject is granted, demised, or released, are the passive parties, and are called the grantees, lessees, or releasees. 4 Cruise, 313. — 2. If several persons join in a deed some of whom are capable of conveying or taking, and others incapable, it shall enure and be construed as the deed of those only who are capable of conveying, and to those only who are capable of taking; for the incapacity of some of the parties will not render it invalid, as to those who are capable. Ibid. 1 Inst. 45. a. Touch. 81.

(k) A deed *inter partes*, is only available between those who are parties to it, and their privies. Hence a deed between A. of the one part, and C. of the other, whereby A. agreed to annul certain claims which he had against B. cannot be pleaded by B. in an action against him by A. brought to enforce those claims. 5 M. & S. 308.

if

if it be agreed between A. and B. that A. being arrested shall go at large upon his note, whereby he writes, I engage to return to the custody of D. such a day; B. is not a party, nor can have covenant upon this note, though it be signed and sealed by A. R. 1 Sal. 197.

### (D 1.) Deed poll.

A deed poll is every deed not indented. Co. L. 229. a.

And if a deed is pleaded, it shall be intended to be poll, if it be not mentioned to be indented. Co. L. 229. a.

If a deed poll between A. and B. be delivered by A. to B. and afterward delivered by B. to A. either of them who has it in his hands may maintain an action thereon: for the re-delivery does not avoid the deed. R. Cro. EL. 483.

So, if A. by deed-poll agrees to pay so much to B. he shall maintain an action upon it, though he be a stranger, and did not seal it. 3 Lev. 140.

### (D 2.) Who shall take, though not a party.

None shall take a present interest by a deed, if he be not a party to it. Co. L. 231. a. Vide ante, (C 2.)

So a party to a deed cannot covenant with one, who is a stranger to the deed. Per Holt, Carth. 76. (l)

But a man may take by way of remainder, though he be not a party to the deed. Co. L. 231. a.

As, if by deed between A. and B. only, A. conveys to B. for life, or in tail, remainder to D. for life, in tail, or in fee; D. shall take the remainder, though he be a stranger to the deed. Co. L. 231. a.

So, if a lease be to B. for years if A. so long lives, and that it remain to D. for years, to commence after the death of A. it shall be a good remainder to D. though no party. R. Ray. 142.

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(l) 1. That is in the case of a *deed inter partes*; which, in one sense every contract is, since none can be valid to which there are not proper sides or parties; but this expression has a technical sense, and means an agreement professing in the outset, and before the stipulations are introduced, to be made between such and such persons; as thus, 'This deed concluded on the 1st day of January, 1821, between A. of the one part and B. of the other.' — 2. The effect of such an introduction is very great indeed, it being a solemn declaration, that all the covenants comprised in that instrument, are intended to be made between those parties and none others. Insomuch, that should a stipulation be found in the body of the deed like this, 'And the said A. covenants with J. S. to pay him 20l.' the words 'with J. S.' are inoperative, unless to denote for whose benefit the stipulation is made, being in direct contradiction to what had been previously declared, and B. alone can sue for non-payment: a consequence of the maxim, that where two opposite intentions are expressed in one contract, the first in order shall be preferred. 8 Mod. 116. Carth. sup. 1 Show. 58. 3 Lev. 138. — 3. Where there are more sides to a contract *inter partes* than two, as where made between A. of the first part, B. of the second, and C. of the third, there is no objection to one covenanting with another in exclusion of the third. In such case, the introduction must not be construed to declare, that every provision of the deed is made between all alike; but rather, that some are concluded with this person, some with that: and, indeed, chiefly for this end, were the contractors divided into more sets than two. On the other hand, the introduction must not receive this force, that some provisions are made with or by one party, some by or with another, and none with or by two jointly; so that two may covenant with the third, and *vice versa*. Vide Dyer, 337. pl. 39. 3 Taunt. 87. &c. — 4. Indenting a deed (in the usual form) only multiplies the copies, and has not the effect of making it a contract *inter partes*. 3 Lev. 139.

## (E) The parts of a deed.

## (E 1.) Recital.

A deed may be good, though it has not formal parts.

A recital (*m*) is not an essential part of a deed, (*n*) for it may explain the intent, or may be repugnant. (*o*) Per Holt, 3 Ca. Ch. 101. (*p*)

(E 2.) Indorsement, &c. (*q*)

A thing subscribed after the words, *in cujus rei testimonium*, or indorsed, may amount to a covenant or defeasance; but is no part of the deed: (*r*) as, if a bill or note for 10*l.* be subscribed, Memorandum that he is not to pay the 10*l.* till he has recovered, &c. R. 2 Brownl. 98.

So a thing wrote after, *in cujus rei testimonium* is no part of the deed, though it was wrote before the sealing and delivery of the deed. 2 Rol. 23. l. 20. R. Cont. Mo. 3.

(*m*) 1. The recital is a narrative of such facts, deeds, or agreements, as are necessary to explain the grantor's title, and the motives and reasons upon which the deed was founded. 4 Cruise, 317.

(*n*) Although recitals are not absolutely necessary, yet they are now usually inserted in all deeds, for the purpose of showing the origin and derivation of the title, or of stating such facts as are connected with or relate to, the subject matter of the deed. 4 Cruise, 317.

(*o*) 1. A misrecital of a former grant will not invalidate a deed; nor will a misrecital of the estate of the grantor in the land. Hob. 128. 3 Leon. 135. Cro. Jac. 127. Skin. 543. — 2. And Lord Coke laid it down, that a recital does not conclude, because it is no direct affirmation. 1 Inst. 352. b. — 3. But it has been since held, that though a person shall not be estopped by a general recital, yet he may be estopped by the recital of a particular fact. For where it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee; it was held, that the obligor was estopped to say, that he had not received any money for the use of the obligee. Willes, 9. — 4. Where it can be proved, that a deed was actually executed, and is lost, the recital of it in another deed is evidence of it. 6 Mod. 45.

(*p*) 1. If there is any mistake in a recital, that part of the recital in which the mistake is, shall be rejected. — 2. Thus, in an award under a submission by bond, if the arbitrators offer to recite the bond and mistake the date of it, the mistatement shall be rejected.

(*q*) After the recitals comes the witnessing part, which begins with an account of the consideration, and if it be a pecuniary one, the payment of it is mentioned, and the grantor acknowledges the receipt of it, and releases the grantee from the payment of it. And it is also usual to indorse a receipt for the consideration, where it is pecuniary, on the back of the deed, which should be signed by the party who receives the money. 4 Cruise, 318. 2 Atk. 478. 3 Atk. 112.

(*r*) 1. An indorsement of the same date as the deed, and made before its execution, must be taken as part of the deed itself. 4 M. & S. 30. 6 T. R. 737. — 2. And when a bond was conditioned that the obligor should indemnify the obligee from all sums which he should pay upon the obligor's account, and before the bond was executed a memorandum was indorsed on it, that the obligee undertook not to sue upon the bond until after the obligor's death; the bond, it was held, was not payable by the obligor himself but only by his representatives after his death. 8 T. R. 483. — 3. But where an indorsement was made upon a deed after its execution, 'that the lessee should not be dispossessed, but should have the land from the day of the indorsement until, &c., being a day beyond the term granted by the deed; it was held, that the memorandum had no force whatever: it could not operate to take from the lessor, the power of determining the first lease, not being by deed; and it did not operate as a surrender of the former lease and the creation of a new one, that being obviously against the intention of the parties, since then a lease with rent and covenants should be exchanged for one without. 4 M. & S. 30.

But

But if words are wrote upon the back for want of room within the parchment, they shall be part of the deed. 2 Rol. 22. l. 47.

So, if a condition be indorsed upon an obligation, &c. it shall be good; for it goes in defeazance. 2 Rol. 22. l. 50.

So, if under the condition words are wrote, and that they shall be parcel of the condition; this makes the words part of the condition. 2 Rol. 23. l. 15.

So, if there be a memorandum wrote under, that the sum in the condition shall not be paid till such a contingency, without more. R. 2 Rol. 23. l. 5.

Or, a memorandum indorsed. R. Mo. 679.

(E.3.) The premises : — When the parties are well described.

The office of the premises of a deed is to ascertain the parties, and the lands, &c. conveyed. Co. L. 6. a.

The proper description of the party is by his christian and surname. Vide Capacity, (B 4, 5.) — Vide ante, (B 1.) — Grant, (A 2.)

So he may be described by his name of office, or dignity.

So, if a man executes a deed, and his addition be mistaken, (s) this shall not avoid the deed: as, if A. B. junior executes an obligation by the name of A. B. senior. R. 13 H. 4. 4. b. 2 Rol. 21. l. 15.

So, if his surname be mistaken: as A. Bosom, for, A. Bozom. 14 H. 4. 30. b. 2 Rol. 21. l. 19.

Or, if it be totally different: for a man may have two surnames. 3 H. 6. 25. b.

So, if a deed be executed by A. and subscribed by his christian and surname, but in the ingrossing his christian name is left blank, yet it shall be good. R. 2 Cro. 261. (t)

So, if a man be baptised by one name and known by another, a grant by the name, by which he is known, shall be good. 2 Rol. 43. B. (u)

So, if Jane B. makes a lease by the name of Joan, it shall be good. R. 2 Rol. 42. l. 50.

But if Edmund executes a deed in which he is named Edward,

(s) Mistakes in the description of the parties will not, unless very gross, make a deed void; for if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good. *Nihil constat error nominis, cum de corpore constat.* 4 Cruise, 314.

(t) 1. A wife is a good name of purchase without a christian name. 1 Inst. 3. a. — 2. And so it is if a christian name be added, and mistaken; for *utile per inutile non vitiatur.* Ibid. — 3. But if an ordinary person grant by his surname only, without any name of baptism; or by his name of baptism, without any surname; in these and the like cases, the deed will be void for uncertainty; unless there be some other matter in the deed to help it; or something done after to supply the defect. Ibid. — 4. A person to whom an estate in remainder is limited, may be described in a deed, without mentioning either his christian or surname; as if a remainder is limited, *primogenito filio*, or *seniori puero*, of J. S., it will be good. And in the usual limitation of remainders to persons unborn, they are necessarily described in this manner. Ibid.

(u) Persons who have several christian names, as 'Thomas Henry,' frequently use only the first name, and in that case, if they are described in the deed by the first name only, it will be good. For this there is an authority in Bracton, who, speaking of legal proceedings, in which the description of the parties should be particularly accurate, says, '*Se quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit, quo solet frequentius appellari.*' 4 Cruise, 314. Bract. 188. b.

and



and he be sued by the name of Edmund *alias dict'* Edward, &c. he may plead *non est factum*, and shall avoid the deed. R. 3 H. 6. 25. Per Prisot, 34 H. 6. 19. b. 2 Rol. 21. l. 21. R. Dy. 279. b. Ow. 48. R. Cro. El. 897. R. 2 Cro. 558. 640. (x)

Though he subscribes by his true name, Edmund. R. 2 Cro. 640.

Though the jury find that Edmund executed the deed. R. 2 Cro. 640.

So, if he be sued by the name of Edward, when his name was Edmund; for he may plead *non est factum*, though in fact he executed the deed. Cont. Dy. 279. b. but that is denied, *ibidem* in marg.

So, if a man takes solely by the deed, a mistake of the title, or addition to the party, shall avoid the deed: as, if a grant be to A. B. knight, where he is not a knight. 2 Rol. 43. l. 30.

Or, to A. B. esquire, where he was a knight. R. per 3 J. Rookby cont. Sal. 561. (y)

Yet if Edmund executes a deed in which he is named Edward, and is sued by the name of Edward, and pleads misnomer; he may be estopped by the deed. Per 2 J. Dy. 279. b. in marg.

(E 4.) When the lands are well described. — By what names they pass.

The premisses ought to comprehend the certainty of the lands or tenements to be conveyed. Co. L. 6. a. (z) Vide Grant, (E 1, &c.)

Land is *nomen generalissimum*, and comprehends all the species of land. Co. L. 4. a. Vide Grant, (E 3.)

If a man possessed of a term for years, by indenture, reciting the term, grants all the said lands to A., his executors and assigns; the whole term passes, without more. R. Skin. 542.

If the description of the tenements granted comprehends several particulars and circumstances in the same sentence, all ought to be true, otherwise the grant will be void: as, if a man conveys all his tenements in the parish of B. in the tenure of A.; if they are not in the parish of B. though they are in the tenure of A. they do not pass. R. 3 Co. 10. a. Doughty. R. Dy. 292. b.

So, if he conveys all his tenements in the tenure of A. in the parish of B., for it is not material that the first part of the description is true, if the whole is not so. R. 2 Co. 33. a. D. cont. 3 Co. 10. a. Acc. Hob. 171.

So, *a fortiori* if he conveys *omnia illa messuagia, terras, tenementa in tenura*, A. B. &c. in W. when they are in D. for, *illa*, refers to the whole period. R. 2 Co. 33. a.

(z) If lands be granted to Robert Earl of Pembroke, when his name is Henry; or to George Bishop of Norwich, when his name is John; it will be good. For in these and the like cases, no doubt or uncertainty can arise; as there can be but one person having those dignities. 1 Inst. 3. a.

(y) A grant to a duke's eldest son, by the name of marquis; or to the eldest son of a marquis by the name of earl; *et sic de similibus*; would be good; because of the common courtesy of England, and their places in heraldry. Carth. 440.

(x) There was a parish and also a vill called Street, and a person having lands in the vill of Street, and also lands in the parish of Street, but not within the vill of Street, conveyed all his lands in Street. It was resolved, that the lands in the vill only passed; because, when Street was named generally, it must be understood of the vill only. 3 Ro. Abr. 54.

*Totam illam portionem decimarum in L: cum omnibus decimis in L. in tenura* J. C. when he has not any portion, and the other tithes in L. were not in the tenure of J. C. R. 4 Co. 35.

If he conveys the manor of D. in the county of B. by bargain and sale, when it lies in the county of O. R. Dy. 292. b. in marg.

But if the thing described is sufficiently ascertained, it is sufficient, though all the particulars are not true: as if a man conveys his house in D. which was R. Cotton's, when it was Tho. Cotton's. Hob. 171. (a)

Or, his house late R. Cotton's in D. R. Dy. 376. b.

If he demises the manor of D., which manor is in lease for such a rent; the demise is good, though the rent be mistaken. Per Poph. 2 Cro. 34.

Or, a meadow in the parish of D. *in com'* B. though it was *in com'* W. R. Dy. 292. b.

Or, the manor of D. *in com.* B. when it was *in com.* O., if livery be made. Dy. 292. b. in marg.

Or the commandry of S. *in com.* R. though it be not *in com.* R. Cro. El. 114.

So, if he demises the tithes of seventy-eight acres, and all tithes prædial and personal belonging to the prior, &c. all which were in lease to M. The tithes pass, though not in lease: for there was a sufficient certainty before, and therefore the words, all which, &c. shall be taken as an explanation, not as a restriction. R. Cro. Car. 584. (b)

If he demises his meadows in B. and D. containing ten acres, where they contain twenty acres; all the meadows pass. Semb. Sav. 114. (c)  
(E 5.)

(a) 1. Lord Bacon says, *veritas nominis tollit errorem demonstrationis*. And, therefore, if lands are described, in the first instance, by their proper names, as the manor of Dale; or by their abutments, as a close of pasture bounded on the east by Endsdenwood, on the south by, &c.; or if the general boundary is mentioned, and the grantor has no other lands in the same precinct; or if the lands are described by their appendancy to other lands more notorious, as parcel of the manor of A.; in all these cases, if there be an error in any addition made to these names or descriptions, it will have no effect. Bac. Tra. 102. — 2. Thus, if a person grants his close called Dale, in the parish of Hurst, in the county of Hants, and the parish extends into the county of Berks, and the whole close of Dale lies in the county of Berks; yet because the parcel is especially named, the falsity of the addition bindeth not. Ibid. 105. Dyer, 376. — 3. And where a lease was made of all that the farm of Brosley, then in the tenure and occupation of R. Wilcox; which was not the fact; the court said, that the word 'farm' had a certainty in itself; and when the description went farther, and said, in the tenure and occupation of R. Wilcox, this was of no effect; for though it was not in his occupation, yet it should pass, because there was a certainty in the thing devised, viz. the farm of Brosley; and so another certainty put to a thing which was certain enough before, was of no manner of effect. Plowd. 191. — 4. But if there is an error in the principal description of the thing intended to be granted, though there be no error in the addition, nothing will pass. Thus, says Lord Bacon, if a person grants *tenementum suum*, or *omnia tenementa sua*, in the parish of St. B. without Aldgate, where in truth it is without Bishopsgate, *in tenura Gulielmi A.*, which is true, yet the grant will be void; because that which sounds in denomination is false, which is the more worthy; and that which sounds in addition is true, which is the less. And though the words *in tenura Gulielmi A.*, which is true, had been first placed, yet it had been all one. Bac. Tra. 105. 3 Rep. 9. Hob. 171.

(b) 1. 546. — 2. Where the lands are first described generally, and afterwards a particular description is added, that shall restrain the general words. Thus if a man grants all his lands in D. which he has by the gift and feoffment of J. S., nothing will pass but lands of the gift and feoffment of J. S. But if he had granted all his lands in D. called N., which was the estate of J. S., there the lands called N. shall pass, though they never were the estates of J. S. Bro. Abr. Grants, 92.

(c) 1. The next clause usually inserted in the premises of a deed, where the fee simple

(E 5.) Exception: — By what words.

If a man makes a grant he may make an exception (*d*) out of the generality of the grant, by the words, *exceptis, salvo, præter, &c.* Co. L. 47. a.

So, by the words, reserving; which has the force of an exception, or saving, sometimes. Co. L. 149. a. (*e*)

So an exception may be added, after a limitation of an use, R. Cro. Car. 487. Jon. 376.

(E 6.) The effect of an exception.

*Si quis rem dat et partem retinet, illa pars, quam retinet, semper cum eo est, et semper fuit.* Co. L. 47. a.

And therefore, if a leases a tenement reserving a house *pro proprio usu et occupatione*; the house is wholly in the lessor, and not demised. 4 Mod. 11.

So, if the exception be, for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee; the house is wholly excepted out of the demise, though the latter words make the lessee tenant at will. R. 4 Mod. 12, Sho. 311.

If a man lets his manor, *exceptis boscis*, the soil shall be excepted. Dub. Dy. 19. a. R. 5 Co. 11. Cro. El. 522. 2 Rol. 455. l. 15. (*f*)

So, if it be, except woods, underwoods, coppices, &c. standing and growing upon the manor, with liberty of ingrest, saving for the botes of the lessee, who covenants to make fences, except to new coppices: for upon the whole lease it appears, that the intent was to except the soil. R. 2 Rol. 455. l. 20. 2 Cro. 487. Vide post, (E 7.)

simple is conveyed, is 'together with all deeds, evidences, and writings,' &c. For although in general, deeds follow the land, and a purchaser in fee, without warranty, is entitled to them, though not particularly granted, yet it is not amiss to insert this clause. And in conveyances to uses it ought never to be omitted, because in that case there is a doubt whether the deeds pass to the releasees to uses, or to the *cestui que use*. 4 Cruise, 327. 1 Rep. 1. a. 1 Inst. 6. a. n. 4. — 2. In Lord Buckhurst's case it was resolved, that if a person made a feoffment with warranty, by which he was bound to render in value, there, without an express grant, the feoffee should not have the charters that comprehended warranty, upon which the feoffor might have his warranty paramount. 1 Rep. 1.

(*d*) 1. An exception in a deed is that whereby the grantor excepts something out of that which he has before granted; by which means it does not pass by the grant, and is severed from the thing granted. Touch. 77. — 2. And to make a good exception, the following circumstances are necessary. — 3. It must be made by apt words. Ibid. — 4. The thing excepted must be part of the thing previously granted, and not of any other thing. Ibid. — 5. It must only be a part of the thing granted; for if the exception extends to the whole, it will be void. Ibid. — 6. It must be of such a thing as is severable from the thing granted; and not an inseparable interest or incident. Ibid. — 7. It must be such a thing as that he who excepts may retain it. Ibid. — 8. It must be of a particular thing out of a general one; not a particular thing out of a particular one. Ibid. — 9. It must be certainly described and set down. Ibid.

(*e*) On a conveyance of premises, a right cannot be reserved to one who has not a legal estate therein, so as to enure otherwise than as a grant; and therefore the reservation to a mortgagor, who joins with the mortgagee in conveying, of a right to dig coals, gives him no vested property therein, even admitting, contrary to the fact, that it would, had he possessed the legal estate. 4 East, 469.

(*f*) On a conveyance of property, the reservation to the grantor of a right to dig for coals, confers no property therein until obtained by him 4 East, 469

## (E. 7.) When it shall be void.

But an exception of a thing not *in esse*, or not contained in the demise, is void. Co. L. 47. a. 143. a.

As, if a lessee for years assigns his whole term, except the trees, mines, &c. it will be a void exception; for they were not in his power. 5 Co. 12. b. Cro. El. 522. R. 2 Rol. 454. l. ult.

But if a lessee for life, or years, makes an under-lease, except the trees, it will be a good exception: for he may have trespass for cutting them down, and is subject to waste if they are cut down. R. 2 Rol. 454. l. 42. 45.

So an exception of a thing certain, out of a thing particular and certain, will be void: as, if a man leases twenty acres, excepting one acre, the exception is void. Co. L. 47. a.

So, if he grants a piscary, saving *pischaria sua*. 2 Rol. 454. l. 2.

So, if he leases an house and shops, except the shops. 2 Rol. 454. l. 27. Dy. 264. b.

If he leases a parsonage with all lands, underwoods, &c. except great trees, wood, and timber; it shall be void as to the underwood. R. 2 Rol. 454. l. 25. Hob. 170.

If he grants the manor of B. with all lands reputed parcel thereof, and occupied therewith, except the manor of C. if White-acre be reputed parcel of B. and occupied with it, though in truth it be parcel of the manor of C., it shall not be excepted: for it was expressly granted before. R. 2 Rol. 454. l. 30.

If he grants his manor, except the demesnes, or services. Hob. 170.

Or, except wards, marriages, reliefs, and courts, in a grant by a subject. R. 2 Cro. 176.

So, if a man grants *totum statum et interesse suum*, except the moiety: it shall be void. 2 Rol. 455. l. 1.

Or assigns his whole term, except to himself for his life; for it is repugnant. 2 Rol. 455. l. 5.

So an exception of the whole contained in the grant, &c. shall be void: as, if A. releases all his right to such land, except that which he has by descent, when he has the whole by descent; the exception is contradictory, and void. R. 2 Rol. 454. l. 5.

So, if he demises all his land in B. except White-acre, when he has nothing but White-acre. R. 2 Rol. 454. l. 20. Hob. 170.

Or, all his house, except such a chamber, when he has nothing but the chamber. Semb. 2 Rol. 454. l. 10.

Or, all his land in A. *præter* his manor of B. and he has nothing in A. but that manor. 2 Rol. 454. l. 40. Hob. 170.

So an exception out of an exception leaves the thing unexcepted.

So words added to an exception may qualify the force of the words, and explain the intent of the exception: as, if a man leases land, except his wood, viz. oak, ash, and crabtrees, &c. the soil is not excepted. Semb. 2 Rol. 455. l. 10.

## (E 8.) How it shall be construed.

Every exception is the act and words of the lessor, grantor, &c. and therefore shall be taken *strictè* against him. 10 Co. 106. b. (g)

(E 9.)

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(g) 1. A reservation in a deed, of hawking and hunting, does not extend to shooting  
1 B. Moore,

(E 9.) The *Habendum*.

The office of the *habendum* is (*h*) to name the grantees, and limit (*i*) the certainty of the estate. Co. L. 6. a. 2 Rol. 65. l. 25. 9 Co. 47. b.

As, if a man grants land to A. *habendum eidem A. et hæredibus suis*, or, *hæredibus de corpore suo*, or, *pro termino vitæ, vel annorum*.

And if a limitation be to A. *habendum* to the use of him and the heirs of his body, it will be a good estate tail; for it does not operate by way of use, but as a limitation at common law. R. Cro. Car. 231. 245.

So the *habendum* may abridge or alter the generality of the premises. Hob. 171. (*k*)

As

1 B. Moore, 346. — 2. In a conveyance in fee of a messuage, &c.; by an exception of all veins of coal beneath said hereditaments, with liberty to enter and sink pits for getting all such coals, except as to such lands as lie within one hundred and fifty yards of said messuage, and except any homestead; liberty is reserved to the vendor to sink pits any where except within one hundred and fifty yards, &c. under any homestead. 15 East, 444.

(*h*) 1. Its office is only to limit the certainty of the estate granted. — 2. Therefore no person can take an immediate estate by the *habendum* of a deed, where he is not named in the premises; for it is in the premises of a deed that the thing is really granted. 2 Rep. 55. a.

(*i*) 1. The words inserted in the *habendum* for the purpose of shewing the quantity of estate intended to be given, are called *words of limitation*; in contradistinction to the words in the *premises* by which the lands are given, and which are called *words of purchase*. 4 Cruise, 332. — 2. Thus, Mr. Fearn says, in general, words of purchase are those by which, taken absolutely without reference to, or connection with, any other words, the estate first attaches, or is considered as commencing in the person described by them; whilst words of limitation operate by reference to, or connection with, other words, and extend or modify the estate given by those other words. Cont. Rem. 108. — 3. So, he observes, that when the word heirs, &c. operates only to expand an estate in the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively, through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation. But when they operate only to give the estate imported by them to the heirs described, originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase. Id. 107. — 4. In some cases, the same words operate as words of purchase, and also as words of limitation. 4 Cruise, 333. — 5. Thus, Lord Coke says, where a remainder is limited to the right heirs of B., it need not be said, and to their heirs; for being plurally limited, it includes a fee-simple; and yet it rests but in one by purchase. 1 Inst. 10. a. — 6. So where an estate is limited to the heirs male of the body of A., the eldest son of A. takes by purchase, and his male issue by descent. 4 Cruise, 333.

(*k*) 1. For where a deed first speaks in general words, and afterwards descends to special ones, if the special words agree with the general ones, the deed shall be intended according to the special words. 4 Cruise, 531. 8 Rep. 154. b. — 2. Thus where no estate is limited in the premises, and an express estate for years is limited in the *habendum*, this will qualify and abridge the general intendment of the premises, by which an estate for life would otherwise have passed. 1 Inst. 183. a. 2 Rep. 55. a. — 3. So if lands are given in the premises to A. and his heirs, *habendum* to him and the heirs of his body, he will only take an estate tail; because the *habendum* may qualify and restrain the general import of the word heirs. 8 Rep. 154. b. 1 Rol. Abr. 68. — 4. And where lands were granted to A. and his heirs, *habendum* to him and his heirs for three lives; the *habendum* was construed so as to abridge the estate, given in the premises, to an estate for three lives. T. Jon. 4. — 5. And if a lease be



## FAIT.

If a reversioner after three lives grants his estate to A. for life, *habendum* for life when the three lives expire; it will be a good grant in the reversion for life. Hob. 171.

If a grant be to two, *habendum* to the one for life, and after his death to the other in fee; the one shall take for life, remainder to the other. R. 8 Ed. 3. 59. b. 2 Co. 55. b. Pl. Com. 153. cont. but not accord. Acc. Hob. 172. Dy. 126. b.

If a grant be to two jointly, the *habendum* may limit a moiety to the one, and a moiety to the other; by which they shall be tenants in common. Co. L. 183. b. Cont. Pl. Com. 153. but acc. 160. a. Vide Estates, (K 2.)

So a grant may be to three, *habendum* to one for life, remainder to another for life, remainder to the third for life, *successive*. 2 Rol. 65. l. 50. R. Dy. 160. b. Per 2 J. Mo. 26. R. Dy. 361.

So a grant to A. *habendum* to him and his wife for their lives *successive*, will be a good remainder to the wife. R. 2 Cro. 372. R. 2 Cro. 564.

So, if a grant, or feoffment be to A. and his wife and their heirs, *habendum* to them and the heirs of their bodies, without more: they have an estate tail, with a remainder expectant in fee. R. 2 Rol. 19. 23. But said, that it shall be only an estate tail, without a remainder in fee expectant; for the *habendum* abridges the generality of the premisses. Co. L. 21. a. 8 Co. 154. b.

So a grant of rent to A. and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of B. he shall have only a descendible freehold. R. Mo. 876.

So, where no estate is expressed in the premisses, the *habendum* may frustrate and make it void; as, if a feoffment be to A. *habendum*, after the death of the grantor, for life; the *habendum* makes the feoffment void: for a freehold cannot commence *in futuro*. 2 Rol. 66. l. 5. Hob. 171, Skin. 544.

### (E 10.) Shall not be repugnant.

But if the *habendum* be repugnant to the premisses, (1) it shall be void;

made to two persons, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* makes them tenants in common, whereas by the premisses they were joint-tenants. 1 Inst. 183. b. 190. b. supra. — 6. Where the premisses and the *habendum* of a deed are equally clear, the former will not be controlled by the latter, but both will be allowed to have an operation; it being a rule, that a deed shall be construed in such a manner, as that each part may be effectual, if they can stand together. 4 Cruise, 332. — 7. Thus if lands are given, in the premisses, to a person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail, with a fee simple expectant. 8 Rep. 154. b. 1 Inst. 21. a. — 8. And where lands were given to husband and wife, and to their heirs, *habendum* to them and the heirs of their bodies, it was held that the grantees took an estate tail with a fee simple expectant. Cro. Jac. 476.

(1) 1. In the case of things which derive their effect from the delivery of the deed, without other ceremony, and which lie in grant; there the *habendum*, if repugnant to the premisses, is void. As if a man grants rent or common out of his land, in the premisses of a deed, to one and his heirs, *habendum* to the grantee for years, or for life, the *habendum* is repugnant and void; for an estate in fee passed in

void : (m) as, if a grant be of all his term, *habendum* after his death; the *habendum* will be void. Hob. 171. R. Dy. 272. a. (n)

Or, of all his lands, to the grantee, his executors and administrators; for this passes the term. R. 1 Sal. 346. Skin. 542.

If a grant be by the premisses to A. and his heirs, *habendum* after his death to A. and the heirs of his body; A. shall take immediately; for a freehold *in futuro* cannot be: and therefore the *habendum*, being repugnant to the premisses, shall be void. R. 3 Lev. 389. (o)

So the *habendum* cannot (p) enlarge the premisses: (q) and therefore, if A. leases land to B. for years, *habendum* to B. and C. for life; no

in the premises, by the delivery of the deed. 2 Rep. 23. b. — 2. But where a ceremony is requisite to the perfection of the estates limited by the premisses; and nothing more than the mere delivery of the deed is required to the perfection of the estate limited by the *habendum*; there although the *habendum* be of a lesser estate than is mentioned in the premisses, if the ceremony is not performed it shall stand. 4 Cruise, §30. — 3. A person by indenture covenanted, granted, and demised, and to farm let certain lands to A. B., and A. her son, and to the heirs of the said A.; *habendum* to them from the date of the same indenture until the end of ninety-nine years: no livery of seisin was made. It was resolved, that as livery of seisin was necessary to perfect the estate limited in fee, nothing would have passed but an estate at will, if the deed had not gone further; but as an estate for years was limited in the *habendum*, that was good presently, by the delivery of the deed. And so it appeared to have been the intention of the parties, that the deed should take effect by the delivery. 2 Rep. 23.

(m) And the grantee will take the estate given in the premisses. A consequence of the rule, that deeds shall be construed most strongly against the grantor, and therefore that he shall not be allowed to contradict or retract, by any subsequent part of the deed, the gift made in the premisses.

(n) 1. But where the premisses in a grant are repugnant to the *habendum*, which is consonant to the intention of the parties, as expressed in the grant, the premisses so far as they are repugnant, shall be rejected as surplusage, and the *habendum* preferred. 3 East, 115. — 2. And therefore where a lease for a year having been made between A. and B., the release, stating B. to be a trustee for C., granted the premises unto C. in his possession being by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, *habendum* to B. and his heirs, to such uses as C. should appoint; the release, it was held, was sufficient to convey the premises to B., and the words in the granting part unto C., &c. were rejected as surplusage. Ibid.

(o) 1. So if lands are given in the premisses of a deed to A. and his heirs, *habendum* to A. for life; the *habendum* is void, being utterly repugnant to, and irreconcilable with the premisses. Plowd. 153. — 2. So if the grant were to two persons, *habendum* to the one for life, remainder to the other for life, it would be void; because by the premisses the grantees were joint-tenants; and so the *habendum* would sever the jointure, and make the one to have the whole during his life, and the other to have the whole after him. Ibid.

(p) 1. But see 1 Inst. 299. a. — 2. And it is affirmed, that where an estate is given in the premisses to the grantee for life, *habendum* to him and his heirs, the *habendum* shall enlarge the premisses, and the grantee therefore will take an estate in fee. Ibid.

(q) 1. Nothing can be limited in the *habendum* of a deed, which has not been given in the premisses; because the premisses being the part of a deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift; for in that case the grantee would in fact take a thing which was never given to him. 4 Cruise, 329. 2 Rol. Abr. 65. Touch. 76. — 2. Thus if a person grants a manor, *habendum una cum* another manor, *et una cum advocatione* of another manor, this is not good, because it was not included in the premisses. 2 Rol. Abr. 65. — 3. But if a thing is comprehended in the premisses, and has another name in the *habendum*, the *habendum* is good; as if the nomination of an advowson is granted, *habendum* the advowson, it is good, though it varies in name; for it is one and the same thing. Plowd. 157.

thing passes to C., nor shall B. have an estate but for his own life. Jon. 310. (r)

## (F) When a deed shall be avoided.

### (F 1.) By rasure, interlineation, &c.

But if a deed after execution (s) be altered in a material place by rasure, interlineation, addition, &c. by the obligee himself, it shall be void, and the obligor may plead *non est factum*. R. 11 Co. 27. Pigot. (t)

As, if it be altered in the name of the obligor, or obligee, or sum, &c. 11 Co. 27. a.

Or, by the addition of a christian name, or addition of the obligor. R. Cro. El. 626.

Or, by the addition of a condition for the advantage of the obligor. R. Cro. El. 626.

So, if he makes a lease agreeable to the counterpart, by increase of the rent. R. Cro. El. 627.

So, if he erases part of the land demised. R. Mo. 35.

So, if a word be dashed through with a pen, though it be legible. 11 Co. 27. a.

So a deed shall be void, if it be altered in a material (u) place by a stranger, without the privity of the obligee. R. 11 Co. 27. a. but this seems, per 2 J. understood to be, in a place so material that it cannot be sued. 1 Rol. 40. R. Cro. El. 626. Mo. 10. (x)

Though it be before the obligee had notice of the execution of the deed. R. Cro. El. 627.

(r) 1. 2 Rol. Abr. 67. Hob. 313. — 2. To this rule, however, that no person can take an immediate estate by the *habendum* of a deed, when he is not named in the premises, there are some exceptions. — 3. For where lands are given in frank-marriage; the wife, who is the object of the gift, may take by the *habendum*, though not named in the premises. 4 Cruise, 328. — 4. And if no name whatever be mentioned in the premises, then a person named in the *habendum* may take. Ibid. — 5. There is a case where the two chief justices and the chief baron certified to the chancellor, that a lease was good though the lessee was named only in the *habendum*. 1 Inst. 7. a. n. 3. — 6. And in declarations of uses, a use may be declared in the *habendum* to a person, to whom no estate is granted in the premises; and therefore where A., by indenture between him and B. and C., bargained, sold, and enfeoffed to B. to hold to said B. and C. their heirs and assigns, to the use of them and their heirs for ever; it was held, that although the feoffment was good only to B. and his heirs, yet the use limited to B. and C. and their heirs, was good; because the seisin of B. was sufficient to serve the use declared to C. 13 Rep. 55.

(s) 1. An interlineation, if nothing appear to the contrary, will be presumed to have been made at the time when the deed was executed, not after. 1 Keb. 22. — 2. And it has also been held, that an interlineation by which a power of sale was enlarged, should be presumed to have been made at the time of the execution of the deed and not after; if nothing appeared to the contrary. Fitz. 204.

(t) 9 East, 351. Vide 1 Anst. 227.

(u) Insertion by a stranger of 'hundred' between 'one' and 'pounds,' in the condition of a bond, meeting the obvious sense, is an immaterial alteration. 1 Mars. 311. 5 Taunt. 707.

(x) And in a recent case, the court of king's bench appears to have considered, that an alteration by a stranger, or a mere spoliator, will not invalidate the deed. 6 East, 309.

So,

So, if it be altered by the obligee himself, though it be in a place not material. 11 Co. 27. a.

As, by the addition of a date. Cro. El. 800.

So, by rasure; &c. the whole deed shall be void. 11 Co. 28. b.

Though it contains several distinct covenants, or clauses; and the rasure be only in one. 11 Co. 28. b.

But if the alteration be by the obligor himself, in a place not material, the deed shall not be void: as, if it be an addition to the name of the obligee. 11 Co. 27. a.

So an alteration by a stranger, in a place not material, without the privity of the obligee, does not avoid the deed. R. 11 Co. 27. a. 1 Rol. 40.

Or, if it does not appear, by the pleadings, to be material. 1 Rol. 40.

Nor an alteration by the executor of the obligee, in a place not material, and which tends to the benefit of the obligor. R. 1 Leo. 282.

So an alteration by the obligor himself, in a material place, does not avoid the deed. 11 Co. 27.

So, if a material alteration be by consent of the obligor and obligee, it does not avoid the deed: as, if the name of another obligor be interlined, and he executes the deed. R. 2 Lev. 35.

Or, upon an agreement between them that an addition shall be made after the deed sealed. Per Poph. Cro. El. 627.

## (F 2.) By breaking off the seal.

So, if the seal of any deed be broken off, the deed shall be void. (y)

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(y) 1. If a deed be delivered up to be cancelled, to the party who is bound by it, and it is accordingly cancelled, by tearing off the seals, or otherwise defacing it; or if the person who has the deed cancels it, by agreement with the other party; it becomes void. Touch. 70. — 2. But where an estate has actually passed by a deed, the cancelling of such deed afterwards will not divest any estates out of the persons in whom they were vested by that deed. 2 Ch. Rep. 52. 2 H. Blk. 259. — 3. As where a father, having quarrelled with his eldest son, made a settlement on his wife of 100*l.* a-year, in augmentation of her jointure; and afterwards, being reconciled to his son, he cancelled the deed, and so it was found at his death. On a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled. Prec. Ch. 235. — 4. And where in setting forth a conveyance, it was stated, that a deed of release was cancelled, by the releasor's seal being torn off and destroyed; and that part of the deed was lost, with a *profert in curia* of the residue; it was held to be good pleading; and Lord Chief Justice Eyre said, 'I hold it clear that the cancelling of a deed will not divest property, which was once vested, by transmutation of possession; and I will go farther and say, that the law is the same with respect to things that lie in grant. In pleading a grant, the allegation is, that the party at such a time did grant. But if by accident the deed is lost, there are authorities enough to show, that other proof may be admitted. The question in that case is, whether the party did grant. To prove this, the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received, since God forbid that a man should lose his estate, by losing his title deeds.' 2 H. Bl. 259. — 5. Where a tenant for life, with a power of leasing, in consideration of the surrender of a prior term, granted a new lease, which was void; it was held that the prior term, though the indenture of lease was in fact cancelled, and delivered up, when the new lease was granted, might be set up by the tenant in bar to an ejectment brought by the remainder-man, after the death of the tenant for life. 6 East, 86.

So,

So, though it be broken off by a stranger. 5 Co. 23. a. 1 Rol. 40. (z)

Or destroyed by mice, before plea. 1 Rol. 40.

So, if A. and B. by deed covenant jointly with divers persons, and the seal of one be broken off, the whole deed shall be void. 5 Co. 23. a.

So if bound in an obligation jointly and severally, and the seal of one be broken off. R. 2 Lev. 220.

But where A., B., and C. covenant severally with divers persons, who join in a covenant to them, and the seal of A. is broken off; the deed shall be void only as to him, for it is *quasi* a several deed as to them. R. 5 Co. 23. a.

So, if the seal be broken off by mice, after *non est factum* pleaded, it shall not be void. 1 Rol. 40.

### (G) When a deed takes effect.

A deed is not in force, though it be signed and sealed, till (a) delivery. (b)

And therefore, if a condition be that he shall pay for corn *tunc*, or *postea* delivered, it does not bind him to pay for corn delivered after the date, and before the delivery of the deed. R. 2 Cro. 264.

**Deeds, when evidence.** Vide CHANCERY, (T 7.)—EVIDENCE, (B 1., &c.)

**Oper of deeds.** Vide PLEADER, P 1.)

**Shewing of deeds.** Vide PLEADER, (O 1., &c.)

Vide also CHANCERY, (S I 1. &c.)—FRANCHISES, (F 13.)—SURRENDER, (B—C.)

## FALSE AFFIRMATION, AND WARRANTY.

Vide ACTION UPON THE CASE for a Deceit, (A 8. 9. 10. 11.—E 4.)

(z) 1. The seals of a deed to lead the uses of a recovery were broken off; but it being proved that seals were once annexed to it, and that they were torn off by a little boy, and the parts torn off being compared with the deed, and agreeing, it was held to be valid. Palm. 403.—2. So it appears from a modern case, that an action may be brought upon a deed, of which the seal has been torn off by accident, even before action brought; but then the declaration must not make a profert of a deed. 4 T. R. 339.

(a) 1. All deeds, whether deriving their effect from the common law, or the statute of uses, do, immediately upon their execution by the grantors, divest the estate out of them, and put it in the party to whom the conveyance is made, though in his absence, and without his notice, till some disagreement to such estate appears. 4 Cruise, 12. Gilb. Uses, 224. 505.—2. Which doctrine is founded on the principle, that the assent of the party who takes, is implied in all conveyances; because, first, there is a strong intendment in law, that it is for a person's benefit to take, and no man can be supposed to be unwilling to that which is for his advantage; secondly, because it would seem incongruous and absurd, that when a conveyance is completely executed on the grantor's part, the estate should continue in him; thirdly, and which is the principal reason why the law will not suffer the operation of a conveyance to be in suspense, and to expect the agreement of the party to whom it was made, is to prevent the uncertainty of the freehold. 4 Cruise, 12. 2 Vent. 201. 3 Mod. 296.

(b) Therefore the legal title to real property, passes only from the day of executing the conveyance, not from the day of the date. 2 East, 257.

FALSE



**FALSE IMPRISONMENT.**

Vide IMPRISONMENT, (L 1., &c.) — PLEADER, (3 M 22.)

**FALSE JUDGMENT.**

Vide PLEADER, (3 D.)

**FALSE LATIN.**

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## FELONY.

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## FEOFFMENT.

## (A) A feoffment.

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(A 2.) Of what things. p. 285.

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## (B) Livery of seisin.

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(B 8.) If it does not take effect immediately. p. 290.

## (A) A feoffment.

(A 1.) Of what effect it shall be.

A feoffment is (a) a conveyance of lands and tenements in possession, by one to another in fee. Co. L. 9. a. 2 Bql. 1. A.

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(a) A feoffment, *feoffamentum*, is derived from the word *feoffare*, or *infeudare*, to give one a feoff or feud; therefore a feoffment was properly called *donatio feudi*. 4 Cruise, 56. — 2. And Lord Coke says, that the antient writers called a feoffment *donatio*, from the word *do*, or *dedi*, which is the aptest word of feoffment. 4 Inst. 9. a.

And it is the most antient (b) and most beneficial (c) conveyance.

If the feoffor was out of possession, by the feoffment and livery thereon is brought back, and the feoffee has the freehold perfectly, though he could not have had it by fine, recovery, bargain and sale, or other conveyance. Co. L. 48. b. 49. a.

Who may make a feoffment, or take thereby. Vide in Capacity.

(A 2.) Of what things.

A feoffment may be made of all corporeal estates : as, of houses, lands, tenements, &c. Co. L. 49. a.

So a feoffment may be made of lands, in which a man has no fixed estate ; as, if he has twelve acres to be annually assigned in such a meadow : and livery in any acre, which he has at the time of the feoffment, is sufficient. Co. L. 4. a. 48. b. 2 Rol. 10. l. 40. ad 50.

So, if a feoffment be of fifty acres towards the north in such a moor, which contains one hundred acres, livery in any of them is sufficient. 2 Rol. 11. l. 5. Dy. 372. b.

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor ; and the deed ought to comprehend both, and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. Co. L. 48. b.

But a feoffment cannot be made of a thing, of which livery cannot be given : as, of incorporeal inheritances, rent, advowson, common, &c. 2 Rol. 1. l. 20.

Though it be an advowson, &c. in gross. Cont. 11 H. 6. 4. Acc. 2 Rol. 1. El. 21.

So a feoffment of lands, which are uncertain till a future act, is void ; for livery does not operate *in futuro* : as, if A. agrees by indenture to convey 20*l. per annum* in land to such an use, and 20*s. per annum* to such an use, and makes a feoffment of all his lands to the uses in the indenture ; it will be void for all but that where livery was made, it not being ascertained, which shall be to one use, and which to the other. R. 1 Rol. 187.

(A 3.) By what words.

No precise words are requisite to a feoffment : and therefore a conveyance by other words, as well as by the word, *enfeoff*, amounts to a feoffment. 2 Rol. 73.

So, *dedi et concessi*. 2 Rol. 73.

(b) A feoffment is evidently taken from the *breve testatum* of the feudal law. The proper and original meaning of the word feoffment was the gift of a feud ; but by custom it came afterwards to signify the gift of a free inheritance, or *liberum tenementum*, to a man and his heirs ; respect being had rather to the perpetuity of the estate granted, than to the tenure. 4 Cruise, 56.

(c) 1. The most singular effect of a feoffment is, that it operates on the possession, without any regard to the estate or interest of the feoffor ; so that to make a feoffment good and valid, nothing is wanting but possession. 4 Cruise, 68. — 2. Thus Littleton says, tenant for years may make a feoffment in fee, and by his feoffment a fee simple shall pass, and yet he had, at the time of the feoffment made, but an estate for term of years. Litt. s. 611. — 3. And Lord Coke, commenting upon this passage, remarks, that here it is implied, that albeit the feoffment made by lessee for years, be a feoffment between the feoffor and feoffee, and that by this feoffment the fee-simple passeth by force by the livery, yet is a disseisin to the lessors. Vide 1 Burr. 60. 5 B. P. C. 247. Cowp. 689. — 4. A feoffment passes or extinguishes all collateral rights ; for example it extinguishes a right of way. Barnes, 155.

So,

So, if a man by deed bargains and sells lands to A. and his heirs, and livery be made, it shall be a feoffment. R. 1 Leo. 25. (d)

So, if a man says, all my lands belonging to the monastery of A. I give to B. livery being made, his manor belonging to the monastery of A. passes. Semb. Sav. 104.

So, if the condition of an obligation, &c. be to make a feoffment to A., and he makes a lease and release, it is sufficient; for it is tantamount, Co. L. 207. a.

So, if the words are sufficient for a feoffment or other conveyance, the vendee may take by which conveyance he pleases: as, if a lessor by deed *dedit et concessit* to the lessee for years, with a letter of attorney to make livery, and delivers the deed to the lessee, and afterwards livery is made; the lessee may take it as a feoffment, or a confirmation. R. 2 Leo. 192.

### (B) Livery of seisin.

#### (B 1.) When it shall be good.

To every feoffment, or passing of freehold by a conveyance at common law, livery of seisin is requisite. Co. L. 48. a. Vide post, (B 8.)

Livery may be in fact, or in law. Co. L. 48. a.

Livery, in fact is, when a man delivers the ring of the door, a turf, or twig to the feoffee upon the land, in the name of seisin. Co. L. 48. a.

Or delivers the deed of feoffment upon the land, in the name of seisin. Co. L. 48. a.

Or delivers any thing which does not relate to the land, upon the land, in the name of seisin. Co. L. 48. a.

So, if he being in the house, or at the door, says to the feoffee, I deliver you seisin, or possession, of this house, in the name of all the lands in this deed, according to the effect of this deed, without other act, or ceremony. Co. L. 48. a.

Or, enter into this house, or land, and have, or enjoy it, according to the deed. Co. L. 48. a.

Or, enter, &c. and God give you joy. Co. L. 48. a.

Or, I am content you enjoy this land according to the deed. Co. L. 48. a.

Stand forth, I here give thee this land. 2 Rol. 7. l. 30. Poph. 47.

Or if, being sick in the house, he makes a feoffment to A. and says, I consent you take livery presently, and orders his servants to take him for their master. 2 Rol. 7. l. 25.

So, if he says any words to the same import. Co. L. 48. a.

If the land lies in several counties, he ought to make livery in each county. Lit. S. 61.

But livery in part, in the name of the whole, is sufficient for all in the same county. Lit. S. 61.

So, if an heir enters into part of the land descended, and makes livery therein in the name of the whole, it is sufficient for all the lands which descended. 2 Rol. 5. l. 36.

If a man leases to A. for years, remainder to B. in fee, in tail, or for life, he must make livery to A. Lit. S. 60. Mo. 14.

And if a lease be to A. and B. livery to one of the lessees is sufficient. Co. L. 49. b.

(B 2.) *Secundum formam chartæ.*

If livery be made *secundum formam chartæ*, this implies the effectual quantity and quality of the estate contained in the deed. Co. L. 48. a.

And therefore, if he delivers seisin of one parcel *secundum formam chartæ*, though he does not say in the name of the whole, all in the deed passes. Co. L. 48. a.

Or, to one feoffee, the estate passes to all the feoffees named in the deed. Co. L. 48. a.

So if he makes livery *secundum formam chartæ*, it operates according to the effect of the deed, though there be a mistake of a name, &c. in the deed. R. 2 Rol. 2. l. 6.

So, if the party adds words contrary to the intent of the deed, they shall be rejected: as, if the deed conveys in fee, and livery is made for life *secundum formam chartæ*, the fee passes. Co. L. 48. a.

(B 3.) Livery by attorney.

Livery ought to be made by the feoffor, and taken by the feoffee, in person, or by attorney lawfully constituted. Vide post, (B 8.)

If an attorney be appointed to make, or take livery, it ought to be by warrant of attorney in writing.

And either party may make one or more to be his attorney, to give, or take livery for him. 2 Rol. 8. l. 25.

A man attainted, outlawed, excommunicated, professed, a villein, an alien, an infant, or *feme covert* may be an attorney to make, or take livery. Co. L. 52. a.

So a husband may be attorney for his wife, or a wife for her husband. Co. L. 52. a.

So, he in remainder for the lessee for life. Co. L. 52. a.

Lessee for years for him in reversion, or remainder. Co. L. 52. a.

And if a lessee for years makes livery for his lessor, his term is not merged. Co. L. 52. a. R. 1 Leo. 192.

So, if a reversioner makes livery for the lessee for life, he may enter for the forfeiture. Co. L. 52. a.

Otherwise, if a reversioner makes livery for a lessee for years; for his livery cannot be for the lessee, who has no freehold. Co. L. 52. a.

If an attorney makes livery of an acre in the name of all, it is sufficient for the whole, though his warrant was to make livery of all. 2 Rol. 8. l. 17. 43.

So, if he makes livery in one *secundum formam chartæ*, which comprehends the whole. Co. L. 52. a.

Or, makes livery to one *secundum formam chartæ*, when the feoffment was to several persons. Co. L. 52. a.

Though his warrant was express to enter into all, and to make livery of or to all. Co. L. 52. a.

If a warrant be to three *conjunctim et divisim* to make livery in all and singular the lands, &c. each severally may make livery of part of the lands. R. 1 Leo. 192. 1 And. 246. 4 Leo. 196.

If the warrant be, that he shall enter into any part in the name of the whole, he may make livery of lands in the possession of several tenants, severally. R. Hard. 314.

So,



So, if livery be made after three rent-days incurred, it shall be good, if it is not confined to any time. R. Mo. 875.

But he ought strictly to pursue the effect of his warrant: and therefore, if the feoffor was disseised, and gives a warrant to enter into all the parcels, and make livery of them; if he enters only into one, and makes livery *secundum formam chartæ*, it shall be void: for, without entry into all, the estate shall not be revested for so much into which he did not enter. Co. L. 52. a. 2 Rol. 9. l. 15.

So, if a letter of attorney recites a feoffment of 10th April, where it was 9th April, and gives authority to make, or take livery *secundum formam et effectum chartæ prædictæ*, and livery be made upon it, it will be void; for there is no such feoffment. R. Cro. El. 603.

So an attorney cannot make livery within view. Co. L. 52. b.

If a feoffment be by indenture, there cannot be a warrant of attorney therein to make livery, if the attorney be not made a party to the indenture. Co. L. 52. b. (Vide margin, *ibid.* cont.)

But a deed-poll may contain also a warrant of attorney to make livery. Co. L. 52. b.

How livery shall be made in a feoffment of a moveable inheritance, vide ante, (A 2.)

#### (B 4.) Livery in law.

So, if the feoffor says to the feoffee in sight of the house or land, I give you yonder house, &c., enter and take possession, and he enters in the life-time of the feoffor, it shall be a good livery in law. Co. L. 48. b. R. Pol. 47.

Or, enter and enjoy it according to the effect of this deed. 2 Rol. 7. l. 1.

Or, if he delivers to him the deed, and says, God give you joy of it. 2 Rol. 7. l. 5.

Or, I will you enjoy according to this deed, and shews him the land. 2 Rol. 7. l. 10.

So livery within view shall be good though the feoffment be without deed. Co. L. 48. b.

Though the land lies in another county. Co. L. 48. b.

So it shall be good if the feoffee enters in the life of the feoffor, though the feoffee be a woman, and married before her entry, to the feoffor, or any other, who enters and claims in the right of his wife. 2 Rol. 3. K. 1 Mod. 91.

Though the feoffor be a woman, and married to the feoffee before entry. R. 1 Vent. 186. Pol. 50. 2 Lev. 34.

So, if the feoffee dares not enter for fear of death or mayhem, it is sufficient if he comes as near the land as he dares, and claims it. Co. L. 48. b.

Vide post, (B 8.)

#### (B 5.) When livery is not good.

But if a man delivers a deed of feoffment to the feoffee upon the land, without saying, in the name of seisin, it is not a good livery; for it has another effect. Co. L. 48. a.

So, if a man says to another upon the land, I give or demise you this land, for life, without more, it does not amount to a livery. Co. L. 48. a.

Or, if he shews him the land, without saying any thing, and he enters, and the feoffor agrees thereto. 2 Rol. 7. l. 15.

So,

So, if a feoffment be to A. for years, remainder to B. in fee, livery cannot be given to A. within view; for no one can take by livery in law, who does not take the freehold. Co. L. 49. b.

So, if an actual livery was intended, and is not well executed, it shall not be good as a livery in law. 2 Rol. 7. l. 40.

(B 6.) If the deed, to which it relates, is void.

So, if a man makes livery *secundum formam chartæ*, it has no operation, if the deed be of no effect: as, if the deed be, *habendum* after the death of the feoffor, or, *in futuro*. Co. L. 48. b. Vide post, (B 8.).

So, if a man leases for years by deed, and makes livery to the lessee *secundum formam chartæ*, the lessee has only for years, and the livery is void. Co. L. 48. b.

(B 7.) If it be not made of the possession.

So, if A. makes a lease for years, and afterwards makes a feoffment of the same land, and livery, without the ouster or assent of the lessee, it shall be void. Co. L. 48. b. 2 Rol. 4. l. 1. 16. Mo. 11.

So, if a lease be of a house and several closes, and livery is made in the closes, when the lessee, his wife, or servants continue in possession in the house; it shall be void for the whole: for possession of the house, or any part of the land by the lessee, is possession of the whole. R. 2 Co. 32. a. 2 Rol. 4. l. 40. 50. Mo. 250. Co. L. 48. b.

So, if lessee for years leases part to B. at will, and livery be in the part of B. with his assent, without the assent or ouster of the lessee for years, it shall be void for the whole. 2 Rol. 4. l. ult.

So, if the lessee be absent, but his servant continues in possession, and livery is made with the assent of the servant; for his assent does not dispossess his master. 2 Rol. 5. l. 7.

So, if a stranger makes a feoffment of land, and livery with the assent of lessee for life, without ousting him, it shall be void. Jon. 457.

So, if tenant by statute-merchant, staple, or extent, be in possession, livery of the land without his assent shall be void. 2 Rol. 3. l. 53.

So, if the lessor enters upon the king lessee for years, and makes livery, it shall be void; for his entry does not oust the king. 2 Rol. 5. l. 18.

But if livery be made by the lessor, when his lessee, his wife, and servants are all absent, though he has cattle upon the land, it shall be good. Co. L. 48. b. 2 Rol. 4. l. 21. 45. Dy. 340.

Or, if the lessee be present and assenting. 2 Rol. 5. l. 15.

Or, if he be only lessee at will, though he dissents: for the livery shall be a determination of the will. Dy. 18. b. 2 Rol. 4. l. 14.

So, if the lessor ousts his lessee and family, and makes livery, it shall be good, though the lessee dissents.

Or, if the lessee and his family quit the possession at the time of the livery. R. Dy. 363. a. 2 Rol. 5. l. 5.

So, if the king lessee for years leases to B. and the reversioner ousts B. and makes livery. 2 Rol. 5. l. 20.

So, if husband and wife are joint-tenants, and the husband makes a feoffment, the livery shall be good, though the wife be upon the land and dissent. 2 Rol. 5. l. 30.

So, if a man makes a feoffment of land, part in possession and part

in lease, and makes livery upon the land in possession (without ouster of the lessee, or his assent) in the name of the whole, it shall be good for all that is in possession. Dy. 18. b. 2 Rol. 4. l. 5. 10.

So, if the other part was in possession of a disseisor. 2 Rol. 6. l. 12.

So, if the feoffor has part in his own right, and part as guardian, livery in his part, in the name of the whole, shall be good for the whole. R. 2 Rol. 4. l. 32.

So, if tenant in tail makes a discontinuance to the use of himself in fee, and afterwards leases for years, and dies; a feoffment by the issue and livery shall be good, without ouster or assent of the lessee: for before entry the issue was remitted, by which the lessee became tenant by sufferance. R. 2 Rol. 5. l. 45.

So the king's tenant may make a feoffment and livery, before livery sued, or an *amoveas manum*, executed. 2 Rol. 5. l. 25. 50. Cro. El. 523.

(B 8.) If it does not take effect immediately.

So livery is not good, where it does not take effect immediately; for it cannot give a freehold *in futuro*. Co. L. 217. a. (a)

As, if a lease be to commence at Michaelmas, remainder to A. in fee, and livery is made before Michaelmas; it shall be void. Co. L. 217. a. 2 Rol. 109.

So, if a lease for years begins immediately, remainder to the right heirs of A. the remainder shall be void; for, there is no one in whom the freehold can vest; for *non est hæres viventis*, and a freehold shall not commence, or expect *in futuro*. Co. L. 217. a.

So, if A. leases for life, and afterwards grants the reversion, *habendum* after the death of the lessee for life; it will be void, being made to commence *in futuro*. R. 1 Rol. 261. Vide infra.

So, if a lease be 10th June, to A. for life, *habendum à die datús*, and livery by attorney 23d July; it shall be void. R. per 3 J. 2 Cro. 153. 1 Rol. 229. R. Cro. Car. 388. 1 Rol. 828. l. 10.

So, if livery be made the same day by the lessor in person. R. 1 Rol. 828. l. 20. 829. l. 10.

So, if A. leases for years to B. and afterwards confirms his lease, and grants to B. for one month after his former term, remainder to A. in fee; it will be a void grant of the fee; for he does not grant it as a reversion. R. 1 Rol. 828. l. 30.

If A. enfeofs B. of ten acres out of one hundred which B. or his heirs shall chuse, it shall be void: for the livery cannot operate *in futuro*, at his election. 1 Rol. 829. l. 20.

So, if the king by patent leases lands to A. *habendum à die datús*; it shall be void: for a freehold cannot wait, though it be by the king's letters patent. R. 5 Co. 94. b.

But by grant a freehold may be created to commence *in futuro*: as,

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(a) 1. An estate may, however, be created by feoffment, to commence *in futuro*, by way of remainder. As where a lease is made to A. for three years, remainder to B. in fee. Here livery of seisin must be given to A. by which an estate of freehold is immediately created, and vested in B. during the continuance of A.'s estate for years. Lit. s. 60. — 2. A deed of feoffment was made to three persons, *habendum* to two of them for their lives, remainder to the third for his life. Livery of seisin was made to all three, *secundum formam chartæ*. And the court considered, that the livery was good to two in possession, and to the third in remainder. 2 Mod. 78. 2 Wils. 166.

the king may grant an office for life to B. to commence after the death, &c. of A. who has it at will. R. Sal. 466. Skin. 446. 580.

So a rent *de novo* may be granted to commence upon a contingency. Sal. 466.

So a grant of a rent, *habendum* after his death if he has not issue then living. R. 3 Lev. 370.

So a man, by covenant to stand seised to the use of another, may make an estate to commence *in futuro*. 2 Cro. 180. 3 Lev. 371. Vide Covenant, (G 1.)

So a surrender of a copyhold, *habendum* after his death, is good; for the estate vests in the lord. R. Noy, 152.

So, if a lease be to A. for life *habendum à die datús*, and the deed be not delivered till the day after the date, and then livery is made by attorney, it shall be good. 2 Cro. 153. 1 Rol. 829. l. 5. 1 Rol. 230.

If a lease be to A. for three lives, 8th August, *habendum à die confectiois*, and livery is made by the lessor himself, 9th September after, it shall be good. R. 2 Cro. 458. 2 Rol. 109. R. Mo. 759. R. Cro. Car. 95.

So, if a lease be by husband and wife, to A. for life, *habendum* after Michaelmas next, and livery is made by them after Michaelmas: it shall be good. R. 2 Cro. 563.

So, if livery be by attorney, where the letter of attorney is express to make livery after Michaelmas. R. 2 Cro. 563.

So, if it be found by verdict, *quod A. dimisit*, though the lease appears to be *à die datús*, it shall be good; for it shall be intended that livery was made (*b*) after the day. Cro. Car. 96.

But if the jury do not find a demise, or when livery was made, it cannot be intended after, any more than before. Per 3 J. 1 Rol. 230.

So, if a feoffment be by an infant to commence at a future day, before which the feoffor comes of full age, and after the day he makes livery, it shall be good. 2 Rol. 109.

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## FERÆ NATURÆ.

Vide BIENS, (F).

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## FERRY.

Vide PISCHARY, (B).

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## FIERI FACIAS.

Vide EXECUTION, (C 4., &c.) — PROCESS, (F 5. 7.)

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(K 3.) If they be an infant, *feme covert*, &c. p. 334.

(K 4.) If the case be out of the statute. p. 335.

(L) How a fine operates, [and from what period.] p. 335.

(A) The antiquity of it.

A fine is (a) a feoffment upon record. Co. L. 10. a. (b)

But it is an improper feoffment. 1 Sal. 340.

And it is called a fine, because *finem ponit litibus*. Co. L. 262. Pl. Com. 369. (c)

And it is as antient as any court of record. Pl. Com. 357. a. 368. b. (d)

And it was levied before the Conquest. 2 Inst. 511. Pl. Com. 368. Dub. Mad. Form. Int. 13. (e)

(B) 13p

(a) 1. A fine is an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and enrolled among the records of the court where the suit is commenced, by which lands and tenements are transferred from one person to another, or any other settlement is made respecting them. 5 Cruise, 66. — 2. To this mode of transferring estates of freehold, the ceremony of livery of seisin is unnecessary; not because the supposition and acknowledgement thereof in a court of record induces an equal notoriety, for in ancient fines no such acknowledgement is made; but because lands acquired in this manner, were supposed to be recovered by sentence of a court of justice; and the possession was delivered by the sheriff, in pursuance of a writ directed to him for that purpose; which was equal in point of notoriety to the ceremony of livery of seisin. Bract. 435. b.

(b) 1. That is, a fine *sur cognizance de droit come ceo*. — 2. But this expression is by no means correct; for there are cases in which a feoffment has a more extensive operation than a fine; and therefore Sir William Blackstone has justly observed, that it might with more accuracy be called an acknowledgement of a feoffment upon record. 5 Cruise, 104.

(c) 1. *Et nota, quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab ea de cetero poterit recedere*. Glanv. lib. 8. c. 3. — 2. *Finis est extremitas unius cujusque rei et ideo dicitur finalis concordia, quia imponit finem litibus*. Bract. 435. b.

(d) 1. The idea of a fine appears to have been originally taken from the *transactio* of the Roman law; which was an accommodation of a suit already commenced, or an agreement respecting some doubtful matter, that would otherwise become the subject of a suit; and is thus described: *Transactio est super re dubia, aut lite incerta, conventio non gratuita, aliquo dato, retento, vel promisso*. 5 Cruise, 67. Cowell's Dict. Fine. Voet, Comp. Jur. 51. — 2. So Bracton defines a fine, *Concordia in foro seculari idem est quod transactio; et est transactio de re dubia et lite incerta, aliquo dato, vel promisso, vel retento, à lite transactio*. Bract. 310. Cruise, Ibid. — 3. So Lord Coke, speaking of the etymology of the word fine, says 'and the civilians calls this judicial concord, *transactionem judicalem de re immobili*.' 1 Inst. 262. a. — 4. The word *finis*, continues Mr. Cruise, appears to have been used upon the continent, as synonymous to *transactio*, in the twelfth century; of which several charters, published by Muratori, afford proof. *Transactio inter Gerardum comitem, &c. atque Attonem Archiepiscopum Pisanum, anno, 1121. In Eterni Dei nomine, Amen. Breva recordationis qualiter Gerardus comes, &c. finem fecit et transactionem Gratiano vicedomin, ad partem ecclesie archiepiscopatus Sanctae Mariae et Vice Attoni ejusdem ecclesie archiepiscopo, &c. de quinque partibus integris de Curte de Bellora, &c.* 5 Cruise, 68. Antiq. Med. Æv. tom. 9. 449. 463. 487.

(e) 1. It has been, says Mr. Cruise, a favourite topic with our lawyers, to enlarge on the antiquity of fines. Some have carried this idea so far as to insist, that they

## (B) By whom it may be levied.

All persons (*f*) of full age and sound memory (*g*) may levy fines of lands of which they are seised. Vide West, Symb. 3. a. (*h*)

Though seised only of a reversion or remainder. Vide West, Symb. 3. b.

So, husband and wife, of lands of the wife.

So a parcener, joint-tenant, or tenant in common may levy a fine of his purparty. Vide West, Symb. 3. b. (*i*)

were coeval with the first rudiments of the common law, and formed an original assurance. Others have contended, that fines were well known in this kingdom before the Norman conquest. But if it be admitted that the first idea of a fine was derived from the Roman jurisprudence, it will follow that fines could not possibly have been known in England until some time after the year 1130, when a copy of the Pandects was found at Amalphi, in Italy. 5 Cruise, 69. — 2. As a farther proof of this assertion, it may be observed, he continues, that Dugdale and Madox, two of the most diligent and learned inquirers into our ancient records and charters, have acknowledged, that they could not discover any traces of fines in this country before the time of Henry the second, who ascended the throne in 1155; that is, thirty-four years after the introduction of the Roman jurisprudence. So that there can scarce remain a doubt, but that fines were first introduced into England during the reign of king Stephen, or that of his immediate successor king Henry the Second, and that we are indebted to Justinian's Code for this assurance. Ibid.

(*f*) 1. There are several records of fines published by Dugdale and Madox, to which the king was a party. 5 Cruise, 131. Dugd. Orig. Jur. 93. Mad. Form. No. 394. — 2. It was, however, much doubted in the reign of James the First, whether the king could levy a fine; and his majesty having consulted Lord Chief Justice Popham, and Lord Coke, who was then attorney-general, on this subject, they gave it as their opinion, that although the king could not be cognizor of a fine, because a writ of covenant could not be brought against him; yet that if a fine was levied to the king he might then make a grant and render, which would be good, and sufficient to bind him. 5 Cruise, 131. 7 Rep. 32. — 3. The queen may levy a fine, and a fine may be levied to her; for she has in every instance the particular privilege of suing, and being sued alone, and is considered in all legal proceedings as a *feme sole*. 5 Cruise, 131. 1 Inst. 3. a. 133. a. 4 Rep. 23. b.

(*g*) Persons who are blind, deaf, or dumb, or who are both deaf and dumb at the same time, may levy fines, if it appear that notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a fine, and can express their meaning by writings or signs. And there are three instances of persons born deaf and dumb, who were permitted to levy fines. Carter, 53. Barnes, 19. Id. 23.

(*h*) 1. A disseisor may levy a fine. 5 Cruise, 136. 3 Rep. 79. b. — 2. So if a person enters under a devise that is void, he thereby acquires a freehold by abatement, and may levy a fine. Ibid. — 3. If the heir at law enters, notwithstanding a devise in favour of some other person, and levies a fine, it will be good. Cro. Car. 200. — 4. And where a person has a seisin in law, by the descent of lands upon him, he may levy a fine. Cro. Eliz. 639. — 5. And a person having a defeasible right only to lands, may, notwithstanding, levy a fine of them; which cannot be set aside by the plea, that neither of the parties had an estate of freehold in the lands. 1 P. Wms. 505. 13 Vin. Abr. 336. — 6. Though where persons who have taken possession by wrong, levy a fine before any receipt of rent, such fine has no effect. 3 Atk. 336. — 7. Where a fine was levied of Michaelmas term, relating to the 6th, though, in fact, levied on the 8th of November, it was held to be sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession, after a recovery in ejectment, was executed on his behalf on the evening of the 6th, by the officer's entry on the land, and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. 11 East, 495. — 8. There are two cases in which a fine is allowed to operate, although the parties have no estate of freehold in the lands. The first is, where a *cestui que* trust levies a fine of his trust estate; and the second is, where a fine is levied by a vouchee to the demandant in a real action; or from a demandant to a vouchee, which is held good. 5 Cruise, 144.

(*i*) 1 Rep. 58. a. 6 Mod. 45. 1 Salk. 286.

So

So a corporation sole may levy a fine of his lands, which he has in his corporate capacity. (k)

So a man may levy a fine, though he be outlawed in a personal action. (l)

So a fine by a man *non compos* (m) though it ought not to be levied (n) binds for ever, when it is levied. (o)

So a fine by a man attainted for treason or felony, binds all but the king. Vide West, Symb. §. a. (p)

So, a fine by an alien. (q)

So, a fine by an infant, (r) or *feme covert* (s) without her husband, binds

(k) Co. Read. 7.

(l) West, Symb. p. 2. s. 13.

(m) If it is suggested that the cognizor is insane, he may be produced and examined in court. Barnes, 218.

(n) The statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to levy a fine.

(o) 1. Because the record and judgment of the court, being the highest evidence in the law, the cognizor must be presumed to have been capable of contracting at the time; therefore no averment can be admitted to the contrary. 5 Cruise, 148. 4 Rep. 124. — 2. And a declaration of the uses of a fine, by an idiot or lunatic, will also be good. 12 Rep. 124. 2 Rep. 58. Winch, 106. Hob. 224. 10 Rep. 42. Vide Barnes, 218.

(p) A fine by tenant in tail having committed murder, before conviction, bars the heir in tail. 2 Wils. 219.

(q) 1. An alien, being incapable of holding lands, ought not to be permitted to levy a fine. But if he does levy a fine, it will not conclude the king after office found. 5 Cruise, 144. 13 Vin. Abr. 228. — 2. Nor will a fine be allowed to pass, where it appears that the cognizor, or one of several cognizors, is an alien enemy. 1 Taunt. 144.

(r) 1. By 7 Ann. c. 19, it is enacted, that it shall and may be lawful to and for any person under the age of twenty-one years, by the direction of the court of chancery or exchequer, on the petition of the persons for whom such infants shall be seised or possessed in trust, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said court shall direct. — 2. Under which act, the infant heir of a mortgagee in fee, though a *feme covert*, may convey by fine. 3 Atk. 479. Com. Rep. 615. — 3. By 4 G. 3. c. 16. it is enacted, that it shall and may be lawful for any infants, having estates in lands, tenements, or hereditaments, within the duchy of Lancaster or the counties palatine of Chester, Lancaster, and Durham, or in the principality of Wales, by the direction of the court of the duchy chamber of Lancaster, of the court of exchequer in the county palatine of Chester, or of the court of chancery of the county palatine of Lancaster, or the court of chancery of the county palatine of Durham, and of the several courts of the great sessions in Wales respectively, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said several courts shall direct.

(s) 1. The statute *de modo levandi fines* directs that if a *feme covert* be one of the parties to a fine, she ought first to be examined by four of the justices, and if she refused her assent to the fine, it should not be levied. 2 Inst. 515. — 2. When a married woman is party to a fine, she ought to be examined secretly and apart from her husband, pursuant to this statute, in order that the judges or commissioners may inform themselves, whether she joins in the fine of her own free will, or is compelled to it by the threats or menaces of her husband. Every thing contained in the writ should be distinctly named to her, and she ought to be informed of the consequences of her assenting to the fine. But although the statute *de modo levandi fines* thus positively directs the private examination of a married woman, yet if she is allowed to acknowledge a fine, without being examined, it will bind both her and her heirs for ever; there being no mode of reversing such a fine; because it cannot afterwards be averred that the married woman was not examined, the contrary being recorded. 5 Cruise, 132. 2 Inst. 515. 3 Atk. 712. — 3. The private examination of a married woman, however, is not directed in all cases; as that circumstance was prescribed by the legislature only to prevent married women from making an imprudent disposition of their property, at the instance of their husbands; so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she cannot possibly be prejudiced. It may therefore be laid down that a married

(*t*) binds (*u*) till it be avoided. Vide Baron and Feme, (P 1.) —  
Enfant, (B 2.)

But a fine cannot be levied by (*x*) a corporation aggregate: for it cannot act but by attorney, and it cannot make conusance by attorney. (*y*)

So,

woman need only be privately examined, when she joins in granting some estate, or departing with some interest. 5 Cruise, 132. Litt. s. 670. 1 Inst. 353. b. 2 Inst. 515. — 4. Thus if a fine be levied to a husband and wife, who grant and render a rent, the wife ought to be examined; because by the render she makes herself liable to the payment of the rent. Rol. Abr, tit. Fine, M. 1.

(*t*) 1. 1 Inst. 76. a. 7 Rep. 43. a. 10 Rep. 46. a. Hob. 225. — 2. There is no case in which the court has authenticated a fine levied by a married woman as such without her husband. 5 Cruise, 134. — 3. Upon a motion that Ann Moreau, wife of — Moreau, might levy a fine without her husband, it appeared that the lands had been sold by the husband, who covenanted, that he and his wife, when of age, should levy a fine when the wife came of age, she refused to join in it; but it was levied by the husband alone, who went abroad. Afterwards the wife consented to levy it, but the husband was husband. It was said, that it had been usual in such cases for the cursitor to make out a *præcipe* to the wife, as a *feme sole*; but no example of it was produced upon the motion. The court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse*, before the lord chief justice then in court. 2 Blk. 1205. — 4. The estate of a married woman having been regularly sold, the conveyances duly executed by the husband and wife, and the purchase money paid, the husband became insane. Upon an application to allow the wife to acknowledge the fine without her husband, the court said, that they should make no order upon the subject; but that it appeared to them that there was no objection to the acknowledgment of the fine being taken; *valeat quantum*. 1 N. R. 312. — 5. The court refused to allow a fine by a *feme covert* to pass, though her husband, declared a bankrupt, had absconded and gone abroad. 1 Taunt. 37. — 6. Neither will it allow a *feme covert* to suffer a recovery without her husband, though as a joint-tenant with others. 1 Taunt. 478. — 7. Nor will it amend the recovery by adding the name of her husband. Ibid. — 8. The most scrupulous adherence to the prescribed forms of the caption of the acknowledgment of a recovery by a *feme covert*, is requisite. 5 Taunt. 661.

(*u*) If a woman levies a fine by the name of Mary the wife of Thomas Stiles, it will be void; because it appears by the very record itself, that the cognizor was a married woman. 1 Sid. 122.

(*x*) 1. No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in possession, either by right or by wrong; otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it; so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in possession in the lands whereof the fine is levied, it will only bind the parties themselves and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands, at the time when the fine was levied. 5 Cruise, 135. 5 Rep. 125. b. 3 Atk. 141. — 2. And where a person entitled to an estate tail in remainder, levied a fine of it jointly with his son, who had no freehold estate, it was held, that this fine had no effect. 2 Str. 1086. Andr. 125. 4 B. P. C. 85. — 3. So if a person who is only possessed of lands for a term of years, or who holds them by statute-merchant, statute-staple, or writ of *elegit*, levies a fine of them, it will have no effect whatever, as to strangers, because the cognizor has no estate of freehold. 5 Rep. 77. b. — 4. And it follows from the same principle, that if a copyholder levies a fine of his copyhold, it is void, because the freehold is in the land. Co. Cap. 55. — 5. And the only mode by which a tenant for years, or a copyholder, can levy a fine, so as to give it any force, is, by first making a feoffment, by which means he acquires a freehold by *desseisin*. 1 Inst. 330. b. n. Lev. 52. — 6. This doctrine, however, has been questioned by Lord Mansfield; but is, notwithstanding, admitted by some practitioners. 5 Cruise, 136.

(*y*) 1. It appears from Glanville, that the suitors in the *curia regis* were at all times allowed to prosecute their causes by attorney, who was called *responsalis ad lucrandum vel perdendum*; and a plea might be thus commenced and determined, whether by judgment or by final concord, as effectually as by the principal himself. *Per procuratorem itaque talem potest placitum illud deduci in curia, et terminari, sive per judicium,*

So, if commissioners take a fine of an infant, &c. the court will grant an attachment against them; and upon examination and inspection the fine shall be vacated. R. Skin. 24. (z)

### (C) To whom.

All persons who may be grantees, may be conusees of a fine. Vide West, Symb. 4. a. (a)

So a fine may be levied to a corporation aggregate. Vide West, Symb. 4. a.

But a fine cannot be levied to any not a party to the writ of covenant, except by way of remainder.

Nor to two persons and their heirs; for the court will refuse it. R. 1 Leo. 62.

Yet the king may levy a fine to two and their heirs, and the court will not refuse it.

So, the king's tenant, for the king's benefit. (b)

### (D) Before whom.

By the st. (c) 18 Ed. 1. *de modo levandi fines*, a fine ought to be levied

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*cium, sive finalem concordiam, adeo plenè et firmiter ut per eum qui alium loco suo inde possit.* Glanv. lib. 11. c. 1. 5 Cruise, 73. — 2. In consequence of this doctrine, fines were frequently levied by attorney, and in the *Formulare Anglicanum* there are several records of fines, which appear to have been levied by attorney, the chirograph being worded in this manner; *Hæc est finalis concordia facta, &c. inter Thomam de Preston, per Alexandrum Wallensem, positum loco suo ad lucrandum vel perdendum, et Ranulphum, &c.* No. 362. 369. 5 Cruise, 74. — 3. This practice was productive of several frauds, and therefore the statute *de modo levandi fines* enacted, that the parties to a fine should appear personally in court, in order that the judges might have an opportunity of examining into their age and capacity. 5 Cruise, 74.

(z) An infant acknowledged a fine, and the cognizee omitted to get it engrossed, until the infant should attain his full age, in order to prevent him from bringing a writ of error. The court, upon a view of the cognizance produced by the infant, and upon his prayer to be inspected, and to have his nonage recorded, inspected him, and recorded his infancy, in order to give him the benefit of his writ of error; which he must otherwise have lost, as his nonage determined before the next term. 12 Mod. 444.

(a) Touch. 7.

(b) The king may take lands by fine, because it is matter of record; and therefore where the Marquis of Berkeley levied a fine to certain persons, who granted and rendered to Lord Berkeley, and the heirs male of his body, remainder to King Henry VII., and the heirs male of his body, it was held, that the estate was well vested in the king. Plowd. 237.

(c) 1. A fine being a composition of a suit commenced for the recovery of real property, it might originally have been levied in any court which had jurisdiction, to hold pleas of land. 5 Cruise, 111. Gilb. Ten. 100. Hale's Hist. 151. Præf. 3 Rep. — 2. Accordingly it appears, that in the early ages of the law, when courts were more numerous, and their jurisdiction more extensive than at present, fines were frequently levied in the lord's court, the hundred court, and the county court. Ibid. — 3. And in Dugdale's *Origines Juridicales*, 92. there is the record of a fine which was levied in the county court of Nottingham, in the reign of King John. Cruise, Ibid. — 4. Fines were also levied in all the courts at Westminster, and even before the king himself, as appears from a great number of records which have been published in Spelman's *Glossary*, and by Dugdale and Madox. 5 Cruise, 112. Dugd. Orig. Jur. 50. 92. Madox, *Form. Angl.* No. 364. — 5. From the time of the appointment of justices in eyre, by King Henry II. fines were usually levied before them, on account of the pre-eminence of their courts over the county courts; and Madox has preserved several records of fines which are expressed to have been levied *coram Abbate de Evesham Johanne de Munmul, &c. Justiciariis itinerantibus.* 5 Cruise, 112; *Form. Angl.* No. 365, 366, 367. 369. *Rol. Abr.* tit. Fine, C. — 6. In consequence of the fixed residence of the court of com-

mon



levied before four justices (*d*) in C. B. or in eyre, and not elsewhere. (*e*)

And the number of justices ought to be above one; and therefore, they were named antiently, that the number might appear. 2 Inst. 514. 1 H. 7. 10. 11.

Now by st. 4 H. 7. fines may be levied before the justices of the common pleas.

And therefore, the number of the justices is not now material 2 Inst. 515.

If it be before three justices in C. B. omitting the other, it shall be good. Semb. Cro. El. 677.

So a fine may be levied in the counties palatine of Lancaster and Chester. Vide West, Symb. 5. b. (*f*)

So,

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mon pleas, at Westminster, by magna charta, fines were thenceforth usually levied in that court; because therein only could real actions be commenced. Though if a record was removed by writ of error from the court of common pleas into the court of king's bench, a composition of the suit might take place there; by which means a fine might be levied in that court. 6 Cruise, 112. 4 Inst. 99.

(*d*) Lord Coke says, that this provision was repealed by the st. 4 H. 7.; so that now a fine levied in the court of common pleas, before two justices, is considered to be equally valid as if all the judges were present. 2 Inst. 510. 515. Co. Read. 8.

(*e*) 1. An opinion is advanced by Lord Coke, that a fine cannot now be levied, so as to have the force of a final concord, in any court but the court of common pleas; and therefore that the king cannot now, in contradiction to this negative statute, grant a power to hold pleas for the purpose of levying fines. 5 Cruise, 113. — 2. He seems, continues Mr. Cruise, also to have been of opinion, that, since this statute, fines cannot be levied in any inferior court, unless the privilege of holding such court has been confirmed by act of parliament. Ibid. — 3. But this, he concludes, is certainly a mistake; for fines may still be levied in inferior courts, as he shows in a subsequent part of his chapter. Ibid.

(*f*) 1. The counties palatine of Lancaster, Chester, and Durham, having courts of their own, the king's ordinary writs do not run there; so that fines could not be levied in the court of common pleas at Westminster, of lands situated in those counties. 5 Cruise, 113. — 2. But fines may now be levied in the courts of those counties, under the authority of the following statutes. — 3. By 37 H. 8. c. 19. it is enacted, that all fines levied before the justices of the county palatine of Lancaster, commonly called justices of assize at Lancaster, or before one of them, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Lancaster, which shall be openly read and proclaimed three several days in open sessions, in the presence of the justices of assize at Lancaster, or one of them, for the time being, and also that shall be openly proclaimed, in the same manner, at the two next general sessions that shall be holden in the said county palatine of Lancaster, at three several days in either of the said two sessions, after such manner and form as is commonly used in the court of common pleas at Westminster, shall be of like force, strength, and effect in law, to all intents, effects, constructions, and purposes, as fines levied in the court of common pleas. — 4. If a fine is found by verdict to have been levied before the justices of the county palatine of Lancaster, without finding who those justices were, and whether they had power to take fines or not, the court will presume them to be such justices as have power by statute to take fines in the county palatine of Lancaster, if the contrary does not appear. 1 Wils. 275. — 5. By 2 & 3 Edw. 6. c. 28. it is enacted, that all fines levied or acknowledged before the high justice of the county palatine of Chester, or before the deputy or lieutenant justice there, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Chester, which shall be openly read and proclaimed three several days in the open sessions, in the presence of the justice of the said county palatine of Chester, or before the deputy or lieutenant justice there, at the same sessions that the same fine shall be engrossed, and also that shall be openly read and proclaimed in the same manner at the two next general sessions that shall be holden in the said county palatine of Chester, next after the levying and engrossing such fine, at three several days in either of the said two sessions, after such manner and form as is commonly

So, before justices in eyre. 2 Inst. 515.

And in a court of antient demesne, (g) of lands of antient demesne.

(h) R. (i) 1 Sal. 340. (k) Vide Antient Demesne, (G 2.) (l)

But

commonly used in the king's courts of common pleas at Westminster, shall be of like force, strength, and effect in law, to all intents and purposes, as fines duly levied with proclamations before the king's justices of his common pleas. — 6. By 43 Eliz. c. 15. s. 3. it is enacted, that it shall and may be lawful to and for all persons, upon any original writ or writs of covenant, or any other original writ or writs, whereupon fines have been usually levied, to be purchased out of the court of exchequer, within the county palatine of Chester, returnable before the mayor of the city of Chester in the portmoot court, to be holden within the said city, to levy any fine or fines of any lands, tenements, or hereditaments, lying or being within the county of the city of Chester, before the mayor of the said city, in the said portmoot court, in such manner and form as fines may be levied before the high justice of the county palatine of Chester; and that the mayor of the said city, shall have full power and authority to to receive and record all and every such fine and fines; and that all and every such fine and fines which shall be so levied, and which shall be openly read and proclaimed before the mayor of the said city, in the said portmoot court, once at the same court day that the said fine shall be engrossed, and once at every of the nine next court days of portmoot next after the levying and engrossing of such fine, shall be of like force, strength, and effect in law to all intents, constructions, and purposes, as fines duly levied with proclamations before the said high justice of Chester. — 7. By 5 Eliz. c. 27. all fines levied before the justice or justices of the county palatine of Durham, for the time being, authorized for that purpose, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Durham, which shall be openly read and proclaimed two several days in the open sessions, in the presence of the justices of assize at Durham, or one of them, at the same sessions that the same fine shall be engrossed, and also that shall be openly read and proclaimed in the same manner at the two next general sessions that shall be holden in the county palatine of Durham, next after the levying or engrossing of such fine, shall be of the same force, strength, and effect in law, to all intents and purposes, as fines duly levied with proclamations before the queen's justices of the common pleas at Westminster. — 8. Upon the reduction of Wales, courts of justice were erected there, in which all pleas of real and personal actions were to be held; and fines of lands situated there are levied in those courts under the authority of the st. 34 & 35 H. 8. c. 26. s. 41., by which it is enacted, that all fines levied before the justices of Wales, of lands, tenements, and hereditaments situated within their jurisdiction, with proclamations made the same session, that the said fine shall be engrossed, and in the two other great sessions then next to be holden within the same county, shall be of the same force and effect, to all intents and purposes, as fines levied with proclamations be of, that be levied before the justices of the common pleas of England. 5 Cruise, 116. — 9. The isle of Ely is a royal franchise; the bishop having, by a grant of King Henry I., *jura regalia*, whereby he acquires both a civil and criminal jurisdiction; and therefore fines are levied in a court held by the bishop's justices, of all lands situated within that franchise. Ibid. 4 Inst. 220.

(g) A fine, however, so levied, has only the effect of a fine at common law, which, when levied of an estate tail, is to create a discontinuance; and does not bar the issue in tail from bringing a formedon. For no fine, unless it is levied with proclamations, pursuant to the st. 4 H. 7., has the effect of barring an estate tail, except in the case of copyholds. Dyer, 373. Com. R. 624.

(h) And since tenants in antient demesne cannot sue or be sued for their lands in the king's courts, but have the privilege of having justice administered to them in the court of the manor by writ of *droit close*, directed to the lord of the manor whereof the lands were held, it follows, that no fine can be levied in the court of common pleas at Westminster, of lands held in antient demesne; that, too, would be a wrong to the lord of whom the lands were holden, as they would by that means become frank-free, and not impleadable in his courts. 5 Cruise, 116. 2 Inst. 513.

(i) Com. 93. 124.

(k) 1. As tenants in antient demesne were allowed to prosecute actions in the court of the manor, they were also permitted to compound their suits there; by which means fines have at all times been levied of lands held in antient demesne, upon little writs of right close, in the court of the manor. 5 Cruise, 117. — 2. And lord Holt and the other judges determined that this might be done, notwithstanding the court of the manor

was

But a fine cannot be levied in B. R. 2 Inst. 515.

So, by the st. *de modo levandi fines*, 18 Ed. 1. It ought to be before the justices of C. B. or in eyre, and not elsewhere: and therefore, where a man has power *tenere placita*, a fine cannot be levied before him. 2 Inst. 515.

So, against those negative words of the statute, the king cannot grant a power to levy a fine. 2 Inst. 515.

So a man, or a corporation, cannot prescribe for levying fines in his court. Dub. 1 Leo. 188. Cro. El. 116. Ow. 93. 1 Sal. 340.

So a fine cannot now be levied in the exchequer, though it was antiently levied there. Mad. 145.

### (E) The parts of a fine.

(E 1.) Upon what writ it may be levied:—The original writ.

There are five parts of a fine. 5 Co. 38. b.

The first part of every fine is the original writ. 5 Co. 38. b.

By the st. 18 Ed. 1. (*m*) the order of law does not suffer that a final accord be levied in the king's court without an original writ. D. Cont. 21 Ed. 4. 60. b. 62. a. 4. b. Mad. Form. Inst. 17. (*n*)

The most usual writ, upon which a fine is levied, is a writ of covenant, which is not personal, but real, and requires performance and execution of the covenant. 1 Sal. 340.

was not a court of record; because it was but agreeable to the power of that court in other instances, for they might proceed to try the mise joined in a writ of right close, which was of a higher nature than a fine; whereas in all other inferior courts, on the mise joined, the cause must be removed into the court of common pleas, by *recordari*. And the statute 18 Edw. 1., *de modo levandi fines*, was but declaratory of the common law, and was made to rectify a mistake, that fines were leviable in inferior courts, upon bills or plaints, which could not be, either by grant or custom, by reason of the negative words of that statute. But this did not extend to courts of antient demesne, for then the st. 18 Edw. 1., would make fines of those lands leviable in the court of common pleas; which was not the case; such fines being reversable by the lords. So that tenants in antient demesne would be under a double disadvantage; for a fine could not be levied of their lands in any court. Which judgment was affirmed by the house of lords. 1 Salk. 339. Com. R. 93. 124. 4 B. P. C. 66.

(*l*) 1. Fines may be levied in the courts of cities and corporate towns, where such courts have power to hold pleas of land. Thus Madox has published the record of a fine levied in the town court of the city of Coventry, before the mayor and bailiffs; and also a fine levied in the court of Fordwick, to which King Henry the Eighth was a party. 5 Cruise, 118. Mad. Form. Ang. No. 379. 394. — 2. Unless however it appears that such court had a power of taking fines, the fine is void and may be reversed; and, therefore, in a writ of error to reverse a fine levied in Shrewsbury, before the bailiffs there, the first error assigned was, that it did not appear that they had any authority to take fines, and that they could not have it, by prescription or by general words in the king's grant; and the court said, the fine was void, it not appearing by what authority it was levied, for it was in derogation of the crown, and of its profits *pro licentia concordandi*. Cro. Eliz. 314. — 3. By st. 34 & 35 Hen. 8. c. 26. s. 40. it is enacted, that fines shall and may be taken before the justices of Wales, of lands, tenements, and hereditaments situated within their jurisdiction, by force of their general commission, without any writ of *dedimus potestatem* to be sued for the same, in like manner and form as is used to be taken before the king's chief justice of the common pleas in England.

(*m*) And since the passing of this act, no material alteration has been made in the manner of levying fines. 5 Cruise, 73.

(*n*) If, however, the judges permit a fine to be levied without an original writ, it is not absolutely void, but only voidable.

Yet

Yet it may be levied upon every writ, by which land is demanded, or by which land is charged or bound, or which concerns land in any sort. 5 Co. 38. b. 1 Sal. 340. (o)

As, in a writ of right. 1 Sal. 340. (p)

A *warrantia chartæ*. 5 Co. 39. Bend. pl. 138. Mad. Form. 368. 370.

A writ of mesne. 5 Co. 39.

A writ of customs and services. Vide West, Symb. 6. a. 2 Inst. 513.

A *præcipe quod reddat*. 5 Co. 39.

*Per quæ servitia, or quem redditum reddit*. 5 Co. 39.

*De rationabilibus divisis*. 5 Co. 39.

In an assise of *mortd' ancestor*. Mad. Form. 365, 366.

In a writ *quod habeat a way ultra terram* of the conusor. Vide West, Symb. 6. b. 2 Inst. 513.

So, in a writ of *darrein presentment, quare impedit, &c.* 2 Inst. 514. Mad. Form. 364.

So a fine may be levied by a vouchee to a demandant, or by the demandant to him. 2 Inst. 514.

Or, by tenant by deceit to a demandant, or by the demandant to him. 2 Inst. 514.

But a fine without an original writ is erroneous. 2 Inst. 513. (q)

So, if it contains more than was in the original. 2 Inst. 513.

Or be levied to more persons. 2 Inst. 514.

The writ of covenant, upon which a fine is levied, ought to be written without rature, or interlineation.

It ought to be without false Latin.

The teste ought not to be upon a day not *dies juridicus*. (r)

It ought to have fifteen days between the teste and return.

It ought, regularly, to be tested before the *dedimus potestatem*.

Or, upon the same day. Hut. 135. Vide post, (E 7.)

It ought to be returned as another writ.

If a fine be of a thing not comprised in the original, it is void for that: as, if the writ be of the manor of B. and the fine of the manors of B. and C. it is voidable for the manor of C. 2 Inst. 513.

(o) 1. The writ on which fines are now usually levied is a writ of covenant, which is in the realty, and lies where a man covenants to levy a fine to some other person of his lands and tenements. Booth, Real. Act. 247. — 2. The form of which writ is, *præcipe A. quod teneat B. conventionem inter eos factum de manerio, &c. et nisi, &c.* F. N. B. 146. — 3. And where the lands of which a fine is intended to be levied are situated in different counties, there must be a writ of covenant for each county. 5 Cruise, 75.

(p) 1. Rep. T. Holt. 322. — 2. A fine may be levied of an advowson, in a writ of right of advowson, of which Madox has given an instance of great antiquity. Form. Angl. Dis. c. 15. 5 Cruise, 75. — 3. But a fine cannot be levied on an original in a personal action. 5 Cruise, 75.

(q) 1. Vide supra, that then it will be erroneous only, and not void. — 2. If an original writ be countermanded by a *retrahit*, a fine cannot afterwards be levied on it. Co. Read. 10. 1 Inst. 352. b. — 3. Thus in an assise, the plaintiff appeared and made a *retrahit*; afterwards the judges recorded an agreement between the parties, in the nature of a fine; and by the latter opinion, it was void *coram non judice*; because when the agreement was made, there was no suit depending, the writ being determined by the *retrahit*. Bro. Abr. tit. Fine, pl. 82.

(r) Nor upon a Sunday.

(E 2.)

## (E 2.) Of what things.

A fine may be levied of all things (*s*), of which a *præcipe quod reddat* (*t*) lies. 2 Inst. 513. (*u*)

As, of all manors, messuages, lands, tenements, and hereditaments. West, Symb. 6. b.

Of a rent *in esse*. Vide West, Symb. 6. b. (*x*)

So, of a rent not *in esse* before. Vide West, Symb. 6. b.

Of a reversion, or remainder. Vide West, Symb. 7.

So now, since the st. 32 H. 8. 7. it may be levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal. (*y*)

Of a chantry. Vide West, Symb. 7. (*z*)

So it may be of a seigniorie. Vide West, Symb. 7.

Of all services; as, homage, fealty, &c. Vide West, Symb. 6. b.

Of acquittal, and of every thing, for which a *præcipe quod faciat* lies. 2 Inst. 513.

So it may be levied of common of pasture. Vide West, Symb. 6. b. (*a*)

Of a corody. Vide West, Symb. 6. b.

Of an office: as of the custody of a forest. (*b*)

Of a boilary.

Of two pools (*c*) and a fishery in the water of D. (*d*)

Of an annuity. (*e*)

## (E 3.)

(*s*) A fine may be levied of an undivided a part of a manor, messuage, or other real estate, as well as of the whole; and the writ must be for an undivided moiety, third, or fourth part of a manor, messuage, &c. But if an entire thing, as a manor or messuage, be parted; as if the manor of Dale be divided into two parts; if the division be so made, that the manor of that part be not extinct, and a fine is levied of a part of it, it must pass by the name of the whole; as *de manerio de D. cum pertinentiis*. Mo. 230. 3 Rep. 88. Touch. 12.

(*t*) 'Or *faciat*.' 2 Inst. 513. *infra*.

(*u*) 1. Co. Read. 11. — 2. There are even some things whereof a fine may be levied, although a *præcipe quod reddat* cannot be brought for them; as an office, for which neither a *præcipe* nor an assize lies, but only a *quod permittat*. Co. Read. 11. 2 Inst. 513. *infra*.

(*x*) Touch. 11. 1 Str. 106.

(*y*) So a fine may be levied of an adowson in gross. 8 Rep. 145. b. 1 Wils. 242.

(*z*) The right of nomination to a perpetual curacy, cannot be the subject of recovery. 3 Taunt. 462.

(*a*) A fine may be levied of any thing that lies *in prender*, provided it can be ascertained with sufficient accuracy; but of things uncertain, such as common without number, a fine cannot be levied. West, Symb. s. 25.

(*b*) Vide *supra*.

(*c*) 1. Any number of conusors may pass their separate interests in one estate, to any number of purchasers, by one fine. 5 Taunt. 265. — 2. So a fine *sur concessit* may be levied, to pass a reversion in fee and the mesne estates. 2 Taunt. 84. — 3. And the court will allow a fine *sur concessit*, for conveying a life estate, and a fine *sur cognizance de droit tantum*, for conveying a reversionary interest in the same premises, to pass as one and the same fine. 1 Mars. 422. 6 Taunt. 21. — 4. But a fine *sur concessit*, and a fine *sur conusance de droit come ceo*, cannot pass in one fine; though if the caption is for both, one may be struck out. Barnes, 216. — 5. Nor can two operations be combined in one fine. 2 Taunt. 198.

(*d*) A fine may be, and is usually levied of New River shares, by the description of so much land covered with water; and wherever a fine is necessary to be levied of such shares, as the New River runs through three counties, Hertford, Middlesex, and London, there must be three several fines, one being necessary for each county. 5 Cruise, 153. 2 P. Wms. 127. 3 Atk. 336.

(*e*) 1. A fine cannot be levied of an annuity to a man and his heirs, because it is only a personal inheritance. 5 Cruise, 153. — 2. And though in equity, where money is covenanted



(E 3.) In what order.

All things, of which a fine is levied, ought to be mentioned in proper order. Vide West, Symb. 8. b.

As, an honour before a castle, a castle before a manor, a manor before a messuage. Vide West, Symb. 8. b.

A messuage, toft, mill, dovecote, garden, land, meadow, pasture, wood, heath, moor, juncary, marsh, alder, broom, rent, follow, according to the verses in the register, Mes. Toft. Mol. Col. Gard. Ter. Prat. Past. Bos. Brue. Mora. Junca. Marisc. Alnet. Rusc. Redd. *Sectare priora*. Vide West, Symb. 9.

Things general ought to be put before special: as, land, the genus, before meadow, pasture, wood, &c. which are species of it. Vide West, Symb. 8. b.

So things entire, before parts of a thing. Vide West, Symb. 8. b.

So things excepted, after the thing out of which they are excepted. Vide West, Symb. 8. b.

If there are several distinct things, each, after the first, begins with these words, *ac de, necnon, ac etiam, præterea, ac alterius, ac insuper*; and so *seriatim toties quoties*. 2 Inst. 514.

And for want of the regular order of these words in a fine, the forgery of it has been detected. 2 Inst. 514.

(E 4.) By what names.

In a fine, (*f*) an honour may be named by the name of the honour of T. Vide Grant, (E 4.) Vide West, Symb. 7. b. Vide Grant, (E 1. &c.)

Or may pass by the name of a manor. Vide West, Symb. 7. b. (*g*)

So a castle, hundred, &c. may be demanded by their own names. Vide West, Symb. 7. b.

Or may pass by the name of a manor. Vide West, Symb. 7. b.

So a manor may be demanded by the name of the manor of B. without naming any vill in which it lies. Vide West, Symb. 7. b. (*h*)

And by the name of a manor, a manor only in reputation passes. Cont. Noy, 7. R. Cont. Cro. El. 524. 707. Vide 1 Lev. 27. R. acc. (*i*)

So, land reputed parcel for eighty years. R. 1 Lev. 27. Vide Grant, (E 10.)

So, by the name of a messuage, a curtilage, garden, orchard, shop mill, dovehouse pass. Vide West, Symb. 7. b.

covenanted or directed to be laid out in the purchase of land, such money is considered as land; still a fine cannot be levied of it, until it is actually invested in land. Id. 154.

(*f*) 1. The descriptions of things whereof fines are levied, should be the same as are used in a *præcipe quod reddat*, in an adversary suit. But a fine being now considered as a common assurance, or conveyance by consent, it is construed more favourably than a judgment. 5 Cruise, 154. — 2. The interest intended to pass, must be specified. 2 Taunt. 198. — 3. But great nicety of description is not required. Cowp. 346.

(*g*) Touch. 11.

(*h*) 1. For it may be out of any vill, or extend into several vills. Touch. 11. — 2. Where a manor extends into several vills, as A. B. and C., it is good to express all or none; for if any one of the vills be omitted, no part of the manor situated in that vill will pass; though a fine of the manor, with the appurtenances, would have carried the whole manor. Touch. 13. West, Symb. s. 27. — 3. The situation cannot be described as in one of two counties in the alternative; and therefore if the premises are situated, part in each county, or if it is not known in which of the two they lie, two fines are requisite. 1 Taunt. 538.

(*i*) 6 Rep. 63.

So,

So, a toft, cottage, chamber, cellar, &c. Vide West, Symb. 7. b.

Or they may pass by their respective names. Vide West, Symb. 7. b.

So, a chapel, (*k*) or hospital. Vide West, Symb. 7. b.

So it may be levied of any thing, of which a *præcipe quod reddat* lies. 2 Inst. 513.

Or, of which a *præcipe quod faciat, permittat, or teneat* lies. 2 Inst. 513.

Land ought to be demanded by the number of acres (*l*) in such a vill. Vide West, Symb. 8.

If the intent appears, that all the estate in B. shall be included, all passes by so many acres as is the reputed measure; though by the st. *de terris mensurandis* the measure is not above three fifths of the estate. Semb. 2 Mod. Ca. 276. (*m*)

So, of two parts of a manor, is sufficient; without saying, in three parts to be divided. 1 Leo. 115.

But a fine of a tenement is not good: for it is not of a certain import. R. 1 Leo. 188.

The usual manner is to name the lands in such a parish, vill, or known place. 2 Mod. 48.

So it may be in a hamlet. 2 Mod. 48.

Or, of a tenement in Golden-Lane, though it be not a vill, or a hamlet. 2 Mod. 47. R. Cro. El. 693.

Or, in the liberty of W. R. 2 Mod. 49.

So, if there are the vills of W. and C. within the liberty of W. a fine of lands in the liberty of W. passes the lands in all the vills in that liberty. R. 2 Mod. 49.

So a fine of lands in a parish passes lands in all the vills in the same parish. R. 1 Vent. 170. (*n*) 2 Cro. 120.

So, if a fine be of a house, or land, by a known name, though there be not any such vill or place; as, if the house be called Easton in B. and a fine be of lands in A. Easton and C. omitting B. it shall be good. R. Cro. Car. 269. 276. Godb. 440. Jon. 301. (*o*)

(*k*) Parsonages, rectories, vicarages, or tithes impropriate do not pass by the words 'the advowson of the church of S.,' but by the words, 'the rectory of the church of S. with the appurtenances.' For the word 'rectory' comprehends the parish church with all its rights, glebes, tithes, and other profits whatsoever. But where a fine is levied of a right of presentation to a church only, the words are of the advowson of the church of S., and not with the appurtenances. And where a fine is levied of a vicarage endowed, the writ must be, of the advowson of the vicarage of S., and not with the appurtenances. And where there is no vicarage endowed, it must pass under the words, 'the advowson of the church of S.' 5 Cruise, 155. Touch. 12.

(*l*) 1. Land ought to be demanded by the certain measure of its quantity, according to the usual mode by which it is measured; as an acre, oxgang, hide, rood, &c. Touch. 12. — 2. And by the names which are usually given to the different kinds of land, as arable, meadow, pasture, &c. Ibid. — 3. Where a fine was levied of a certain number of acres of land, it became a question whether the acres were to be considered as customary acres, or according to the statute *de terris mensurandis*; nor does it appear, how the case was determined. 8 Mod. 276. 5 Cruise, 157. — 4. But Lord Coke mentions a case where it was adjudged, that in a common recovery of a certain number of acres of land, they should be estimated according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*. 6 Rep. 67. a.

(*m*) Second part of 2 Mod. Ca.

(*n*) 1 Mod. 78.

(*o*) Cro. Jac. 574.

If a close be named A. and a fine be of land in A. where there is no such vill. R. 2 Cro. 574.

So, if a fine be of pasture in Arshcomb, where it is written Arshcomb. 2 Cro. 574.

If a fine be of lands in O. to the use of B. of lands in S. which is a place known in the vill of O. to the use of C.; it shall be good to C. for the lands in S. R. 1 And. 245.

But if a fine be levied of lands in A. this passes only land in the vill of A. and not land in B. or any other vill within the parish of A. R. 2 Cro. 120. Vide Parish, (C 1. 2.)

Or, in B. it does not pass land in a hamlet of the same parish, which has separate constables: for it is a distinct vill. R. 1 Vent. 143. Adm. 1 Vent. 170. (p)

(E 5.) The caption of the fine: — In court.

By the common law, the parties who levied a fine ought to do it in court in person, by which the court might judge of their sufficiency. 2 Inst. 512. Vide Mad. Form. Int. 14.

And therefore, after the writ of covenant compounded, indorsed, and entered at the Alienation-office, and affixed to the *præcipe* and concord, it shall be delivered to the serjeant. Comp. Att. 95.

By the st. 18 Ed. 1. *de modo levandi fines*, when the writ is read in presence of the parties, the serjeant shall say, *conge d'accorder*, the justice says, *que donera*; the serjeant names the parties: and when it is agreed of the sum, the justice says *criez la peace*, and then the serjeant recites the concord. Vide 2 Inst. 512.

If there be a *feme covert* (q) she shall be examined by the puisne judge, and her examination recorded. Vide 2 Inst. 515.

And always, where a *feme covert* levies a fine, she ought to be examined; and if she does not assent, the fine ought not to be received. 2 Inst. 515.

So, if a fine be levied of land to husband and wife, who grant and render it; there the wife ought to be examined. 2 Inst. 515.

But where a fine is levied of land to husband and wife, she need not be examined. 2 Inst. 515.

And if her examination be recorded, it cannot afterwards be averred, that she was not examined. 2 Inst. 515.

So a fine taken in court need not be signed by the hand of the judge, as is done where it is taken out of court. Semb. Dy. 320. b.

(E 6.) Out of court, before the chief justice.

The chief justice of C. B. *virtute officii* may take the caption of a fine out of court, without a *dedimus potestatem*. 2 Inst. 512. Dy. 224. b. Cro. El. 469. (r)

(p) 1. A fine does not ascertain, but only comprises, the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, in order that the precise lands comprehended in the fine, and intended to pass by it, may be ascertained. 5 Cruise, 159. — 2. There are frequent instances of tenants in fee simple, who, in levying fines, insert more parcels of land than do actually belong to them; in which case Lord Hardwicke says, a court of equity will restrain the operation of the fine to such lands as do really belong to the parties. Ibid. 2 Atk. 241. 1 Ves. J. 158.

(q) Supra, (B).

(r) 1. Co. Read. 9. — 2. But if he be a party to the writ, he cannot take the acknowledgment of the fine; *quia judex in propria causa*. — 3. A rule which extends to all other judges and commissioners.

The *præcipe* and concord in paper shall be read to the parties in the presence of the chief justice, and being acknowledged and subscribed by them, the chief justice sets his name to it. Compl. Att. 96.

Afterwards it shall be ingrossed in parchment, and signed by the Ch. J. and upon that the cursitor makes the writ of covenant, which shall be compounded at the Alienation-office, and the king's silver paid, and the fine conveyed to the other offices. Compl. At. 96.

So a judge of assise may take a fine, without a *dedimus potestatem*, if he has a special patent to take them in his circuit. Dy. 224. b. (s)

But the chief justice of B. R. or any other judge, cannot take the caption of a fine, without a *dedimus potestatem*. Dy. 224. b.

(E 7.) By *dedimus potestatem*.

By the st. Carl. (t) 15 Ed. 2. If any by age, impotence, or casualty, be withholden that he cannot come to our court, (u) two or one of the justices, by assent of the rest, shall go to the party diseased, and receive his conusance on the plea in which the fine ought to be levied, &c. (x)

If there go but one, he shall take with him an abbot, prior, knight, or man of good fame or credit, and certify the court thereof by the record; that all things incident to the fine being examined by him, it may be duly levied. (y)

And upon this a *dedimus potestatem* (z) is granted to any judge, serjeant, or knight only, to take the fine: for it is now usual for one

(s) 1. Jenk. 227. — 2. A writ of *dedimus potestatem*, however, ought to be sued out, bearing date before the acknowledgment of the fine. 5 Cruise, 122. — 3. Though, if the writ of *dedimus potestatem* be tested after the date of the acknowledgment, still the fine will be supported. — 4. A writ of error was brought to reverse a fine, and the error assigned was, that it appeared upon record that the acknowledgment of the fine was taken by Chief Baron Manwood, on the 27th of March, and the writ of covenant and *dedimus potestatem* were tested on the 9th of April, so that the acknowledgment was taken without any authority; and by the stat. 23 Eliz. the day of the acknowledgment ought always to be certified; but the court over-ruled this objection, saying, it was good enough, and that otherwise they should reverse many fines. Cro. Eliz. 275.

(t) But which, in fact, is a writ addressed by Edward the Second to the judges, for their government in taking the acknowledgment of fines.

(u) Although the writ of *dedimus potestatem* still appears to be granted upon a suggestion of infirmity in the parties, yet such suggestion is seldom true; the writ being usually obtained to save the expence or inconvenience of a journey to Westminster; or for the purpose of levying a fine in vacation time. 5 Cruise, 125.

(x) Where the acknowledgment of a fine is taken before the Chief Justice, no *dedimus* is necessary; where before a puisne judge or a serjeant, a *dedimus* is requisite, though it may be issued after, so as to warrant the acknowledgment; in the case of all other commissioners, the *dedimus* must issue beforehand. 3 Taunt. 49.

(y) And by 43 Eliz. c. 15. sect. 5. it is enacted, that upon all original writs purchased out of the court of exchequer of the county of Chester, for the levying of any fine or fines within the city of Chester, the mayor of the said city, for the time being, shall have power and authority to award and send forth such like writ or writs, process or precepts of *dedimus potestatem*, to any two or more sufficient persons, authorizing them to receive and take the acknowledgment of such person or persons, as shall be willing to levy such fine or fines, and, by reason of sickness or other reasonable impediment, cannot come in person before the said mayor to make such acknowledgment.

(z) Which is directed to a certain number of commissioners, reciting, that a writ of covenant is depending before the justices of the court of common pleas, between certain persons therein named, who are incapable, from infirmity, of appearing personally before the court, and authorizing the commissioners to take the acknowledgment of the said parties concerning the matters contained in the writ; and directing them to certify such acknowledgment, under their hands and seals, to the court of common pleas. 5 Cruise, 120.

only

Only to do it, though the statute says, if one go, he shall take with him an abbot, &c.

So it may be (a) granted to other commissioners, (b) if a knight be named in the writ of *dedimus potestatem*. (c)

After the writ of covenant, and *dedimus potestatem* sealed, compounded, and affixed to the *præcipe* and concord, the judge, &c. of commissioners shall take the caption of the fine. (d)

The

(a) Where the acknowledgment of a fine is to be taken in Westminster, and a judge is then in town, it is irregular to make the acknowledgment before any other than a judge or a serjeant. 3 Taunt. 49.

(b) 1. The attorney upon record cannot be a commissioner to take the acknowledgment of the warrant constituting himself the attorney. 4 Taunt. 590. — 2. Nor can the demandant be a commissioner to take the acknowledgment; though when so named, the fine may be amended in *feri*, by substituting a new commissioner and retaking the acknowledgment. 5 Taunt. 747. — 3. The commissioners for a fine of lands in Chester, must not be attornies of the court of great sessions. 3 Taunt. 302. — 4. Supplemental affidavit, that the commissioners in a fine, sworn to be attornies of the court of king's bench, are attornies of the court of king's bench at Westminster, allowed. 5 Taunt. 835.

(c) 1. The st. of Carlisle only gives authority to two of the justices, or to one of them, attended by an abbot or knight, to take the acknowledgment of fines. But notwithstanding this restriction, writs of *dedimus potestatem* were frequently directed to persons of inferior quality, from whence many abuses arose, which gave rise to a rule of court made in 45 Eliz., by which it was ordered, that no writ of *dedimus potestatem*, directed to commissioners to take the acknowledgment of any fine, should be received or recorded, unless the acknowledgment was taken by some of the justices of the one bench or other, or barons of the exchequer, or serjeants at law, or knight who was of the quorum. Custom however so far prevailed against the positive authority, both of the statute and of this rule, that although a knight was always named in a writ of *dedimus potestatem*, yet he seldom was one of those who took the acknowledgment of a fine. 5 Cruise, 121. Co. Read, 9. 2 Vent. 30. Wils. on Fines, 95. — 2. By an order of the court of common pleas, reciting, that the lord high chancellor had been pleased to direct that no writ of *dedimus potestatem*, to be executed in England, should issue under the great seal directed to any persons except the judges, serjeants at law, barristers of five years' standing, or solicitors or attornies of some of the courts in Westminster-hall, the judges of the court of session and exchequer, advocates and clerks to the signet of five years' standing in Scotland; it is ordered, that no fine shall be suffered to pass, unless the caption of such fine be before one of the justices or barons of his majesty's courts of record in Westminster-hall, or one of the serjeants at law, unless an affidavit be made and filed, stating that the commissioners taking the same are to the best of the deponent's information and belief, either barristers of five years' standing, or solicitors in some of the courts in Westminster-hall, the judges of the court of session and exchequer, or advocates and clerks of the signet of five years' standing in Scotland. 1 B. & P. 362.

(d) 1. It is the duty of all those who are appointed commissioners in a writ of *dedimus potestatem*, to inform themselves by means of some people of credit, that the persons who acknowledged fine before them, are really the parties named in the original writ. They should also be extremely attentive in examining whether there be any married woman, infant, idiot, or lunatic, among the parties to the fine; as they are liable to be severely punished by the court of common pleas, for any fraud or wilful neglect in the execution of their office. 5 Cruise, 123. 1 Freem. 78. — 2. By a rule of C. B. made in Hil. 13 G. 1., it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person who was present when the fine was acknowledged should appear personally before the lord chief justice of the court, and be examined upon oath touching the execution thereof. — 3. Which rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, the court made the following rules. — 4. Hil. 17 Geo. 2. That instead of an oath made *viva voce* of the due acknowledgment of fines, an affidavit in writing on parchment shall be made and annexed to every fine, in which the person making the same shall swear



The *dedimus potestatem* shall be good, though it bears *teste* before the

that he knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding; that the *feme covert*s, if any, were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same; and that the cognizor or cognizors, and every of them, knew the same to be a fine to pass his, her, or their estate or estates: which fine, together with such affidavit annexed, shall be transmitted to the lord chief justice, or some other justice of this court, for his *allocatur* thereon, and such affidavit shall remain annexed to such fine, and be left with the same in the proper office: and it is ordered, that every such affidavit, except where the persons, at the time of their acknowledging the fines, are in Ireland, or some other parts beyond the seas, shall be made by some attorney of the courts of Westminster-hall. Wils. on Fines, 85. — 5. Hil. 26 & 27 Geo. 2., it is ordered, that in the affidavits made in pursuance of the preceding rule, the person or persons so making the same, shall swear that the fine was duly signed and acknowledged upon the day and year mentioned in the caption; and if there be any erasure or interlineation in the body or caption of such fine, that such erasure or interlineation was made before the party or parties signed the said fine, and before the caption was signed by the commissioners. Id. 89. — 6. A fine was taken before Prentice an attorney, and Prentice a tradesman, as commissioners. Prentice the attorney died without making the proper affidavit of the acknowledgment of the fine. One of the cognizors became bankrupt, absconded, and did not surrender within the forty-two days, as requisite by the statute. The fine was ordered to pass, on an affidavit of the due acknowledgment of it by Prentice the tradesman; notwithstanding the general rule requiring such affidavits to be made by attorneys. Barnes, 217. — 7. Where fines have been acknowledged out of the kingdom, the judges have also remitted the strictness of these rules. The lord chief justice, assisted by Mr. Clive, made an order, that a fine should pass as to two of the cognizors, considering the particular circumstances of the case, notwithstanding the same was not signed by them. One of the commissioners attended and made oath, that the fine was duly acknowledged before him and another commissioner at Naples; that the parties were of full age, and good understanding; that the married woman was examined apart from her husband, and freely consented. The fine being taken from persons beyond seas, it was not within the order of the court, requiring an affidavit; and the signing of a fine by the cognizors, was not absolutely necessary. Barnes, 219. — 8. Two fines, taken at Hamburgh, where the cognizors resided, were ordered to pass, by all the four judges, upon an affidavit by a commissioner, of the due execution of each fine, sworn before a clerk in the chancery of the city of Hamburgh; and authenticated by his certificate or attestation, as a notary public. Barnes, 217. — 9. A fine was taken at Edinburgh, and was regular in every respect, except that it was not acknowledged in the presence of an attorney of any of the courts of Westminster-hall, who might have made the usual affidavit of its having been duly taken. An affidavit was made by Seton, the plaintiff, that there was no such attorney in or near Edinburgh. And the court allowed the fine. 2 Blk. 880. — 10. The attestation of a notary public to the affidavit made abroad, of the acknowledgment of the warrant of attorney, is requisite when made before an ordinary magistrate. 2 H. Bl. 275. 1 Taunt. 144. — 11. And the notarial certificate must distinctly state, that it was sworn, and not leave that fact to be inferred. 2 Taunt. 205. — 12. It was dispensed with to the signature of a foreign magistrate attesting the swearing of the commissioners' affidavit, of taking the acknowledgment. 5 Taunt. 197. — 13. And an affidavit of the acknowledgment of the warrant of attorney (for suffering a recovery) made before a British consul in India, where there was neither notary nor magistrate, was held good. 3 Taunt. 275. — 14. But any motion to dispense with the notarial certificate, must be bottomed on an affidavit of the circumstances. 2 Taunt. 313. — 15. The notarial certificate required in the case of a fine acknowledged in a foreign country, must be under seal; and a defect in this particular cannot be supplied by proof of the hand-writing of the cognizors. 1 Taunt. 144. — 16. Unless the notaries of that country do not use a seal. 4 Taunt. 573. — 17. Henry Count Bornbell and Mary his wife, the cognizors in the fine, were resident in France, and the acknowledgment was taken before commissioners in that country; the affidavit of the due taking purported to be sworn before the mayor of the city of Neufchatel, and was subscribed with his name; and a certificate, that that person was mayor of the said city was signed by two persons, who stated them-

selves

the writ of covenant, and though it recites the writ of covenant to be depending. 1 Rol. 223. Cro. El. 677. Vide infra. (e)

Or, after the caption. R. Cro. El. 275. (f)

So the caption may be taken of one, at one time or place, and of another elsewhere. (g) Cro. El. 577. (h)

If the *dedimus potestatem* be to take of four, and it be taken of three, and the other refuses, it shall be made for those three. R. Cro. El. 576.

But if the *dedimus potestatem* be to two jointly, a caption by one will be erroneous. Cro. El. 240.

If the return (i) be, *executio istius brevis patet in quodam pannello annexo*, for, *in quâdam schedulâ*, it is not material. R. 2 Cro. 78.

If the caption be by a *dedimus potestatem*, which bears *teste* upon the same day with the writ of covenant; yet it shall be good, though the

selves to be public notaries; but no notarial seal was annexed; the court said, that they could not supply the defect arising from the want of a seal. There was no rule of court expressly applying to the case of fines levied by persons resident abroad; but the rule relative to recoveries suffered by persons under these circumstances, had always been held to extend to the case of fines; by which rule a seal was necessary. 2 Blk. 880. — 18. An affidavit of acknowledgment abroad made by the commissioner, though not signed is sufficient, if the court is satisfied that it was made by him, from comparing the hand-writing therein with his signature to the acknowledgment at the foot of the *præcipe*, &c. 2 N. R. 57. — 19. An affidavit of acknowledgment abroad, before two English magistrates, prisoners of war, was held sufficient, where the only officer of the country who could take it, refused to receive it without an exorbitant fee. 2 N. R. 57. — 20. So affidavit of the acknowledgment of a warrant of attorney, for suffering a recovery, made before a British consul in India, where there was neither notary nor magistrate, was held good. 3 Taunt. 275. — 21. The affidavit of the taking the acknowledgment of a fine, must state that the party knew that it was for the purpose of suffering a recovery. 4 Taunt. 737. — 22. And must be engrossed on parchment. 5 Taunt. 263. — 23. And fines in several counties require several affidavits of the caption. 4 Taunt. 736.

(e) 1. The writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, and therefore should bear date after the writ of covenant. Co. Read. 9. 1 Rol. R. 223. — 2. A writ of error was brought to reverse a fine levied at Chester, because the teste of the writ of *dedimus potestatem*, was prior to that of the writ of covenant; and it was held to be manifest error. Cro. Eliz. 740. Vide 13 Vin. Abr. 333. — 3. But if the writ of *dedimus potestatem* be tested on the same day with the writ of covenant, the fine will be good. — 4. A writ of error was brought to reverse a fine, on the ground that the writ of *dedimus potestatem* was tested the same day with the writ of covenant, which was contended to be erroneous, because the writ of *dedimus potestatem* recites that the writ of covenant is depending, whereas the writ of covenant could not be said to be depending until its return. But the court held, that this was no error; for the writ of covenant might be said to be depending immediately on the purchase of it; and if a stranger should buy the land before the return of the writ of covenant, it would be champerty. Cro. Eliz. 677.

(f) 1. Vide 3 Taunt. 49. supra. — 2. An insertion in the *dedimus* of the order in which the names of the vouches stand in the *præcipe*, is immaterial. 1 B. & P. 31.

(g) 1. All the acknowledgments must, however, appear on the same parchment, otherwise the fine will not be allowed to pass. — 2. Hence where a writ of *dedimus potestatem* had been directed to commissioners, to take the acknowledgment of nine persons, and the commissioners took the acknowledgment of six out of the nine persons on one piece of parchment, and of the remaining three upon another piece of parchment, and the officers objected to this mode of taking the acknowledgments; on a motion that the fine might pass, Mr. Justice Heath said, that these separate acknowledgments would not warrant a joint judgment, and refused the motion. 3 B. & P. 366.

(h) If a person has several writs of covenant depending against several persons in different counties, he may have a writ of *dedimus potestatem* directed to commissioners, to take their acknowledgments severally. F. N. B. 327.

(i) The return to a renewed writ of *dedimus* must be made by the commissioners themselves. 1 Taunt. 418.

writ recites the writ of covenant to be depending. Hut. 135. R. 2 Cro. 11. Vide ante, (E 1.)

So, if the *dedimus potestatem* bears *teste* before the writ of covenant. Semb. 1 Rol. 223. R. Cont. Cro. El. 740. Vide supra.

Though it be five years before. Jon. 420.

So, if the caption be before the writ of covenant, the fine shall be good: for the fine being afterwards ingrossed, cannot be avoided. R. 2 Vent. 48. R. Cro. El. 275. (k)

Or, after the return of the writ of covenant, though the writ is not then depending, R. Hut. 135. R. 2 Jon. 83.

So, if there be a caption, and the king's silver paid, the fine shall be good though the conusor dies before the fine be ingrossed. 2 Inst. 511. 5 Co. 39. a.

So, if the conusor dies after the caption, and before the king's silver paid, if the fine be afterwards ingrossed as a fine of a term before his death: for it cannot be averred against the record. R. Hob. 330. R. 3 Mod. 141. R. 2 Vent. 48.

So, if the conusor dies before the time of certifying the caption: for it cannot be averred against the certificate, which is a record. 2 Cro. 12. Dy. 89. b.

But if it appears upon record that the conusor died before the writ of covenant returned, it will be error: for by his death the writ abates. R. Cro. El. 469. R. 2 Jon. 181. Ray. 462. R. Skin. 343. (l)

So, if one conusor dies, it will be error, and the whole fine avoided. R. 3 Mod. 99. Semb. 2 Lev. 127.

So, if it appears upon record that the conusor died before the king's silver was paid. Semb. 2 Leo. 127. 2 Inst. 511.

By the st. 23 El. 3. sect. 5. They who certify the caption of a fine, &c. shall mention the day and year of the acknowledgment: and no clerk shall receive it otherwise, on pain of 5l. for every offence.

If a judge, or commissioners, refuse to certify, a *certiorari* lies to them, commanding them to certify. (m)

And if they do not, an *alias*, *pluries*, and attachment lies against them.

But by the st. 23 El. 3. sect. 5. They are not bound to certify but within a year after the caption.

If a judge or commissioner dies before certificate, a *certiorari* goes to their executors. (n)

If a caption be by R. M. knight, it cannot be alleged, that he was not a knight. R. 2 Cro. 11.

If a caption recites *præcipe* J. Foster, where the writ and *dedimus potestatem* are *inter* J. Forster, it is not material: For they are the same name in sound. R. 2 Cro. 77.

### (E 8.) Licence to agree.

The second part of a fine is the licence to agree. 5 Co. 39.

(k) Vide infra, (E 9.)

(l) As the parties are not supposed to appear before the return day of the writ of covenant, it follows, that no agreement can take place between them until that period; and therefore, if any of the parties die before the return of the writ of covenant, the fine will be void. 5 Cruise, 75. Comb. 57. 71. Ld. Raym. 372. Barnes, 220. 3 Wils. 115.

(m) F. N. B. 146.

(n) Ibid.

For upon every fine there ought to be paid a sum (o) *pro licentiâ concordandi*. Vide 2 Inst. 511. (p)

And this an antient revenue of the crown. 5 Co. 39. a. 2 Inst. 511.

This fine is the same as upon every original in a real action, viz. one noble for every five marks *per ann.* 2 Inst. 511.

And the post-fine is as much as the first fine, and half as much more. 2 Inst. 511.

If the land be under five marks, there shall be no fine in the hanaper, but only one noble *pro licentiâ concordandi*. 2 Inst. 511.

If no value of land appears indorsed upon the writ of covenant, or otherwise, by which the king's silver may be taxed, it is error. R. 2 Jon. 83.

But it is sufficient, if the king's silver be indorsed upon the writ of covenant, under the hand of the judge, though it be not entered upon the roll. Semb. Dy. 320. b. (q)

(o) In suing out a writ of covenant, there is a fine due to the king, called the primer fine; for in every real action for lands and tenements, above the yearly value of five marks, there is due a fine of 6s. 8d. for every five marks of the yearly value of the land upon the original in the Hanaper office. 5 Cruise, 75. 2 Inst. 511. Booth, 247.

(p) This fine is called the king's silver, and is paid on obtaining the *licentia concordandi*; because the king, by such composition, loses the fine, amerciaments, and other advantages that would have accrued to him upon the judgment or nonsuit. 2 Inst. 511. Barnes, 218.

(q) 1. The king's silver was entered on the writ of covenant in the following manner: *Robertus Drury dat dominæ Regine, sept. lib. pro licentia concordandi cum Thoma Tey arm. et Eleonora uxore ejus de placito conventionis de maneriis de, &c. &c. et habet chirographum per pacem admissum coram Jacobo Dyer, &c.* And such entry ought to contain, first, the sum given for licence to compound; secondly, the party who pays it, that is, the person in whom the fee is to be vested; thirdly, the plea, and between whom; and fourthly, the land for which the fine is paid. 5 Cruise, 77. 5 Rep. 39. a. — 2. If any of the parties die before the entry of the king's silver, the fine is in general void; because the king's silver not being due until the return of the writ of covenant, and being paid for permission to accommodate the suit, the agreement of the parties cannot be considered as lawful until it is entered; consequently if the demandant or tenant dies before that is done, the fine will have no effect; being similar to a judgment given in an adversary suit, after the death of one of the litigating parties. 5 Cruise, 78. — 3. A man and his wife acknowledged a fine before commissioners, the 26th March 1621, and the wife died on the 27th of the same month. The 28th composition was made in the alienation office upon a writ of covenant, made returnable in Hilary term before, and the king's silver was entered in the office of the king's silver as of the same Hilary term, and so the fine was paid and engrossed. The heir-at-law of the wife moved in the Easter term following against this fine; but upon debate, the court resolved that the fine must stand. 5 Cruise, 78. Hob. 530. Dyer, 220. b. — 4. A fine was acknowledged by a man and his wife on the 27th of December, 1689, but by reason of King James's abdication, and his carrying away the great seal, there followed a stay of proceedings at law, and the woman died on the 22d of February. The king's silver was paid, as upon a writ of covenant in King James's time, though no writ was then sued out. Afterwards a writ of covenant was purchased, returnable in Michaelmas term preceding, sealed with the seal of King William and Queen Mary, and the fine was engrossed as of Michaelmas term. It was moved, that this fine should be vacated; but the court, after the cause had been twice argued, gave their opinion *seriatim* that the fine should stand, as the entering of the king's silver after the death of the parties could not then be examined into, the fine being engrossed and completed as a fine of Michaelmas term. 5 Cruise, 79. 3 Mod. 140. — 5. A fine was acknowledged before commissioners on the 13th of May 1754. The writ of covenant was tested the first day of Easter term in five weeks, (19th May.) It was compounded, and the pre-fine paid between the 17th and 20th of May, and after passing the return, warrant of attorney, and *custos brevium* office, was brought to the king's silver office on the 11th of June, and the clerk then entered the king's silver or post fine in his book, and on the writ of covenant. Mary Nunn, the cognizor, died on the 27th of May.



May. A *caveat* to prevent the completing of this fine was brought to the king's silver office the 13th of June, before the record was made up in form, in behalf of John Nunn, eldest son and heir of the cognizor. A rule to shew cause why that *caveat* should not be withdrawn was made absolute, and the court utterly exploded the notion which prevailed, undoubtedly by mistake, in *Harneis v. Micklethwaite*, Barnes, 214., that the king's silver was the pre-fine, or fine, for licence to alienate, whereas the king's silver is the post-fine, or *fine quæ pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the life-time of Mary Nunn, the cognizor; and from that time the crown had a right to the post-fine, which was entered at the king's silver office before any *caveat* was entered against it. The making up the record in form is a ministerial act, not necessary to be done previous to the *caveat*, as the entry of the clerk of the king's silver was sufficient. 5 Cruise, 79. Barnes, 218.

— 6. When a year and a day has elapsed from the date of the caption, or acknowledgment of a fine without entering the king's silver, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And if a year elapses before the fine is carried to the king's silver office, an affidavit must be made that the parties were alive when the king's silver was made. 5 Cruise, 80. Barnes, 25. 215. — 7. By a rule of the court of common pleas, made in Easter term, 9 Anne, it is ordered, that no fine whatsoever, taken and acknowledged before the chief justice, or any judge of assise, or serjeant at law, if the dates of the caption of such fine shall appear to have been raised, shall for the future pass the queen's silver office, and the queen's silver of such fine be recorded by the said clerk of the queen's silver, before there be an order under the hand of the said chief justice, or some other justice of this court, for his passing and entering such fine, first had and obtained. 5 Cruise, 80. — 8. Formerly the post-fine or king's silver was paid at the king's silver office; but by the st. 32 G. 2. c. 14. s. 1., it is enacted, that on every writ of covenant which shall be sued out for passing of fines in the common pleas at Westminster, the officer whose duty it is to set and indorse the pre-fine payable thereon, shall, at the same time, set the usual post-fine, and indorse the same on the back of the said writ, together with his name or mark of office, in like manner as the same are now indorsed at the king's silver office; which post-fine shall be forthwith paid to the receiver of the pre-fines at the alienation office, with 4d. as his fee for receiving the same, instead of his fee of 4d. charged on lands and hereditaments, and payable to sheriffs, bailiffs, and others, on discharging the same, by 3 G. 1. c. 15.; which fee of 4d. by the said act granted, after the first day of Trinity term, 1759, shall cease; and such receiver shall indorse upon the back of every such writ of covenant one mark of office, as is now used by him on the receipt of pre-fines at the alienation office, with the name of such receiver, and the sum received as the post-fine; which mark of such receiver, shall discharge the manors, lands, and hereditaments comprised in the said writ of covenant, and the cognizees named therein. — 9. By s. 2., the officer or clerk of the king's silver office, or his deputy, shall continue to enter every fine upon record, in the way hitherto used, and make the same entries, and put thereon the same indorsements, with the same mark, and in like manner, as hath hitherto been the practice of the said office in passing fines; and no fine until the same be marked with the sum to which the post-fine amounts in the king's silver office, shall be effectual in law. — 10. By s. 3. where no pre-fine is payable on any writ of covenant, viz. where the lands are, under the yearly value of five marks, the officer at the alienation office, whose duty it is to set pre-fines, shall set on every writ of covenant brought to the said alienation office, on which no pre-fine is payable, a post-fine of 6s. 8d. and shall indorse such post-fine of 6s. 8d. on every such writ of covenant, with his name and mark of office as has been usual; and every such post-fine of 6s. 8d. shall be paid to the receiver of the alienation office before the writ of covenant, on which no pre-fine is payable, be passed at the alienation office; and the receiver on payment of the said 6s. 8d. shall indorse and mark every such writ of covenant, as other writs of covenant are by this act directed to be indorsed. — 11. By s. 4. the officer or clerk of the king's silver office or his deputy, after the first day of Trinity term, 1759, shall not receive any writ of covenant; unless it appear, by the mark and indorsement of such receiver, that the post-fine has been paid. — 12. By s. 5. if after the payment of such post-fine, the writ of covenant, by the death of any of the parties, or other cause, be prevented from passing through the several other offices, so as the said fine is not completed, then the said receiver shall repay to the cognizees, or their attorney, on producing and filing with him the said writ of covenant, every such sum as has been by him before received for the post-fine; and such writ of covenant so remaining filed with such receiver, shall be a discharge to such receiver. — 13. By a rule of the court of C. B. made in Easter term, 36 G. 3.; it



(E 9.) The concord:—*Fine sur conusance de droit come ceo, &c.*

The third part of a fine is the concord. 5 Co. 39. a. (r)

And this contains the substance of the fine. (s) 5 Co. 39. a. (t)

All

it is ordered, that no fines which shall appear to have been acknowledged more than twelve calendar months, shall be permitted to pass the king's silver office, without a rule of court, or an order under the hand of the lord chief justice, or some other judge of that court. And that where the conuzor or conuzors shall be all living at the time of making the application for such rule or order, an affidavit shall be made thereof. And in case any or either of the conuzors of such fine should not then be living, an affidavit shall be made, stating the time of the death of such conuzor or conuzors; and the application in such case for a rule or order, that the said fine may pass the king's silver office, shall be made to the court by motion, if in term time, or if in vacation to the lord chief justice or some other of the justices of that court, at his chambers. And that the rule or order in such last-mentioned cases, when obtained, shall be filed with the *præcipe* and concord of the fine at the king's silver office. 1 B. & P. 530.

(r) 1. Which is entered into openly in the court of common pleas, or before the chief justice of that court, or commissioners duly authorised for that purpose. 5 Cruise, 83. 5 Rep. 39. a. — 2. It is usually an acknowledgment from the deforciant, or those who keep the others out of possession, that the lands in question are the right of the demandant; and from the acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. Ibid. — 3. And the form of the concord is this: And the agreement is such, to wit, that the aforesaid A. (the deforciant in the original writ) hath acknowledged the aforesaid manors, lands, tenements, and hereditaments, with the appurtenances, to be the right of him the said B. (the plaintiff or demandant) and those he hath remised and quit-claimed from him the said A. and his heirs, to the aforesaid B. and his heirs for ever. And moreover the said A. hath granted for himself and his heirs, that he will warrant to the aforesaid B. and his heirs, the aforesaid manor, lands, tenements, and hereditaments, with the appurtenances, against him the said A. and his heirs for ever. 5 Cruise, 83. — 4. By the common law, indeed, the cognizor seems to have been bound to warrant the lands to the cognizee, though no express words to that purpose were inserted in the fine. Thus Bracton says, *Item sufficit finis factus in curia domini regis, licet expressa warrantia vel homagium et servitium non intervenerit; dum tamen constiterit, per finem et chirographum, quod ille qui tenet, tenere debeat de eo qui vocatur ad warrantiam.* Bract. 382. a. 389. a. 5 Cruise, 84. — 5. But in course of time it became the practice to annex an express warranty to all fines, which is still continued. 5 Cruise, 84. Vide infra in the text.

(s) 1. The loss of the concord was supplied by another, that it might pass the *custos brevium* office. 4 Taunt. 195. — 2. So a fine was allowed to pass by a copy of the *præcipe* and concord left with the judge, the original having been lost. 1 Mars. 553. 6 Taunt. 231. — 3. So if the clerk of an attorney employed to levy a fine abscond, whereby the papers are mislaid, the court will permit such fine to be afterwards perfected, although the time allowed by rule of court of Trin. 52 G. 3. be exceeded. 1 B. Moore, 125. — 4. A fine was varied, by omitting a conusor, whose acknowledgment had been incorrectly taken. 5 Taunt. 249. — 5. A fine was permitted to pass, where the Christian name of one party had been interlined after acknowledgment by another party. 6 Taunt. 586. — 6. A fine was permitted to pass as to all the parties as one fine, on, in addition to the original, a new *præcipe* and *dedimus*, under which the acknowledgments of all but one, who was abroad, were taken anew, to correct the misnomer of another in the first writ. 4 Taunt. 817. — 7. The court will not permit a fine to pass, which is left imperfect by the attorney's laches. 5 Taunt. 305.

(t) 1. The *concordia facta in curia* is the complete fine; and therefore, if after the concord is acknowledged in court, one of the cognizors dies, still the cognizee may proceed with this fine, against the surviving cognizor. 5 Cruise, 84. — 2. Two brothers acknowledged the concord of a fine, and then the elder brother died; and held that the cognizee might proceed with his fine as against the surviving brother, and take out his writ of covenant accordingly; the death of his elder brother being no impediment; for the acknowledgment of each person was good against himself, and should operate for as much as he could pass. Hob. 329. — 3. A fine was stopped at the king's silver office, for want of an affidavit that the parties were living, a year having elapsed since the

All fines agreed to be levied are executed, or executory. Vide West, Symb. 5. b. 2 Inst. 513. (u)

A fine executed is *sur conusance de droit come ceo, &c.* Upon a release, or upon a surrender. Vide West, Symb. 6. 2 Inst. 513.

A fine *sur conusance de droit come ceo que il ad de son done* is so called from those words in the fine, (x) and it is the most high and powerful fine. (y)

Antiently it had only these words *recogn' maneriam, &c. esse jus ipsius A. ut illa quæ iidem A. & B. habent de dono (z) prædict' D.* 2 Inst. 513.

Afterwards these clauses were added, *et remiserunt et quiete clam', &c.* and the clause of warranty. 2 Inst. 513.

A fine *sur conusance de droit come ceo, &c.* grants the fee (a) to the conusee (b): and therefore there cannot be a remainder over upon such fine. Pl. Com. 248. a.

But it grants the fee only by implication, which may be controuled by an express limitation for life. R. 1 Sal. 340. (c)

If the *præcipe* entered in the concord be *duobus messuagiis*, where the writ of covenant is *duobus toftis*, it is not material: for the concord re-

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the acknowledgment; and one of the cognizors being dead, application was made to the court that he might be struck out, and that the fine might pass as to the other cognizor. This motion was denied; but a rule was made that the surviving cognizor should shew cause why the fine should not pass generally as to all the parties, and upon affidavit of service, the rule was made absolute. Barnes, 215.

(u) Vide infra, (E 15.)

(x) The form of this fine is, And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid manor, &c. to be the right of him the said B., as that which the said B. hath of the gift of the aforesaid A.; and that he hath remised and quit-claimed from him the said A. and his heirs, to the aforesaid B. and his heirs for ever. 5 Cruise, 104.

(y) And it is the best and surest kind of fine; for the deforciant, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the formality of an actual feoffment with livery of seisin, acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff; so that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, '*cognoscit*,' the right to be in the plaintiff or cognizee as that which he had *de son done*, of the proper gift of himself, the cognizor. 2 Comm. 352.

(z) Formerly lands purchased of different persons were allowed to be comprised in the same concord; and every vendor warranted against himself and his heirs only; but by an order of Lord Chancellor Hatton, reciting that by fines of this sort her majesty was defrauded of the profits of her post-fines, and of the seals on writs, and the chancellor and others lost their fees; the cursitors are authorised to stay a writ where there is more than one demandant, and one deforciant, except coparceners, joint tenants, and tenants in common. But the cursitors will permit two separate purchases to be comprised in one fine, on an affidavit that the value of both together, does not exceed two hundred pounds. Wils. on Fines, 47. 5 Cruise, 87.

(a) Vide supra, Estates by Grant, (A 2.) in notis.

(b) 1. The object of fines being to settle the possession, not only for the present, but for ever, in the most certain and secure manner, the judges never allow lands to be limited in the concord of a fine to two persons and their heirs, but always direct them to be limited to the two persons, and to the heirs of one of them. 5 Cruise, 86. Bro. Abr. tit. Fine, 7. Co. Read. 8. 5 Rep. 38. b. 2 Taunt. 198. — 2. The necessity of the case however requires that where the lands comprehended in a fine are held in gavelkind, this rule should be dispensed with; and therefore when a fine is levied of lands of this sort, the judges will permit them to be limited to two or more persons and their heirs. 5 Cruise, 86. Rob. Gav. 132. — 3. For the reason before given, a warranty ought not to be allowed in the concord of a fine from two persons and their heirs. Co. Read. 3. — 4. But a warranty has been allowed from three persons and their heirs, where the lands were held in gavelkind. Rob. Gav. 132.

(c) Vide supra, Estates by Grant, (A 2.) in notis.

lates to the writ of covenant, and the *dedimus potestatem*, and entry of the *præcipe* upon the concord is more than is necessary, and ought to be a rehearsal of the substance of the writ; but if it be variant, it is idle. R. 2 Cro. 78. (d)

If a *dedimus potestatem* and concord upon it be five years before the writ of covenant, where by the foot of the fine it is said, *hæc est finalis concordia capta* 7 Jac., it shall be good: for it shall be intended another concord according to the foot of the fine. R. by 2 J. 2. Cont. Jon. 420. (e)

#### (E 10.) Fine upon a release.

A fine upon a release is, when he in reversion releases by fine his estate to his lessee for life, or years.

If a joint-tenant releases by fine to his companion. 2 Cro. 696.

If a donor of fifty acres has other fifty acres in K. and levies a fine of one hundred acres to the donee, who renders one hundred acres to the donor for life, &c. this operates as a release as to the fifty acres contained in the gift, and the render operates as to the other fifty acres only: for it shall be restrained to the quantity intended by the deed declaring the uses. Poph. 104.

But a fine does not operate by way of release, where the conusee has no estate of freehold, either in remainder, or reversion, or there is no privity between the conusor and conusee. Ray. 146. Vide Release, (B 3.)

#### (E 11.) Fine upon a surrender.

A fine upon a surrender is, when a lessee for life, or *pur autre vie*, tenant in tail after possibility, tenant by the curtesy, or in dower, by fine surrender their estates to him in reversion.

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(d) 1. The concord comes in lieu of the sentence which would have been given in case the parties had not compounded the cause; and is therefore considered as exactly similar, and attended with the same consequences, as a judgment in an adversary suit. The cognizance must therefore be made of those things only, and to those persons only, who are named in the original writ, on which the fine is levied; because the cognizance being in the nature of a judgment, binds only those persons and things which are judicially before the court. 5 Cruise, 85. Co. Read. 6. — 2. This rule, however, admits of a few exceptions; for a remainder may be limited in the concord of a fine, to a person not named in the original writ; in the same manner as a remainder may be limited, in a deed, to a person who is not a party. Ibid. — 3. And if a *præcipe* be brought against a tenant for life, and upon his default the person in reversion is received, he may levy a fine of his reversion to the demandant, although he is not named in the original writ. 5 Cruise, 85. Co. Read. 11. — 4. So if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good; but a fine levied by a vouchee to a stranger is void. 3 Rep. 39. b.

(e) 1. It was formerly the practice for the cognizor to make the cognizance, that is, to acknowledge the concord of the fine, before any original writ had been sued out; and this custom so far prevailed, that the judges uniformly supported such fines; but in all cases of this kind, an original writ must have been sued out and made returnable on some day previous to that on which the concord was acknowledged: a *licentia concordandi* must also have been obtained; for these circumstances were absolutely necessary to complete the fine. 5 Cruise, 84. Hob. 330. — 2. The practice of acknowledging the concord of a fine before the writ of covenant was sued out, was often productive of great inconvenience and irregularities; which are now prevented by a rule of C. B., by which it is ordered that every fine, at the time of signing the judge's *allocatur* thereon, shall have the writ of covenant sued out and annexed thereto. 5 Cruise, 84. 1 H. Bl. 526. — 3. Lands situated in different counties may be contained in the same concord, though there must be several writs of covenant. Dyer, 227. 2 Inst. 512. a.

A fine

A fine upon a surrender is in the form of a fine (*f*) *sur conusance de droit come ceo, &c.* saving that they add the words *sursum reddidit*, and omit the warranty.

(E 12.) *Sur conusance de droit tantum.*

Fines executory (*g*) are a fine *sur conusance de droit tantum* (*h*), or, *sur grant et render*. Vide West, Symb. 6.

A fine *sur conusance de droit tantum* omits the clause *come ceo que il ad de son done*. (*i*)

(E 13.) *Sur grant et render.*

A fine *sur grant et render*, is (*k*) when by the same fine the conusee renders the estate granted, or part of it, or a rent out of it, to the conusors, or some of them.

And this fine shall be always levied upon a fine *sur conusance de droit come ceo, &c.*; for, if it should be levied upon a fine executory, the conusee has nothing which he can render to the conusor, till execution. Vide West, Symb. 6.

Or it may be upon fines upon a release, or surrender: for those are executed.

The render ought to be of a thing issuing out of the same land con-

(*f*) Vide infra, (E 12.) in notis.

(*g*) Vide infra, (E 15.) in notis.

(*h*) Or upon acknowledgment of the right only, without the circumstance of a preceding gift by the cognizor.

(*i*) 1. This species of fine is generally used to pass a reversionary interest, which is in the cognizor; for of such reversions there can be no feoffment or grant supposed; as the freehold and possession, during the particular estate, is vested in a third person. 5 Cruise, 105. — 2. It may also be used by a tenant for life, in order to make a surrender of his life-estate to the person in remainder or reversion; and it is then called a fine upon surrender. Co. Read. 5. — 3. The form of this fine is, And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid tenements, &c. to be the right of the said B.; and he hath granted for himself and his heirs, that the aforesaid tenements which W. R. and M. his wife hold for the term of the life of G. of the inheritance of the said A., on the day on which the agreement was made, and which, after the decease of him the said G., ought to revert to the said A. and his heirs, shall, after the decease of the said G., entirely remain to the said B. and his heirs for ever. 5 Cruise, 106. — 4. It passes an estate in fee-simple without the word 'heirs.' Ibid. Co. Read. 6. — 5. And seems to have been, the most antient species of fine, for the demandant was obliged to follow the rules of law, and sue out a writ of possession; but when it became usual to procure a feoffment of the lands first, a writ of possession was unnecessary; which probably gave rise to fines *sur cognizance de droit come ceo, &c.* Ibid. — 6. If there be tenant for life, remainder for life, and the first tenant for life levies a fine to the person in remainder, *sur cognizance de droit tantum*, it will operate as a surrender of his estate for life; because by this fine the tenant for life acknowledges all the right which he had in the lands to belong to the person in remainder. Co. Read. 3.

(*k*) 1. It is a double fine, comprehending the fine *sur cognizance de droit come ceo*, and the fine *sur concessit*. 5 Cruise, 107. — 2. It is used in order to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo, &c.*, conveys nothing but an absolute estate, either of inheritance, or at least of freehold; for in this fine the cognizee, after the right is acknowledged in him, renders or grants back to the cognizor some other estate in the lands. 5 Cruise, 107. — 2. The form of the fine is, And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid tenements to be the right of him the said B., as those which the said B. hath of the gift of the aforesaid A. and those he hath remised and quit-claimed from himself the said A. and his heirs for ever (warranty from the cognizor); and for this acknowledgment, remise, quit-claim, warranty, fine, and agreement, the said B. hath granted to the said A. the aforesaid tenements, &c. And this he hath rendered to him in the same court, to hold the said tenements to the said A. and the heirs of his body. Ibid.

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tained in the fine, and not of a thing collateral, or of another nature, which is not issuing out of it, nor incident to it. 2 Inst. 514. (l)

It ought to be some party to the fine, if it be not by way of remainder. 2 Inst. 514. 4 Leo. 26.

So a render shall be only of the lands granted by the fine, and intended to be passed by it, though the parcels comprised are sufficient for more lands: and therefore, if a donor of 50 acres in K., having other 50 acres there in fee, by fine grants 100 acres in K. to the donee, who renders 100 acres to the donor for life, &c. nothing shall be rendered but the 50 acres in fee. R. Poph. 104. (m)

And a fine *sur grant et render* operates as a feoffment and refoffment. R. 1 Sal. 337. (n)

But a render shall be transposed by construction, to make it effectual: as, if a fine be to D., who renders a rent out of it, &c. to A. and B. and the heirs of B., and afterwards renders the tenements out of which, &c. to A. and B. for life, remainder to C. in tail, remainder to the heirs of B.; it shall be a good render of the rent. 1 Leo. 255. Cro. El. 226. (o)

So, if a render be of a remainder to A. upon condition (p), and for default, &c. to B.; it shall be good. Pl. Com. 34. b. (q)

(l) A rent cannot be reserved on a fine which is executed; because, as the cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of the lands whereof he has already conveyed away the absolute property; so that the *reddendum* comes too late, when a precedent absolute gift, without any such reservation is before acknowledged. 5 Cruise, 105. Rol. Abr. tit. Fine, O. pl. 14.

(m) 1. In a fine of this sort, the render must be made of the lands demanded in the original writ, or of something issuing out of those lands. 5 Cruise, 108. Co. Read. 11. 2 Rol. Abr. 15. — 2. Thus, if the cognizance be made of the manor of Dale, the cognizee cannot make a render of the manor of Dale; or if the cognizance be made of the third part of a manor, the render cannot be made of the whole manor; because the court can only determine the right of that about which the parties contended, and which was demanded in the original writ. Ibid. — 3. But if the cognizor acknowledges all his right in the land to be in the cognizee, and the cognizee in return grants and renders to the cognizor a particular estate in the land, or a rent, or common, out of it, the render is good; because the determination entirely refers to the things in dispute; one party taking the ultimate property in the land, and the other a particular estate in it: all which is comprehended in the original writ. Ibid. — 4. It follows, from the same principle, that the lands must be rendered, in the first instance, to some person named in the original writ. But an estate may be rendered, by way of remainder, to a person not named in the original writ, as well as in any other kind of concord. Ibid.

(n) 1. And therefore gives a new estate. — 2. But as the cognizee has only a seisin of an instant of that which he renders, it will not entitle his wife to dower.

(o) This species of fine being generally used to create particular limitations of estates, is construed rather as a private deed or conveyance, than as a judgment in an adversary suit; and therefore it need not have such a precise form as other fines. Touch. 18. 5 Rep. 38.

(p) 1. The judges ought not to permit a fine to be levied upon conditions; nor should a saving or exception, or a clause of re-entry, be allowed in a fine. But if a fine is actually levied to two persons and their heirs, or with a warranty from two persons and their heirs, or upon condition, with a saving, exception, or clause of re-entry; such fine will notwithstanding be valid, upon the principle that *fieri non debuit, sed factum valet, et facta tenent multa quæ fieri prohibentur*. 5 Cruise, 87. 2 Rep. 74. b. 5 Rep. 38. b. 12 Rep. 125. — 2. And Plowden has given some instances of fines levied on condition, which were allowed to be good. Plowd. 34.

(q) 1. If lands be rendered by fine to a person and his heirs, the lands are thereby immediately bound. And though the person, to whom the render is made, die before execution, yet his heir will have the lands; for the fine having been levied in the lifetime of the parties, the lands are so bound by it, that it cannot be altered. 5 Cruise, 110. 5 Rep. 156. a. — 2. And a declaration of the uses of a fine of this kind, which is contrary to the grant and render, is void. Clayt. 94.

So,



(E 14.) *Sur concessit.*

So a fine may be *sur concessit* (r), when tenant for life, or for years grants his estate.

So, if he in remainder grants his estate to tenant for life. 2 Cro. 40.

So, if A. and B. levy a fine to C. who renders to B. in tail, and if he dies without issue, *quod tenementa integre remanebunt* to A. this operates as a fine *sur concessit* of the reversion to A. R. Cro. El. 727. 792.

A fine *sur concessit* grants only that which the party may lawfully grant; and does not divest the estates of others in remainder. Semb. per 2 J. 2 Lev. 154. (s)

## (E 15.) How a fine executory shall be executed.

A fine executory may be executed by entry, or by writ. Vide West, Symb. 57. Vide Execution, (A 6.) (t)

For the conusee may enter into the lands comprised in the fine. Vide West, Symb. 57.

Or, within a year, may have (u) an *habere facias seisinam*. Vide West, Symb. 57. (x) And

(r) 1. Which is where the cognizor, in order to make an end of all disputes, though he acknowledges no precedent, right, or gift, grants to the cognizor an estate *de novo*, by way of supposed composition; which may be either an estate in fee, in tail, or for life, or even for years. 2 Comm. 353. — 2. The form of this fine is, And the agreement is such, to wit, that the aforesaid A. hath granted to the aforesaid B. the aforesaid tenements, &c. to hold for, &c. 5 Cruise, 106.

(s) 1. A fine *sur concessit* will not be allowed to be levied for the purpose of passing such estate as the party may have, by the description of all and whatsoever he hath in the tenements. 2 Taunt. 198. — 2. A man and his wife, being seised of different estates in different hereditaments, and intending to pass them all, acknowledged the concord of a fine *sur concessit*, 'to hold the said tenements, with the appurtenances, to the cognizee and his heirs, for and during all the term, and other estates, and all and whatsoever else the said S. and A. had in the tenements aforesaid, with the appurtenances.' The chirographer of fines refused to make out the indentures, alleging that the limitation must be certain, that is, to the cognizee and his heirs for ever, or for the life of the tenant, or *pour autre vie*; and the court refused to permit the fine to pass. Ibid.

(t) 1. Whenever a judgment is obtained, whether in an adversary or an amicable suit, the next step is to procure the execution of it, by obtaining the actual possession of the thing recovered; and for this purpose the law has provided, that in all real actions, the person who recovers shall have a writ of *habere facias seisinam*, directed to the sheriff of the county in which the lands are situated, commanding him to deliver the possession, according to the judgment. 5 Cruise, 101. — 2. Fines having at all times been considered as judgments, a writ of *habere facias seisinam* always issued, to put the party who acquired the lands by a fine, into possession of them. When fines became common assurances, the purchaser, in order to avoid the trouble and expense of suing out a writ of possession, had in many instances livery of seisin given him in the country, and for his further assurance obliged the vendor to covenant that he would levy a fine to him; but as the purchaser was already in possession, no writ of *habere* was necessary. Ibid. — 3. This practice gave rise to the distinction between fines *executed* and fines *executory*. A fine executed, immediately transferred the possession from the cognizor to the cognizee, who might therefore enter on the lands which had been conveyed to him by the fine, as soon as it was levied. 5 Cruise, 102. Co. Read. 2.

(u) 1. If a fine executory is levied of a reversion, depending on an estate for life or years, or of a seignory, or any thing which lies in grants, they will pass immediately; because it would be impossible to give actual possession of them. 1 Rep. 97. a. — 2. And since the statute of uses, writs of possession are never sued out when fines are levied to uses; for the statute executing the possession to the use, the cognizee is immediately in possession without attornment. 5 Cruise, 103. Booth, 250. Pigot, 49. 6 Rep. 68. a. — 3. And by the 4 & 5 Ann. c. 16., attornment after a fine is become unnecessary. — 4. So that writs of possession are now totally disused. Ibid.

(x) If the party to whom the estate was limited by a fine executory, was in possession

And after the year, a *scire facias*. Vide West, Symb. 58.

A *scire facias* for executing a fine may be brought by the issue of tenant in tail. West, Symb. 58.

Or, by him in remainder. Co. Ent. 632. b.

Or, by the heir of him in remainder. West, Symb. 59. a. Co. Ent. 625. 630.

To a *scire facias* for executing a fine, the defendants may plead *quod partes finis nihil habuerunt*. West, Symb. 59. a. Co. Ent. 631. b. Vide post, (H 1.)

*Quod partes finis habuerunt* only for life. Co. Ent. 633. a.

So, to a *scire facias* for executing a fine by the heir, the defendant may plead, that the plaintiff is a bastard. West, Symb. 63. b.

That another was heir, *cujus statum ipse habet*. West, Symb. 62. a.

Until a fine be executed, nonclaim to bar any stranger does not begin. Pl. Com. 357. b.

### (E 16.) The note, and foot of the fine.

After conusance, and before the ingrossing of a fine, the chirographer (y) makes a note of the fine, which contains an abstract of the original and the concord. (z) 5 Co. 39. a.

The office of chirographer is appointed by the king's patent. Dy. 176. a. Vide Courts, (C 2.)

If the writ of covenant with the *dedimus potestatem* be returned, the concord made, the king's silver paid, and the note of the fine made, the fine is then complete. Semb. Pl. Com. 431. (a)

So, by the st. 5 H. 4. 14. writs of covenant, and other writs whereon fines be levied, with the *dedimus potestatem* if any be, the knowledges, and notes of the same, before they be drawn out of the common bench by the chirographer, shall be inrolled of record by the chief clerk (viz. the *custos brevium*) for the old fee of 22d. To the intent, that if the notes in the custody of the chirographer, or the fines, be imbezilled,

sion at the time when such a fine was levied, he need not have sued out a writ of *habere facias seisinam*, for in that case the fine would enure by way of extinguishment. Touch. 4.

(y) Fines are to be carried to the chirographer within fourteen days after passing the king's silver office. 4 Taunt. 601.

(z) 1. It is only a docquet taken by the chirographer, from which he draws up the indenture. — 2. It is sometimes taken, in the old books, for the concord. 5 Cruise, 87.

(a) 1. A fine, says Lord Coke, is said to be levied, when the writ of covenant is returned, and the concord and the king's silver duly entered; this maketh the land to pass, and from this shall the year and day be accounted, albeit the fine be engrossed afterwards. 2 Inst. 517. — 2. When the mode of levying a fine by first acknowledging the concord, the suing out an original writ, and paying the king's silver, was allowed, a different manner of expressing the rule laid down by Lord Coke was adopted; for the fine was said to be completed upon the entry of the king's silver, provided it was previously acknowledged; and if any of the cognizors died before the remaining parts of the fine were perfected, still the fine would be valid. 5 Cruise, 95. — 3. A motion was made to stay the passing of a fine, which was acknowledged by an infant of thirteen years old. The court said, that as the king's silver was paid, it was gone too far; but they assigned the infant a guardian, who had instructions to bring a writ of error to reverse it. 5 Cruise, 76. 1 Freem. 78. — 4. In consequence of the rule of court already stated, by which it is required that the writ of covenant shall be sued out before the concord is acknowledged, it may now be laid down, that a fine is completed when the concord is duly acknowledged.

recourse

recourse may be to the said roll to have execution in the same manner as if the fines were not imbezilled. Vide post, (G. 3.)

And this is called the foot (*b*) of the fine.

Which contains the day, year, and before whom levied. 5 Co. 39. a.

### (F) *Quid iuris clamat*, &c.

If a fine be of a reversion or remainder, if the particular tenant refuses to attorn, a *quid iuris clamat* issues, before the ingrossing, out of the record remaining with the *custos brevium*. West, Symb. 47, &c. Pl. Com. 481. b.

So, if a fine be of a rent, and the terre-tenant refuses attornment, a *quem redditum reddit* issues. West, Symb. 52. b.

So, if a fine be of a seignior, manor, &c. a *per quæ servitia*. West, Symb. 53. a.

So, though a fine be by one parcener, of her reversion to the other. R. 3 Leo. 6.

If the conusee dies pending the *quid iuris clamat*, his heir shall have a new writ. Cro. El. 693.

But a *quid iuris clamat* does not alter the fine, though the defendant, has judgment for him.

And if he pleads to part that he himself has the fee, and attorns for the residue; the fine may be ingrossed for the whole. R. Cro. El. 693.

By the st. 23 El. 3. no attornment on a fine shall be entered on record, except the person, mentioned to attorn, appear in court in person, or by attorney warranted by hand of the judge, or justices of assise, on a writ of *quid iuris clamat*, *quem redditum reddit*, or *per quæ servitia*, as the case requires: and if entered, it shall be void, without error, &c.

But now, by the st. 4 & 5 An. 16. all grants and conveyances thereafter to be made of any manors or rents by fine or otherwise, or of the reversion or remainder of any messuages or lands, shall be good and

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(*b*) 1. Chirograph, or indenture, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made and engrossed at the chirographer's office, and delivered to the cognizor and cognizee; beginning with these words: 'This is the final agreement,' &c. and then stating the whole proceeding at length. Thus the fine is completely levied at common law. 5 Cruise, 88. — 2. A fine is said to be engrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be engrossed, provided the concord be recorded; for Lord Coke observes, that a fine is a perfect record before it is engrossed. And a fine may be engrossed at any time after it is levied. Ibid. Co. Read. 1. — 3. Sir John Brome, in 33 H. 8., acknowledged a fine of certain lands. The king's silver was entered, and the cognizance taken; and in 29 Eliz. the person who claimed under this fine came into court, and prayed that the fine might be engrossed, it appearing upon examination that the party to whom the fine was levied was seised after the fine, and had suffered a common recovery of the land, which had been enjoyed according to the said fine. The court ordered the fine to be engrossed. 5 Cruise, 88. 4 Leon. 96. Dyer, 254. a. — 4. The record of the fine which remains in the possession of the chirographer, is the principal document; so that if there is any difference between it and the record which remains with the *custos brevium*, that which continues with the chirographer is considered as the true record. 5 Cruise, 88. 3 Leon. 183. Godb. 103. — 5. The stat. 23 Eliz. c. 3. s. 6., enacts, that the chirographer shall every term write out a table of the fines levied in each county in that term, and shall affix it in some open part of the court of Common Pleas, all the next term; and shall also deliver the contents of each table to the sheriff of each county, who shall, at the next assizes, fix the same in some open part of the court.

effectual to all intents, without any attornment of the tenants of any such manors, or of the lands out of which such rent was issuing, or of the particular tenant, upon whose estate any such remainder, or reversion was dependant. (c)

### (G 1.) Proclamations, &c.

By the st. 27 Ed. 1. *de finibus levatis, notæ et fines in posterum levandi publicè et solemniter legantur, et placita interim cessant; et hoc fiat per duos dies in septimana secundum discretionem justiciariorum.*

By the st. 4 H. 7. 24. a fine shall be read and proclaimed in court the same term, (d) and in three terms next ensuing the engrossing, and in four several days (but now, by the st. 31 El. 2. only in one day) of the said terms, and the pleas then to cease. (e)

And by the st. (f) 1 Mar. 2 Parl. 7. if the term be adjourned, a fine shall be of as good force, notwithstanding the neglect of proclamations by reason of such adjournment, as if the term had been held from the beginning to the end. 1 Leo. 84.

So, if part of the term be adjourned. (g)

If the conusee dies before proclamations, his heir, if he pleases, may cause proclamations to be made. R. Cro. El. 693.

(c) 1. Applications are sometimes made to the court of common pleas by motion, to prevent fines from being completed; on a suggestion that the parties are disabled by law from levying such fines. 5 Cruise, 94. — 2. And by a rule of court all persons making any complaint against fines acknowledged by infants, *feme covert*s without the consent of their husbands, or persons of nonsane memory, or otherwise disabled by law to acknowledge the same, or by any person in the name of another, or by the like deceit, and obtaining rules for the staying of such fines, shall from term to term, so long as they shall expect benefit or observance of such rules, enter and continue the same rule for that term, or leave copies thereof with the *custos brevium*, clerk of the king's silver, and chirographer, that the same may thereby be the better taken notice of; or in default thereof, the said officers, or any of them, shall not stand farther obliged thereby. And all persons concerned in the obtaining or prosecuting such rules for the staying of such fines so levied as aforesaid, their attornies and clerks, are thereby enjoined, every term, to search and see the books and entries of fines with the clerk of the king's silver, or other officer where entries are kept for that purpose. Wilson on Fines, 96. — 3. And by another rule of court, all manner of caveats and orders for the stopping any fines, shall be renewed every term, and copies thereof left with the clerk of the king's silver, for which he is to demand only his ancient fee of 3s. 4d. the term; and in default thereof, all caveats that shall not be so renewed, shall lose their force and be void. 5 Cruise, 95.

(d) 1. 'At the time when the judges are sitting.' — 2. Hence if proclamations appear to have been made out of term, or on a Sunday, or other festival, on which the court of C. B. does not sit, the proclamations will be all void. And although the proclamations should be made on days which were *dies juridice*. Yet if the contrary appear on record, the proclamations will be void; as no averment can be admitted against the record. 5 Cruise, 99. Plowd. 265. Dyer, 181. b. — 3. If the proclamations on a fine be certified in a *certiorari* by the *custos brevium*, and it appear by the certificate, that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer; and if he certifies that the proclamations were well and duly made, the court will direct the proclamations in the office of the *custos brevium* to be amended, according to the proclamations in the chirographer's office: because the chirographer makes the proclamations, and is the principal officer as to them; and the *custos brevium* has only an abstract of them. 5 Cruise, 99. 3 Leon. 106.

(e) Since the making of this act the proclamations are indorsed on the foot of the fine, and are considered as matters of record. Dyer, 234. a.

(f) By the words of the st. 4 H. 7., if one of the three terms immediately subsequent to that in which a fine was levied was adjourned, the proclamations would have been ineffectual, and this defect could not have been supplied in the next term. Plowd. 371.

(g) Dyer, 186. a. 2 Inst. 519.

A fine without proclamations (*h*) makes a discontinuance, but does not bar an estate tail.

So, a fine in antient demesne. R. Lut. 781. 1 Sal. 340. Vide Ancient Demesne, (G 2.)

So, if a fine be determined or avoided before proclamations passed, it shall be of no effect, but as a fine without proclamations. (*i*) R. 2 And. 109. Pl. Com. 437. Vide Estates, (B 25.) (*k*)

### (G 2.) Ingrossing.

An immaterial variance in the ingrossment from the caption, or concord, signifies nothing: as, if the words are of the same import. R. Cro. El. 275.

So a rent need not be mentioned in the ingrossment, if under 5*l*. though it be in the writ and caption. R. Cro. El. 275.

### (G 3.) Inrolment, and exemplification.

By the st. 23 El. 3. Every writ of covenant, and every writ whereon a fine shall be levied, and its return, the writ of *dedimus potestatem*, and its return, the concord, note, and foot of every fine, the proclamations thereon, and king's silver, may be inrolled, &c. Vide ante, (E 16.)

The justices of C. B. (exclusive of the Ch. J.) shall take care of the inrolments, have an office for that purpose, and take 6*s*. 8*d*. for the inrolment, and 5*s*. for the exemplification of every fine. Sect. 6.

By the st. 27 El. 9. The like inrolment may be of fines in Wales, and counties palatine.

## (H) A fine, how avoided.

### (H 1.) By plea.

A fine (*l*) may be avoided by plea, *quod partes finis nihil habuerunt*. Vide ante, (E 15.) (*m*)

And therefore, if a fine be between A. and B. who were not seised of the lands contained in the fine at the time of the fine levied, a stranger to the fine may plead this plea. 2 Inst. 523.

So the son and heir of A. if he was seised at the time of the fine, may plead it: for he is a stranger when he does not claim the land under his father, though he be privy in blood. 2 Inst. 523. 3 Co. 89. Hob. 333.

So, in every case, where the heir does not claim his estate from

(*h*) The indorsement of proclamations on a fine is not alone sufficient evidence of their having been made. 2 Mars. 170. 6 Taunt. 485.

(*i*) 1. Dyer, 216. a. 1 Bulst. 206. — 2. But if the fine itself is erroneous, the proclamations are then void, because the fine is the principal.

(*k*) Since the st. 4 H. 7., fines have been distinguished into fines at common law, and fines with proclamations. It is in the election of every person who levies a fine to have it proclaimed in the usual manner; and if the cognizee dies before the proclamations are made, his heirs may cause the fine to be proclaimed. 5 Cruise, 100. Cro. Eliz. 692. Dyer, 254. a.

(*l*) Void *ab initio*, either as to all mankind, or as to some particular persons.

(*m*) *Excusatur enim quis quod clameum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quod alius tenuit, ut si ipse qui debuit clameum apponuisse, vel antecessor suus, fuit in seisina de eadem re, quando finis factus fuit, et non ille vel antecessor suus qui finem allegat.* Bract. 436. b.



him to whom he is heir; for *hæres dicitur ab hæreditate*. 3 Co. 88. b. 89. a.

As, if the grandfather levies a fine of the land of B.; his son, being heir also to B. may plead it, though he derives his pedigree by the grandfather. Per 2 J. Jones. Cont. Cro. Car. 524. 543. Jon. 460.

So, if tenant in tail accepts a fine, and thereby renders a rent to the conusor: the issue in tail may plead in avoidance of the fine, *quod partes finis nihil habuerunt*. 3 Co. 89. b.

So, if the tenant levies a fine executory; as, *sur conusance de droit tantum*. Vide 3 Co. 89. b.

So, if tenant for years levies a fine, he in reversion may plead, *quod partes finis nihil habuerunt*. 1 Sal. 241. (n)

So, if tenant in tail dies, having a daughter, and his wife *privement enseint* with a son, and the daughter levies a fine; the son born after may plead, *partes finis nihil*, &c. for he is a stranger. Hob. 333.

The form of pleading is not only, *quod partes finis nihil habuerunt*, but ought to allege, that A. was seised at the time of the fine, under whom he claims. 2 Inst. 523. Lut. 1623. Vide post, (H 2.)

Or, that he (or A. under whom he claims) was seised, *absque hoc quod partes finis aliquid habuerunt*.

Yet though seisin in A. be alleged, it is not traversable; but the issue shall be, whether the parties to the fine were seised. Lut. 1623.

And therefore, the tenant or defendant shall conclude to the country, *et de hoc ponit se super patriam*. 2 Inst. 523. Lut. 1623.

But by the st. 27 Ed. 1. *de finibus levatis* (which restored the common law) parties and privies to a fine are ousted of the plea, *quod partes finis*, &c. 2 Inst. 522.

And therefore, if tenant in tail levies a fine *sur conusance de droit come ceo*, &c. the issue in tail cannot say, *quod partes finis nihil habuerunt*; for he is privy; for he claims as heir, and by descent. R. 3 Co. 89. b. 90. a. R. 1 Leo. 83. 1 And. 170. Sav. 88.

So, in no case, where the issue claims as heir to the tenant in fee, or the tenant in tail, who levied the fine. 1 Leo. 83.

So, if a devise be, that his executor shall sell, who levies a fine to B. and it be said, *quod partes finis nihil habuerunt*; the vendee may aid himself by the special matter: for he is in by the will. 1 Leo. 31.

So, if the issue in tail takes husband, and they levy a fine in the life of the ancestor, and afterwards the husband dies, the wife takes a second husband, and dies; the second husband shall not say, *partes finis nihil habuerunt*, to preserve his estate as tenant by the curtesy, though he was a stranger to the fine: for he claims by her who was a party. 1 Leo. 82.

### (H 2.) How a fine shall be pleaded.

A fine shall not be pleaded, that A. levied a fine, &c. but *quidam finis se levavit*, &c. 2 Inst. 511.

(n) 1. The reason that a fine levied by persons who have no freehold estate in the lands has no effect is, because it divests no estate; those who are entitled to the lands whereof the fine is levied, being in possession thereof; and no estate is barred or effected by a fine, unless it is divested out of the real owner. 5 Cruise, 293. — 2. It is said in the Touchstone, that the cognizor or cognizee of a fine must have an estate of freehold in possession, reversion, or remainder. Touch. 13. — 3. But this is a mistake; for if a person, having only an estate in remainder or reversion, levies a fine, it may be avoided on the ground that *partes finis nihil habuerunt*. 5 Cruise, 294. 3 Atk. 135. 6 B. P. C. 351. Irish, T. R. 567. 2 N. R. 1.

Or it may be, *Et fuit quedam finalis concordia, &c.* 2 Lev. 31: R. Pl. Com. 431. b.

Neither is there any need to allege, that A. who levied the fine, was seised in fee, or of any other estate. Semb. Lut. 1622. 1 Leo. 255.

Or, if it be alleged, it is not traversable. R. Lut. 1621. For it is but form. Sav. 85.

Yet it is the most usual form to allege it. Lut. 1621.

And in a fine *sur conusance de droit tantum*, it ought to be alleged. Lut. 1622.

So it need not be alleged, before what justices the fine was acknowledged. Pl. Com. 105. a.

Or, that a *feme covert* was examined. Pl. Com. 105. a.

Or that the party barred by it was of sound mind, of full age, at large, &c. Pl. Com. 376. a. R. 1 Leo. 76. Sav. 85.

Or, that it was in C. B. For, *coram justiciariis domini regis apud W.* is usual, and well. Pl. Com. 431. b.

Or, that it was ingrossed. Semb. Ant. cont. 1 Leo. 76, 7. Sav. 85.

So, if a fine was acknowledged in Hilary term, and recorded in Easter, it may be pleaded, *quidam finis se levavit termino S<sup>ti</sup>. Hilarii*: for it was a fine before the ingrossing. Semb. Pl. Com. 431. b. 1 Sal. 341.

Or it may be alleged specially, as the truth was. Pl. Com. 431. b. 1 Leo. 76.

Or, *quidam finis se levavit term. Hil. et postea term. P. concess' et recordat.* Bend. pl. 141.

So it may be pleaded, *prout per finem de recordo hic remanen.* &c. without adding, *et per proclam.* 1 Leo. 77. Sav. 85.

So, *prout patet per finem de recordo, &c.* may be omitted. 1 Leo. 77. Sav. 85.

But it is not proper to plead a fine of such land, *inter alia*. 1 Leo. 255.

### (H 3.) By writ of error: — What shall be error.

So a fine may be avoided by writ of error: as, if it be levied in B. R. or other court of record, which has not power to hold plea of it. 2 Inst. 515. Vide ante, (D)

Or, without an original writ. 2 Inst. 513. Vide ante, (E 1.)

So error lies of a fine in B. R. which *coram vobis residet*. R. 1 Sal. 337.

### (H 4. a.) By whom error shall be sued.

Error in a fine ought to be sued by (o) some intitled to it. Vide Pleader, (3 B 9.)

So, by a privy in estate, as by him in reversion, or remainder, after

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(o) 1. The person entitled to a writ of error to reverse a fine, is he who would have had the lands if the fine had not been levied; which, in general, is the heir at law. Dyer, 90. a. — 2. But where one who is seised *ex parte maternâ* levies a fine, in which there is error, the heir *ex parte maternâ* will be entitled to the writ of error. 1 Leon. 261. — 3. The youngest son, when entitled to the lands, by the custom of borough-english, shall have the writ of error, and not the heir at common law, because this remedy descends with the land. Ibid. — 4. A brother of the half-blood, however, is not entitled to bring a writ of error, on a fine levied by his elder brother. 1 Inst. 14. a. n. 6.

an estate tail: for the reversion, or remainder was discontinued by the fine. R. 2 Jon. 182. (p)

And if several persons join in a fine; he only, who has a prejudice by the fine, and an interest in the land, shall have error, without the others. R. 2 Jon. 182. (q)

[(H 4. b.) Against whom.] (r)

(H 5.) How it shall be pursued.

If error be in a fine, a writ shall be directed to the Ch. J. of C. B. to certify the record and process of the fine, another writ to the *custos brevium* to certify the transcript of the foot of the fine, another writ to the chirographer to certify the record and process of the fine in his custody. West, Symb. 71.

And only the transcript shall be removed. 1 Sal. 337. 341.

So there ought to be a *scire facias* against the terre-tenants: for though it is not by law required of necessity, yet it is requisite by the course of the court. R. 1 Sal. 339, 598. (s)

(H 6.) What is not error in a fine.

But by the st. 23 El. 3. No fine shall be reversed for false or incongruous latin, rasure, interlining, mis-entry of any warrant of attorney or proclamations, mis-return, or non-return of the sheriff, or other want of form, in words, and not in substance.

(p) No person can have a writ of error to reverse a fine, who took any estate by it. And upon this principle it is held, that in a fine *sur done, grant, et render*, the cognizor cannot assign error in the grant and render, by which he himself has taken an estate. 1 Rep. 39. b.

(q) 1. Mr. Cruise says, that all those who are parties to a fine, must in general join with the person entitled to the land, in reversing it; but that this rule admits of some exceptions. 5 Cruise, 279. — 2. As in a case where husband and wife were tenants for life, with remainder to an infant in fee, and they all joined in levying a fine, and the infant alone brought error to reverse it on account of his non-age; since the error assigned was not in the record, but without it, namely in the person of the infant, the writ was held to be well sued. Cro Eliz. 115.

(r) The writ must be brought against some one of those who were parties or privies to the fine, and not against the tenant of the land only. But the court will not in general reverse a fine, unless a *scire facias* is returned against the persons who are then in possession. 1 Salk. 339. R. T. Holt, 614.

(s) 1. By st. 10 & 11 W. 3. c. 4. reciting, that fines, recoveries, and judgments were reversible at any time without restraint or limitation, for any error or defect which happened therein, by the ignorance or carelessness of clerks, and sometimes by unavoidable accidents, it is enacted, that no fine or common recovery, &c. shall be reversed or avoided for any error or defect therein, unless the writ of error or suit for the reversing of such fine, recovery, &c. be commenced or brought or prosecuted with effect, within twenty years after such fine levied, or such recovery suffered; with a proviso, that if any person who shall be entitled to any such writ of error as aforesaid, shall at the time of such title accrued, be within the age of twenty-one years, or covert, *non compos*, imprisoned, or beyond the seas; then such person, his or her heirs, executors, or administrators, (notwithstanding the said twenty years expired,) shall and may bring his, her, or their writ of error, for the reversing any such fine, recovery, &c., as he, she, or they might have done in case this act had not been made; so as the same be done within five years after his or her full age, discoveriture, coming of sound mind, enlargement out of prison, or returning from beyond the seas, or death; but not afterwards or otherwise. — 2. In consequence of which statute a writ of error to reverse a fine must be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued; for the time when the fine was levied is the period from which the twenty years are to be reckoned. 2 Str. 1257.

## (H 7.) Judgment for reversal, &amp;c.

If a fine appears to be erroneous, judgment shall be for a reversal.

So B. R. may award a *certiorari* to the chirographer for the fine itself, which shall be cancelled there. 1 Sal. 341.

So, if a fine be levied by a counterfeit person, a *vacat* may be entered on the roll. Cro. El. 531.

So it may be reversed for part. R. Cro. El. 469. (t)

Or, against one conusor, and shall stand in force against the other: as, if an infant tenant in tail, and he in remainder of full age, join in a fine; it may be reversed as to the infant only. 1 Leo. 115.

So, if tenant in tail and others join; it may be reversed against the tenant in tail only, and as to the land entailed. R. 2 Jon. 182.

So, if husband and wife within age levy a fine; upon the special matter, it may be reversed as to the wife only. Semb. 1 Leo. 115.

But, generally, it shall be reversed for the whole: for when husband and wife join in a fine, *prima facie* it shall be intended the inheritance of the wife. R. 1 Leo. 115.

## By claim.

When a fine may be avoided by claim, vide Claim, (B 1, &c.)

## (I) Who are barred by a fine.

## (I 1.) Parties and privies.

A fine is a final bar to all parties and privies to the fine. 2 Inst. 516.

And therefore, if a man levies a fine; the conusor, and all who claim the estate as heir to him, are barred for ever. R. 2 Co. 55.

Though the conusor was tenant in tail, the issue in tail shall be barred. (u) 19 H. 8. 7. a. R. Dy. 3. a. R. Sav. 88. Vide Estates, (B 25.) (x)

So a privy, as an heir by the custom, shall be barred: as, an heir of lands of the nature of gavelkind, or borough-english. 2 Inst. 516.

So, a privy; though the estate was in contingency, and not vested at the time of the fine. R. Pol. 66.

Or not commenced, if he afterwards survives the age at which his estate commences. R. 3 Leo. 227.

So, a privy in estate by succession: as, if an abbot, bishop, &c.

(t) But a fine cannot be reversed in *toto* as to one person, and remain good in *toto* as to another. Ld. Ray. 179.

(u) 1. St. 4 H. 7, c. 24. 32 H. 8. c. 36. — 2. The word *privy* sometimes means that connexion which arises between persons who have entered into a mutual contract with each other, as between donor and donee, lessor and lessee; or else it signifies a relationship of blood, as between ancestor and heir. But in consequence of the statute of Henry the Eighth, it has been determined, that by the word privies in the statute of Henry the Seventh are meant those persons who are not only privies in blood to the persons who levy the fine, but also privies in estate and title to the land whereof the fine is levied; that is, those who must necessarily convey their descent through the cognizor, before they can make out their title to the estate; which comprehends the issue in tail: and a person who is privy within the intention of the stat. 4 H. 7, is an heir in tail within the intention of the stat. 32 H. 8, *et sic e converso*. 5 Cruise, 183. 1 Inst. 271. a. 8 Rep. 42. b. Touch. 21. 9 Rep. 138. Cro. Car. 476.

(x) 1. Bro. Abr. tit. Fine, pl. 1. 1 Inst. 121. a. n. — 2. See the recital of 32 H. 8. c. 36.

levy a fine, his successor shall be barred. 2 Inst. 516. Cont. Pl. Com. 375. Acc. 1 Leo. 84. Vide post, (K 4.)

So, if the conusor grants a term for years to A. in trust for himself, it shall be a bar of the trust. 1 Ch. R. 50.

So a fine *sur grant et render* for years, by a tenant in tail, shall be a bar to the issue in tail. Sav. 106. (y)

So, if A. enters into land, devised to the corporation of London for a charity, and levies a fine, and five years pass; the corporation shall be barred, though it had no notice of the devise. R. Jon. 452.

But a man shall not be barred as privy, who does not claim the estate as heir to the conusor, though he was his heir in blood: (z) and therefore, if the uncle disseises the father, and both die after a fine levied by the uncle; the son shall not be barred, though he was heir to the uncle: for he claims as heir to the father, and not as heir to the uncle.

So he shall not be barred as privy, who is only privy in estate: as, a fine, by one joint-tenant, of the whole, does not bar his companion as privy. 2 Inst. 516.

So a fine by a donee, or lessee, does not bar the donor, or lessor. 2 Inst. 516.

So a fine by tenant for life does not bar his heir, who has the remainder in tail. Sav. 128.

## (I 2.) Strangers: for what interest.

So a fine bars not only parties and privies, and their heirs, but all other people in the world, of full age, &c. who do not make claim, &c. Stat. 18 Ed. 1. *De modo levandi fines*. St. 27 Ed. 1. *De finibus levatis*. Pl. Com. 357. (a)

And therefore, not only estates of inheritance, and freehold, are barred by a fine, but also leases for years. 2 Inst. 517. R. 5 Co. 124.

The estate of tenant by statute-merchant, or statute-staple. 2 Inst. 517. R. 5 Co. 124. Sho. 40. Skin. 262.

And of tenant by *elegit*. 1 Mod. 217.

If (b) the statute be extended, or an inquisition found, before entry. 1 Mod. 217.

So, all interests which are vested, and *in esse*: (c) as, a copyhold, or customary interest. R. 9 Co. 105. Vide Copyhold, (N)

The interest of an executor, who has land for payment of debts. 5 Co. 124.

If *cestui que trust* of a term purchases the inheritance, and levies a

(y) 1. If a tenant in tail accepts a fine from a stranger, it has no operation whatever; and after his death his issue may enter, and aver a continuance of the estate tail in his father. 2 Inst. 517. 3 Rep. 89. b. 1 Mod. 117. — 2. But if a tenant in tail makes a grant and render in such fine, it will then, when executed, bar his issue. Jenk. 275. 2 Inst. 517. — 3. The grant and render however, must be of something that is entailed. Plowd. 435. Jenk. 275. — 4. As a tenant in tail may convey his whole estate by fine, so he may create any lessor estate out of it, which will likewise bind his issue after his death. Plowd. 430.

(z) The privy must be both in blood and estate. 13 Vin. 213. Touch. 21. Hob. 333.

(a) *Infra*, (K.)

(b) 1. But not otherwise. — 2. So where a person has a judgment for debt, and the debtor before execution aliens by fine, and five years pass, yet the creditor may still sue out execution. 1 Ch. Ca. 268. 1 Freem. 211.

(c) Hence remainders and reversions.



fine, the essees shall be barred. R. Cro. Car. 110. R. 1 Sid. 458. 1 Vent. 56. 81. 2 Vent. 329. 1 Lev. 270. Carth. 102. (d)

So, the interest of a lessee for years before entry. R. 5 Co. 124. 2 Cro. 60.

So, if a lease be to commence *in futuro*, and a fine passes, and then the lease commences before the five years pass after the fine; it shall be barred, if it be not claimed. Per 3 J. 2 Cro. 60. (e)

So, the estate of a devisee, if a fine be levied by the heir, before entry. R. Cro. Car. 201.

So a title to dower is barred by a fine of the husband, though it is not consummate till the death of the husband after the fine. Semb. Dy. 224. Dub. Pl. Com. 373. a. Acc. 2 Co. 93. a. 10 Co. 49. b. 99. a. R. Mo. 53.

So, a title to be tenant by the curtesy, by a fine with his wife. Adm. 5 Mod. 67.

So, a title of entry for condition broken. R. Cro. Car. 577.

So, a title of a lessee who never was in possession, but named as a trustee for the wife of the conusor of the fine. R. 1 Ch. R. 64.

(d) 1. A fine is a good bar to a trust estate, as well as to a legal one: because the *cestui que* trust has an equitable interest, and is therefore bound to pursue the proper remedies for securing it; and if this were not the case, the operation of a fine would be much less extensive than it is, as there are so many trust estates now always existing. Thus if A. is seised of lands in trust for B., and a stranger enters on those lands, and levies a fine of them with proclamations; if five years pass without any claim being made, this fine will be a good bar, both to A. who had the legal estate, and to B., who was the *cestui que* trust. 5 Cruise, 208. 1 Ch. Ca. 268. 278. 1 Freem. 311. — 2. But with respect to equitable titles there is a distinction; for where the equity charges the lands only, a fine and nonclaim is a good bar; but where it charges the person only, in respect of the land, it is then no bar. — 3. Thus if a trustee levies a fine of the lands whereof he is seised in trust, to a person who has notice of the trust; or if a man purchases from a trustee, with notice, and levies a fine; the *cestui que* trust will not be barred; because the fine being levied to a person, or by a person who has notice of the trust, the land will continue subject to the trust; and therefore the court of chancery will not permit the fine to be a bar; so that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, and deny his claiming under the trustee; or else, if he does claim under the trustee, he must set forth that he paid a valuable consideration for the lands, and deny that he had any notice of the trust. Gilb. Cha. 62. 5 Cruise, 208. — 3. If however the title is merely a legal one, and a man has purchased an estate which he himself sees has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right; because this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fines being levied. 5 Cruise, 209. 2 Atk. 631. — 4. Where a fine is levied by a trustee, or a person who has notice of the trust, it is not void at law, but the person to whom the fine was levied, without consideration, or with notice, becomes himself a trustee for the real owner. 5 Cruise, 209. — 5. As to how far a fine levied by a *cestui que* trust himself is a bar to his trust estate: before the statute of uses, if a *cestui que* trust had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; because the *cestui que* use had no estate in the land, but was barely tenant at will to his trustees. 5 Cruise, 209. 27 H. 8. 20. Bro. Abr. tit. Fine pl. 4. — 6. But modern chancellors have very much altered the law in this respect, as it has been long since settled, that a *cestui que* trust in tail may, by a fine duly levied, bar his issue, as fully as if he had the legal estate; for otherwise trustees, by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from executing the power given him by the law over his estate, which would be extremely inconvenient, and tend to the introduction of perpetuities. 5 Cruise, 209. 2 Ch. Rep. 78. — 7. Where a married woman is entitled to a trust estate, for her sole and separate use, she may bar it by joining with her husband in a fine. Forrest. 41.

(e) Vide Hard. 410.

So,

So, if a conveyance be obtained from A. by indirect means; a fine and nonclaim afterwards shall be a bar to relief in equity. R. Jon. 416.

So a title to a writ of error shall be barred by a fine, and nonclaim for five years. 2 Inst. 518. R. Mo. 366.

And a title to a writ of disceit, by the lord in antient demesne. 2 Inst. 518.

But this is understood of a subsequent fine; and not of the same fine intended to be avoided by the writ of error, or disceit. R. Skin. 13. Ray. 462. 2 Jon. 181. Pl. Com. 370. b. 1 And. 172.

So a trust shall be barred by a fine: as, if a devise be of land charged with portions, &c. and the devisee levies a fine to A. &c. the portions incurred after the fine are barred. R. 2 Ca. Ch. 247. R. 1 Ca. Ch. 268. 278. If it be without notice. 2 Ca. Ch. 125. Eq. Abr. 257.

So, an equity of redemption. Per Hale, Hard. 512. 2 Ver. 190. Cont. Eq. Abr. 257.

So, a bill of review. 2 Ver. 190.

### (13.) For what, not.

But an interest not vested shall not be barred by a fine: as, if a lease be made to commence *in futuro*, a fine and five years' nonclaim, before the term commences, is not a bar. R. 5 Co. 124. 2 Cro. 61. Noy, 23. Per Hale, Hard. 413.

So, if a statute be acknowledged, a fine by the conusor of his land, and five years' nonclaim, does not bar, if the statute was not extended. 1 Mod. 217.

Or, judgment be suffered. Ca. Ch. 268.

Or, a decree in chancery be against him, who levied the fine. Ca. Ch. 268.

So nothing shall be barred by a fine and nonclaim, which is not divested, and put to a right. R. 9 Co. 106. a. 3 Mod. 196. Ray. 149. (f)

And therefore, if a lessee for years levies a fine, and five years pass; the lessor shall not be barred: for his estate was not divested, but *partes finis nihil habuerunt*. Hard. 401.

If a lease for life be to A. remainder to B. for years, remainder to B. in fee; if B. levies a fine, the estate for life of A. shall not be barred: for it was antecedent, and not divested. Hard. 402.

So, if a man has a rent, or common, issuing out of land, a fine and non-claim of the land does not bar the rent, common, &c. for it was not divested. Vide Pl. Com. 435. (g)

So a fine by a vendee of tenant in tail of the gift of the king, the reversion being in the king, and non-claim for five years, does not bar the issue in tail. Semb. 1 Sid. 166. Vide Estates, (B 31.)

So, if there be a devise for years for payment of debts and legacies, remainder to B. in tail, who enters and pays several, and afterwards levies a fine; this does not bar the term. Dub. 3 Mod. 195. Sho. 73.

So, if a fine be levied by lessee for life, or years, and he continues

(f) 5 Rep. 123. b. Hard. 400.

(g) 5 Rep. 124. a. Cro. Jac. 60. T. Raym. 149. Touch. 23. And see Goodright v. Board and Jones. MSS. 5 Cruise, 270.

the payment of the rent, &c. it does not bar: for it would be fraudulent. R. 3 Co. 77. Fermor.

If a mortgagor levies a fine, and he continues in possession, and five years pass; the mortgagee shall not be barred: for the fine was fraudulent as to him. Per Ch. J. 1 Vent. 82. Per Hale, Hard. 402.

If *cestui que trust* of a term purchases the inheritance, and levies a fine, and the intent appears, that the term shall be preserved to protect the purchaser; the term is not barred. 1 Vent. 82. 1 Sid. 460. Per Vent. 2 Vent. 329. Hard. 401.

If A. conveys to B., and covenants to make further assurance, and afterwards B. leases for years to A. who makes assurance by fine; if the intent appears, that the term shall be preserved, it is not destroyed by the fine. Hard. 402.

If a trustee, or mortgagee, levies a fine, the trust, or equity of redemption, shall not be barred. Per Hale, Hard. 512.

So a trust, or equity, created by a fine and the uses declared upon it, shall never be barred by the same fine and nonclaim. R. Ca. Ch. 278.

So a fine and nonclaim shall not be a bar of an equity, which does not directly charge the land in the fine, but only the person in respect of the land. R. Ca. Ch. 278.

## (K) Who are not barred.

### (K 1.) If they claim within five years.

By the st. 18 Ed. 1. *de modo levandi fines*, all (*h*) were barred by a fine, if they did not put in their claim within a year and a day; and this was the common law. 2 Inst. 518. (*i*)

But by the st. (*k*) 34 Ed. 3 16. nonclaim upon a fine was not a bar (*l*).

(*h*) 1. By the common law, no laches can be imputed to the king; and therefore no delay or omission upon his part, in making a claim, will bar his right. Hence he cannot be barred by a fine to which he is not a party. 5 Cruise, 264. — 2. Nor is the royal prerogative in this instance taken away by the st. 9 G. 3. c. 16. Ibid. — 3. Ecclesiastical corporations, and in general all ecclesiastical persons, who are seised in right of their churches only, and have not an absolute estate in their possessions, being restrained from alienation by several statutes, are not only prohibited from levying fines, but cannot even bar their successors by their non-claim. Ibid. 11 Rep. 78. b. 1 Rol. Rep. 151. Watson, 427. 3 Keb. 775.

(*i*) And it was determined, that in the case of a tenant for life, remainder for life, remainder in fee, if the first tenant for life had aliened his estate, and the alienee had levied a fine, the remainder-man for life might enter, and avoid the fine, both as to himself, and as to the remainder-man in fee; but if the person next in remainder neglected to enter within the year and day, not only he, but also the remainder-man in fee, were for ever barred; and a claim by the remainder-man, within the year and day, would not have saved his right; by which means, the estates of remainder-men and reversioners were frequently barred, by the neglect of the particular tenants. Plowd. 357. 359. 1 Inst. 254. 262. 2 Inst. 51.

(*k*) 1 Rich. 3. c. 7., the clauses of which are copied almost verbatim in 1 Rich. 3.

(*l*) This statute was made, in consequence of the following petition from the commons, which is published in the rolls of parliament, 17 Edw. 3. No. 26. "Item que noncleyne des fines levees sur le rendre en temps a venir ne barre nul home de sa action." To which the king answered, 'Il plect au roi q' desore cest chose soit fait, et q'estatut eut soit fait p'avis des granty at autres de son conseil. 5 Cruise, 177.

Yet by the st. 4 H. 7. 24. (m). a fine (n), &c. shall conclude all (o), as well privies as strangers, &c. saving to every person and persons and their heirs, other than the parties, such right, claim, and interest as they have to, or in the said lands, &c. at the time of the fine engrossed; so as (p) they pursue the same by action or entry within five years after the proclamations made. (q)

And therefore, every stranger to a fine, who has a present right to the land at the time of the fine levied, shall not be barred, if he pursues his claim, by action or entry, within five years after the proclamations made upon the fine.

But a man, who has a present right, ought to claim within five years, otherwise he shall be barred; as, if a lessee for years be ousted, and his lessor disseised, and the disseisor levies a fine; the lessor ought to claim within five years: for he had a present right. R. 9 Co. 105. b. Podger. Vide post, (K. 2.)

So, if a copyholder for life, or years, be ousted, and the lord disseised, and the disseisor levies a fine; the lord ought to avoid it within five years, for he has a present right. 9 Co. 105. b.

If tenant in tail be disseised, and the disseisor levies a fine, and five years pass, the issue in tail shall not have five years after the death of tenant in tail; for his father had a present right to the entail. Pl. Com. 374. a.

(K 2.) Or within five years after a new right accrued.

So, by the st. 4 H. 7. 24., a fine shall conclude, &c. saving to all persons such action, right, &c. as first shall grow, remain, or come to them after the said fine levied and proclamations made, by force of any entail, or other matter had before the said fine (r); so as they pursue their action, right, &c. within five years next after such action, right, &c. accrued.

And

(m) By the st. 34 Edw. 3. c. 16., the efficacy of fines was entirely destroyed, and strangers were thereby allowed to claim lands at any indefinite period of time, after a fine had been levied of them, which must have been productive of very great inconveniences, and occasioned this act. 5 Cruise, 177.

(n) With proclamations; for the statute of nonclaim is still in force with respect to fines that are levied without proclamations. But though fines without proclamations are no bar to the issue in tail, yet when levied by a tenant in tail in possession, they operate as a discontinuance, and of course put the remainder-man or reversioners to their formedon; which now, by the st. 21 Jac. 1. c. 16., must be brought within twenty years after the right accrues, unless the person who has the right labours under any of the disabilities specified in that statute. 5 Cruise, 178.

(o) 1. The object of the st. 4 H. 7., was not confined to the enabling tenants in tail to bar their issue; it was also intended to secure those who were in possession of land against all dormant claims; the words of the statute being so extensive, that they comprehend almost all persons, and almost every kind of estate or interest in lands. 5 Cruise, 199.—2. And where a fine and nonclaim is pleaded, a court of law will not enter into any discussion of the title, till that is accounted for. 2 Blk. 1259.

(p) Although there be no transmutation of possession, and the cognizor be in of the old use, yet after five years the fine will operate as a bar to all claims whatever. 3 Wils. 19.

(q) 1. Explained by 32 H. 8. c. 56.—2. And the doctrine established by them is, that a fine with proclamations shall bar all privies and strangers; and when levied of any manors, lands, tenements, or hereditaments entailed to the person levying such fine, or to any of his ancestors, shall bar the said persons and their heirs, whether lineal or collateral, claiming by force of such entail. 5 Cruise, 183.

(r) 1. Plowden was of opinion, that the purview of the st. 4 H. 7. is only against those who have right at the time of the fine levied; or have future right upon cause arising before;

And therefore, none who has a right accrued after the fine, for a cause done before the fine, shall be barred, if he claims within five years after the new right accrued.

As, if tenant in tail levies a fine, and dies without issue; he in reversion, or remainder shall not be barred, if (s) he claims within five years after the (t) death without issue. (u)

If tenant in tail, by bargain and sale, lease and release, &c. conveys to B. who levies a fine: the issue shall have five years after the death of tenant in tail. R. Cro. El. 896. Noy, 46. (x)

If tenant in tail discontinues, and the discontinuee levies a fine; the issue in tail shall have five years after the death of tenant in tail. Dy. 3. b. Pl. Com. 374. a. 3 Co. 87. b.

If a mortgagee be disseised, and a fine levied, and five years pass, and afterwards the mortgagor pays the money at the day; he shall have five years after the money paid. Pl. Com. 373. a.

If a husband be disseised, and a fine levied; the wife shall have five years after the death of her husband, for her dower. Pl. Com. 373. a.

If tenant for life, remainder to A. in fee, be disseised, and a fine levied; he in remainder shall have five years after his remainder commenced. Pl. Com. 373. b.

If a person *non-compos* enfeoffs A. who levies a fine; the heir shall have five years after the death of the feoffor. Pl. Com. 374. b.

If a son purchases, and dies, and his sister enters, and is disseised, and a fine levied; a brother born afterwards shall have five years after his birth. Pl. Com. 374. b.

If an officer for life levies a fine of lands appertaining to his office his successor shall have five years after his death. Pl. Com. 538. b.

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before; and that, as to rights accruing after a fine is levied, they are not barred by the statute. Plowd. 273. n. — 2. This doctrine is nearly transcribed into the Touchstone, where it is said, that such as have neither present nor future right, at the time of the levying of the fine, by reason of any matter before the fine, but whose right groweth either entirely after, or partly before and partly after the fine; and these are not barred at all by the fine, but they may make their claim, &c. when they will. Touch. 22. — 3. This opinion has however been entirely exploded by a late decision, which holds, that no new cause of avoiding a fine can arise after the fine: that every right of avoiding a fine must commence in the party or his ancestor, testator, or intestate, upon a cause existing before the fine was levied; so that no alienation or disposition can be made, which can introduce strangers into the situation of claiming a new title, or cause of entry or action. 1 Taunt. 578. 8 East, 552. 5 Cruise, 229. — 4. And therefore, that admitting that a right of entry is desirable, the right must be enforced by the devisee within the period allotted by law to the devisor. Ibid.

(s) A *cestui que* trust in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, if they do not make their claim within five years after the expiration of the estate-tail. Supra, 1 Vern. 226. 9 Mod. 144.

(t) 1. Where there is a term for years existing at the time when an estate-tail determined, the remainder-man or reversioner will be allowed five years from the determination of such term to make his claim. 8 East, 552. — 2. And where there are several remainder-men, they will respectively be entitled to their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him. 8 East, 552. 1 Taunt. 578.

(u) Plowd. 374. T. Raym. 151.

(x) If a tenant in tail discontinues his estate, reserving a rent, and dies, and the issue in tail accepts of the rent from the discontinuee, who afterwards levies a fine with proclamations; the acceptance of the rent by the issue in tail, bars him from claiming the estate tail. But upon the death of the issue in tail, his issue will have five years to avoid the fine, in consequence of the second saving, because he was the first person to whom the right of reversing the fine accrued. Touch. 33.

So,



So, if a man has a present right at the time of a fine, and afterwards a new right accrues; he shall have five years after the new right accrued: as, if tenant for life levies a fine, and afterwards dies; though the lessor had a right at the time of the fine, for the forfeiture, yet he shall have five years after the death of the lessee. Per Dyer. Mo. 71. R. Cro. El. 220. 254. Cont. Pl. Com. 373. b. Agreed. Cro. Car. 157. Dy. 3. b. in marg. R. ac. 1 Lev. 212. (y)

So, if a lessee for years makes a feoffment, and the feoffee levies a fine; the lessor shall have five years after the expiration of the term. R. 1 Vent. 241. Ray. 219. 2 Lev. 52. (z) Cont. Pl. Com. 374. a. Vide ante, (K. 1.)

So, if a lessee of a future term dies, and the prior term expires, then the lessor enters, and levies a fine, and five years pass, and then B. takes administration to the lessee; he shall have five years afterwards: for no one had title till administration. R. 2 Cro. 60. (a)

If A. tenant *pur auter vie*, remainder to B. for life, remainder to A. in fee, be disseised, and the disseisor levies a fine, and five years pass, then B. dies; A. shall have other five years for the remainder in fee. Per 4 J. 2. cont. Pl. Com. 367. b. 372. b.

If a husband discontinues land of his wife, upon a condition, which is broken, and then five years pass after a fine; the issue, barred of entry for the condition broken, shall have other five years after the death of his mother, for the discontinuance. Pl. Com. 367. b.

If a disseisor takes to wife the disseisee and is disseised, and a fine levied; their issue after five years after the fine, shall have other five years after the death of his father, as heir to the disseisee. Pl. Com. 367. b.

If a statute be acknowledged to A. and afterwards another to B. and afterwards a fine levied; if the statute to A. be satisfied, B. shall have other five years. R. Skin. 263, 264. Vide infra.

But a man shall be barred, if he does not pursue his claim within five years after his right accrued.

And if he, to whom the right first accrues, does not pursue his right within five years; his heir shall be barred. (b)

So, if he to whom the right first accrued, had only in tail, and did not pursue within five years; the issue shall be barred. R. Dy. 3. b. Pl. Com. 374. Acc. Cro. El. 896. 3 Co. 87. b.

So, if he who has a right dies within five years, his heir within age, beyond sea, &c. shall be barred, if he does not pursue within the first five years; for, where the time attaches in the ancestor, the heir, though an infant, &c. shall never have longer time. R. Pl. Com. 375.

So, if A. makes a lease for years, remainder after his death to B. for years, and afterwards levies a fine; admitting this to be a good contingent remainder, not divested by the fine, yet if B. does not claim within five years after the death of A. he shall be barred. R. Ray. 151.

(y) No person who is within the first saving of the statute 4 H. 7., can be comprehended within the second saving, unless the second right which accrues to him is different from the first right; for if it is only the same right which accrues a second time, a non-claim, during the five years after the right first accrued, will be a good bar. Cro. Car. 156. W. Jones, 208.

(z) 1 Atk. 571.

(a) Whence a rule, that if there be no person who has a right to make a claim at the time when a fine is levied, and afterwards some person does acquire such a right, he will be allowed five years, from the time when he acquired the right of avoiding the fine, to make his claim.

(b) Plowd. 374. 3 Rep. 87. b. Jenk. Cent. 6. ca. 74. Cro. Eliz. 896.

So

So a man shall be barred, if he does not pursue his right within five years after the accruing, though he had not then a right to the possession; as, if tenant in tail makes a lease pursuant to the st. 32 H. 8. and then levies a fine, and dies without issue, and afterwards the lease expires; the reversioner ought to enter within five years after the death without issue, and shall not have five years after the term expired; for he had not then a new right. R. Cro. Car. 156. (c)

If the conusee of a statute purchases the inheritance and levies a fine, and then satisfaction is acknowledged upon the statute, a conusee of another statute shall not have five years after satisfaction acknowledged: for he had not then any new right. R. 2 Vent. 334. (d) Vide Skin. 263, 264. Vide supra.

So, if the impediment be removed only for a month, or a week, and afterwards a new defect, or impediment happens; the fine shall be a bar, if there be not a claim within five years after the first removal of the impediments. Pl. Com. 375. a.

So, exceptions out of the st. 4 H. 7. shall not be taken by equity. Pl. Com. 375. a.

(K 3.) If they be an infant, *feme covert*, &c.

By the common law, and by the st. 18. Ed. 1. *de modo levandi fines*, infants, *femes covert* not examined (e) upon the fine, persons of unsound memory, or in prison at the time of the fine, were not barred. Pl. Com. 359. b.

Nor persons out of the realm.

So, by the st. 4 H. 7. 24. A fine shall conclude, &c. all except *femes covert* not parties, persons within age, in prison, out of the realm, or not of whole mind at the time of the fine levied, so as they, or their heirs, take their action or entry in five years next after they be uncovert, come of age, (f) out of prison, into this land, or of whole mind.

And if the person was covert and not party, within age, in prison, out of the realm, or not of whole mind, when the right first grew or came, &c. they shall have five years after they become discovert, &c.

And if a person has several impediments; he shall have five years after the last impediment removed. 1 Leo. 215. Pl. Com. 375. a.

So, if a person becomes covert or under any other impediment, before the last proclamation; they shall have five years after the impedi-

(c) W. Jones, 208. supra.

(d) 1 Show. 36. Colles, Parl. Ca. 64.

(e) 1. The common notion of a fine's owing its effect in barring married women, to their secret examination by the judges or commissioners, is incorrect. 1 Inst. 121. a. n. — 2. Which remark is fully confirmed by a passage in Glanville, from which it appears that a married woman might appoint her husband as her attorney to acknowledge a fine for her, in which case it is highly improbable, that she should have been examined. 1 Glan. lib. 2. c. 3. 5 Cruise, 202. — 3. It may therefore be concluded that the private examination of a married woman was not a necessary circumstance at common law, and was probably first prescribed by the statute *de modo levandi fines*. Ibid. — 4. If, continues Mr. Cruise, a fine derived its efficacy in barring married women from the circumstance of their private examination, then that form might easily have been added to any other conveyance; whereas, by the common law a bargain and sale by a husband and wife on which the wife is privately examined, does not bind her, after the coverture, is determined.

(f) An infant may, if he pleases, make his claim before he attains his full age. Plowd. 366. 1 Leon. 215.

ment removed, though they were not under it at the time of the fine levied. Pl. Com. 375. a. (g)

So an infant shall have five years after full age, though the fine was levied when he was *en ventre sa mere*. Pl. Com. 366. a.

So, if the ancestor was within age, beyond sea, &c. and died before full age, or return, his heir shall have five years (h) after his death. R. 1 Leo. 212. Cro. El. 220. (i) .

So, if an heir, at the death of his ancestor beyond sea, &c. be within age, &c. he shall have five years after his full age. 1 Leo. 212.

So, if a husband levies a fine, and is outlawed for treason, and dies, and afterwards the outlawry is reversed; the wife shall have dower five years after the outlawry reversed, though ten years be passed after the death of the husband. R. Mo. 639.

(K 4.) If the case be out of the statute.

If an infant dies during his infancy, his heir shall have time to avoid the fine for ever: for he was excepted out of the st. 4 H. 7. and was not within the clause, which binds to claim within five years after he comes to full age; for he never was at full age. R. 4 Co. 125. b. 2 Inst. 519. Semb. cont. Cro. Car. 200.

So, if a *feme covert* at the time of a fine, a man *non sane*, in prison, or out of the realm, dies during the coverture, insanity, imprisonment, or absence out of the realm; the heir is not within the act, but may avoid the fine at any time. 4 Co. 125. b. 2 Inst. 519. Cont. 1 Leo. 212, for he shall have but five years after the impediment removed. 1 Leo. 215.

So the successor of a bishop, dean, parson, &c. shall not be bound by nonclaim within five years: for a bishop, dean, parson, or other ecclesiastical sole corporation, is not within the purview of the act. Pl. Com. 375. b. Vide ante, (I 1.)

So, if an infant avoids a fine within age, and a disseisor afterwards enters, and enjoys for ten years; it shall not be a bar: for when he had avoided the fine, it shall be void for ever. Pl. Com. 366. a.

And it may be avoided by an infant within age, as well as at full age. 1 Leo. 212.

How a claim shall be made to avoid a fine, and by whom, vide Claim, (B 1, &c.)

(L) How a fine operates, [and from what period.]

A fine (k) may enure to a confirmation of a former estate, which was defeasable

(g) When once the five years, allowed to persons labouring under disabilities to avoid a fine, begin, the time continues to run, notwithstanding any subsequent disability. Plowd. 375. 4 T. R. 300.

(h) But no more. 2 Inst. 519. Cro. Eliz. 219. 1 Leon. 211. Sav. 128. 4 Rep. 125. b. 2 H. Bl. 584.

(i) The privileges of infancy, coverture, &c. are only given to those to whom a right first accrues, and in whom it first attaches; for a person to whom a right first accrues, and who is not under any disability, dies before the expiration of the five years allowed him by the statute to make his claim, and such right descends upon his son or heir at law, who is then under age, or labouring under any of the other disabilities mentioned in the statute, still such son or heir must make his claim before the five years are expired, which commenced in the life time of his ancestor, otherwise he will be for ever barred; because the right did not first accrue to him, but to a person who was not under any disability. Plowd. 355. Jenk. Cent. 6. ca. 74.

(k) 1. A fine and deed to lead the uses, are to be considered as one conveyance. Dougl.

defeasable before: as, if tenant in tail by bargain and sale, lease and release, &c. conveys to B. in fee, and afterwards levies a fine to B. and his heirs; this gives him a base fee determinable upon his death without issue. Vide 1 Sand. 261.

So, if he levies a fine to the heir of the bargainee. 1 Sand. 261.

So, if tenant in tail makes a lease, &c. and afterwards levies a fine to the lessee, or a stranger; this enures to a confirmation of the lease. Vide Estates, (B 25.)

So if a husband, seised in right of his wife, makes a lease not warranted by the st. 32 H. 8. and afterwards the husband and wife levy a fine to B. the lease shall be confirmed, and the lessee shall hold during the term. Per Gawdy, Wray. cont. 4 Leo. 15.

But such subsequent fine has not relation to affirm the first estate *ab initio*. And therefore, if tenant in tail bargains and sells lands to B. and his heirs, B. dies, and afterwards he levies a fine to his heir; this has not relation to make a devise of B. to be good. R. 1 Sand. 261.

So a fine may enure by way of extinguishment; and therefore, if tenant in tail makes a lease, or other estate, to A. and afterwards levies a fine to B., the lease, or other estate, shall be indefeazable: for his right during such former estate was extinct by the fine. R. Jon. 60. 2 Cro. 689. Vide Estates, (B 25.)

So, if the issue in tail levies a fine, and before, or afterwards, the tenant in tail makes an estate by lease, or otherwise. R. Jon. 60.

So, if tenant in tail covenants to stand seised to the use of himself for years, and afterwards to his son for life, remainder over, and then levies a fine to a stranger. Dub. 2 Lev. 84.

So, if a disseisee levies a fine without declaring any use, it enures to the benefit of the disseisor. R. 2 Co. 56. a. Adm. 1 Lev. 128.

But if tenant for life be disseised, and afterwards he in reversion levies a fine to B. this shall not enure to the benefit of the disseisor, but to the conusor. Semb. cont. 2 Co. 56. a. Acc. per 2 J. Cro. Car. 484.

So, if a disseisee levies a fine to B. and declares the use to him; it does not enure to the disseisor. Per Bridgm. 1 Lev. 128. (l)

Vide

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Dougl. 45. 2 Wils. 220. — 2. The fine therefore operates according to the declaration of uses. — 3. But a fine *sur cognizance de droit come ceo*, without consideration or uses declared, whether the conusor is in possession, or the fine is of a reversion, enures to the old uses, and the conusor shall be in of the old use. 2 Wils. 19. — 4. And though it passes nothing, yet after five years and nonclaim, it operates as a bar. 2 Wils. 19. — 5. Yet where no uses are declared, parol evidence may rebut the resulting use to the conusor, in favour of the conusee, without any written declaration of uses in his favour; for the statute of frauds extends, in the case of fines, to third persons only, and not to the conusors or conusees of the fine. Doug. 25.

(l) 1. As to the period from which a fine begins to operate: although, says Mr. Cruise, it must be very material, in many cases, to ascertain the precise time when a fine begins to operate, yet it is a subject respecting which very little is to be found in the books; but if we reason by analogy from the nature and effect of other judgments, we shall be able to ascertain this point. 5 Cruise, 96. — 2. The time when a fine is acknowledged is perfectly immaterial; since in one case it was determined that a fine began to operate in Michaelmas term, although it was not acknowledged until four months after. 1 Brown, 379. Salk. 341. 10 Mod. 40. 4 B. P. C. 73. — 3. The whole term is considered to many purposes as but one day; and if a judgment be given at any time during the term, it relates to the first day of that term, and is considered in law as having been given on that day. And the first day of term is the *essoign day*; for the *quarto die post* is only a day of grace. But if a writ be returnable on the second, or any other return day of the term, the judgment will then relate to that

Vide more concerning FINE, in AMENDMENT (N) — BARON AND FEME, (G 1.) CHANCERY, (3 N 1. 2.) — ENFANT, (B 2.) — PLEADER, (2 Y 14.)

## FINES AND AMERCIAMENTS.

Vide CHANCERY, (3 K) — CHIMIN, (C 13.) — COPYHOLD, (H 1., &c. — M 4.) LEET, — (H—N 1. &c. — O 1. &c.) — PARLIAMENT, (H 8.) — PRÆROGATIVE, (D 51., &c.) — SEWERS, (E 7.)

## FIRST-FRUIT.

Vide TENTHS.

## FISHING.

Vide JUSTICES of PEACE, (B 44.)

## FLEET.

Vide CHANCERY, (B 8.) — IMPRISONMENT, (D)

## FLOTSAN.

Vide WRECK, (A)

## FOLDAGE.

Vide ACTION upon the case for a DISTURBANCE, (A 4.)

## FOLKMOTE.

Vide COURTS, (O 7.)

that return day; for till the return of the writ, the judgment cannot possibly be given. 5 Cruise, 96. Cro. Car. 102. — 4. Now, a fine being considered as a judgment, must, like all other judgments, relate to the first day of the term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term; otherwise it must relate to the return day of the writ of covenant. For in levying a fine there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged. 5 Cruise, 97. — 5. In support of which proposition he transcribes the following case reported by Jenkins, of which, he presumes, the authority will not be disputed, though the reporter has not mentioned when, and by what court it was determined: A. covenants with B. to levy a fine. Oct. Michaelis 1 Car. A. acknowledges a statute to C. 8th October, same year. The fine is levied according to the covenant, and the conusance taken the 12th October aforesaid. This conusance shall avoid the said statute by relation to the day of the essoign; which was before the said 8th October. Jenk. 250. — 6. In a note of Peere Williams, it is said, that if A. devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption. And yet, says the reporter, this is a hard case; since, by the caption the party conusor does all his part, and the rest is only the act of the clerk, or his attorney, without any particular instructions from the party. 3 P. Wms. 170. n. — 7. Which passages, and the conclusions drawn from the rules by which all other judgments are construed, seem, says Mr. Cruise, fully to prove, that a fine, whether acknowledged before or after the original writ, on which it is levied, is sued out, will begin to operate from the return day of such original writ. 5 Cruise, 98.



## FORBEARANCE.

Vide ACTION upon the case upon ASSUMPSIT, (B 1.)

## FORCEABLE ENTRY.

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**(A) Forceable entry.**

**(A 1.) How restrained.**

By the st. (a) 5 R. 2. 8. None shall enter into lands, &c. but when the entry is legal; and then in peaceable manner, and not with strong hand, or multitude.

By the st. (b) 15 R. 2. 2. On complaint of forcible entry into lands, benefices, or offices of holy church, the justices of peace with the posse of the county shall go to the place, &c. and if they, or he, find any hold forcibly, shall commit them to the next gaol, till, convict by record of such justices, they make fine and ransom.

And all of the county, and the sheriff, shall assist, &c. on pain of fine and ransom.

By the st. (c) 8 H. 6. 9. On complaint of forcible entry, or detainer, the justices of the county, or mayor or justice in a corporation, at the costs of the party, shall cause these statutes to be executed.

And whether the persons be present, or gone, shall inquire, &c. of such forcible entry, or detainer.

So, by the st. (d) 21 Jac. 15. The justices shall give the same remedy

(a) 1. It has been said that, at common law, and before the passing of the statutes, if a man had a right of entry upon lands or tenements, he was permitted to enter with force and arms, and to detain his possession by force, where his entry was lawful. Dalt. last. 297. Lamb. 135. Crompt. 70. a. b. 1 Hawk. c. 64. s. 1. 2. 3. 3 Bac. Abr. Tit. for Entry. — 2. And that even at this day, he who is wrongfully dispossessed of his goods, may justify the re-taking of them by force from the wrongdoer, if he refuse to re-deliver them. 1 Hawk. c. 64. s. 1. — 3. However it is clear that, in many cases, an indictment will lie at common law for a forcible entry, if it contain, not merely the common technical words with force and arms, but also such a statement as shews that the facts charged amount to more than a bare trespass, for which no one can be indicted. 3 Burr. 1731. Say. 225. 8 T. R. 357. — 4. And it has been affirmed by Lord Kenyon, for part of the law which ought to be preserved, that no one shall with force and violence assert his own title. 8 T. R. 361. — 5. But whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice; and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved. Russell, 408, 409.

(b) The st. 5 R. 2. gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers. Hence the occasion of the st. 15 R. 2.

(c) The st. 15 R. 2. gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave no power to the justice to restore the party injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. Hence the occasion of the subsequent enactments.

(d) 1. In the construction of the antecedent statutes it was holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as

for forcible entry, or detainer, on a term for years, copyhold, land held by *elegit*, statute-merchant, or staple, or guardian in chivalry, as on freehold.

And these statutes extend, where the entry, or detainer is with force. F. N. B. 248. C.

So, if the entry, and also the detainer, be forcible; though the statute speaks in the disjunctive. F. N. B. 248. D. 19 H. 6. 32. a. R. Mar. 6.

### (A 2.) What shall be.

Forcible entry is, (*e*) when a man (*f*) enters into lands or tenements (*g*) *manu forti*: as, (*h*) if he brings unusual weapons. Co. L. 257. b. H. P. C. 138.

Or threatens violence. Co. L. 257. b. H. P. C. 138.

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disseisin, be found in an indictment of forcible entry, the court may, in their discretion, award a restitution of the possession to such lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. — 2. But it was a great question, whether a lessee for years, or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 H. 6. the words of which are, that the justice shall cause to re-seise the lands, &c. and by which it seems to be implied, that the party must be ousted of such an estate whereof he may be said to be *seised*, which must at least be a freehold. — 3. For the purpose of removing this doubt, the 21 Jac. 1. passed. — 4. It has been holden, that a tenant by the verge is not within this statute; but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the copy of court roll, seems at least to be within the meaning, if not within the words of the statute. 1 Hawk. c. 64. s. 17. Russell, 411, 412. — 5. If a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he has no remedy for a restitution by force of any of the abovementioned statutes; there seems, however, to be no doubt but that a justice of peace, &c. may remove the force and commit the offender. 1 Hawk. c. 64. s. 17, 18.

(*e*) A forcible entry is committed by violently taking possession of lands or tenements, with menaces, force, and arms, and without the authority of the law. 4 Blk. Com. 148

(*f*) A joint-tenant or tenant-in common, may offend against the statutes, either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et pur tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury done to his companion; and consequently an indictment of forcible entry into a moiety of a manor, is good. 1 Hawk. c. 64. s. 33.

(*g*) 1. It has been holden as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes. — 2. It is, however, questioned whether there be any good authority, that such an indictment will lie for a common or office; though it seems agreed, that an indictment of forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put his beasts into the common, &c. — 3. No one can come within the danger of the statutes, by a violence offered to another in respect of a way or such like easement, which is no possession. — 4. And it seems that a man cannot be convicted, upon view, by force of the 15 R. 2. of a forcible detainer of any incorporeal inheritance wherein he cannot be said to have made a precedent forcible entry. 1 Hawk. c. 64. s. 31. Bac. Abr. for Ent. C. Russell, 414.

(*h*) An entry may be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house; and perhaps also by any act of outrage after the entry, as by carrying away the parties' goods, which being found in an assize of novel disseisin will make the defendant a disseisor with force, and subject him to fine and imprisonment. 1 Hawk. c. 64. s. 26. Russell, 414.

Or

Or breaks the door of the house, being lockt. H. 138.

Or ejects the possessor with violence. H. 138.

So, if he enters into a church with force. R. 1 Sid. 101. 1 Lev. 90.

And one alone may make a forcible entry. H. 138. (i)

Though it be an infant, or *feme covert*. Vide Crompt. 69. a. b.

So, if one alone uses force, all in company are guilty. Co. Lit. 257.

b. (k)

If he breaks the door, and enters, though nobody be within the house. R. 2 Rol. 2.

So it shall be a forcible entry, if (l) it be attempted with force, though obtained by intreaty.

If he enters by force, though he does not eject the owner, nor continue in possession. (m)

If he enters by force to make a distress for rent due. Vide Crompt. 69. b. (n)

Or to take grass, corn, &c. Vide Dalt. c. 126. Crompt. 68.

If he be accompanied, or weaponed, in such a manner, that people may dread force, though he does not use force. (o)

So it shall be a forcible entry, if (p) he enters with a multitude. H. P. C. 138.

The

(i) 1 Hawk. c. 64. s. 29.

(k) 1. Whether they come upon the lands or not. 1 Hawk. c. 64. s. 22. — 2. So, if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only uses force, it is a forcible entry in them all, because they come in company to do an unlawful act; but it is otherwise where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only who used it. Bac. Abr. For. Ent. (B). — 3. And he who only agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force. 1 Hawk. c. 64. s. 24.

(l) 1. If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry. 1 Hawk. c. 64. s. 26. — 2. In which book it is given as the author's opinion; and contrary opinions are noticed, proceeding upon the ground that no violence was done to the house, but only to the person of the party. Russell, 415.

(m) 1. Though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry. Dalt. 299. 3 Bac. Abr. For. Ent. (B). — 2. But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. 1 Inst. 257. Bro. tit. Duress, 12. 16. 1 Hawk. c. 64. s. 28. Russell, 416.

(n) 1. Because, though he does not claim the land itself, yet he claims a right and title out of it, which by the statutes he is forbid to assert with force. 3 Bac. Abr. For. Ent. (B). — 2. But if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party; but he cannot have a writ of restitution, for the statute does not give the justices power to receive the rent, but only the lands and tenements themselves. Ibid.

(o) Whenever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to them, his entry is esteemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat, those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance. 1 Hawk. c. 64. s. 27.

(p) There may be a forcible entry, where any person's wife, children, or servants,

The number of ten makes a multitude : but what shall be so, lies in the discretion of the justices. Co. L. 257. a.

If a master enters with an unusual number of servants. Co. L. 257. b.

### (A 3.) What not.

But it shall not be a forcible entry, if (q) there be not an actual entry. (r)

So, if he does not enter forcibly (s); as, if he opens the door with a key. 2 Rol. 2. (t)

Or enters by an open window. 2 Rol. 2.

Or, if the entry be without semblance or force; as, if a man comes in a peaceable manner, and entices the owner out of possession.

Though he afterwards opens the door, being only latched, and enters. H. P. C. 138.

Or, afterwards excludes the owner, by shutting the door, without other force.

Or, if he takes the owner, and imprisons him, and then sends his servant peaceably to make entry; this is false imprisonment, but not forcible entry.

Or if, after entry, he cuts corn, grass, &c.

Or, if the entry be forcible, but not with intent to do wrong there; as, if a man goes cross the land with force, or a great company, to church, or market. (u)

So, if a man enters an house, to apprehend a felon, &c.

Or, an officer with force enters to do execution.

Or, by warrant of law.

## (B) Forceable detainer.

### (B 1.) What shall be.

Forceable detainer is, when a man, who enters peaceably, afterwards

are upon the lands to preserve the possession; because whatever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land continues no possession. 3 Bac. Abr. For. Ent. (B).

(q) 1. A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry, or detainer within these statutes] 3 Bac. Abr. For. Ent. (D). 1 Hawk. c. 64. s. 32. — 2. So it is said that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will; but a quære is subjoined. Hawk. Ibid.

(r) Where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry. 1 Hawk. P. C. c. 64. s. 22. 34. Crom. 69. Dalt. c. 77. Co. Litt. 256.

(s) Regularly, a forcible entry must be with a strong hand, with criminal weapons, or with menace of life or limb: it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by law in every trespass, is not within the statutes. 3 Bac. Abr. For. Ent. (D) Dalt. 300. 1 Hawk. c. 64. s. 25.

(t) Vide Noy. 136, 137. Bac. Abr. For. Ent. (B). 1 Hawk. c. 64. s. 26.

(u) 1. 1 Hawk. c. 64. s. 20, 21. — 2. Without doing any act which expressly or impliedly amounts to a claim of the lands. Ibid. — 3. Otherwise, if he make an actual claim with any circumstances of force or terror. Ibid.

detains



detains his possession by force; as, if he threatens a corporal damage to him who attempts to enter. H. P. C. 139.

If he repels him with violence.

Or continues the door shut, when the justices demand entrance. H. P. C. 139.

If he brings more arms than his family usually has. H. P. C. 139.

Or more persons than his usual family. H. 139.

Or the justices find unusual arms or company there.

If he lodges arms or men at a neighbouring place. H. P. C. 139.

If at the end of his term, he keeps drums, guns, halberts, to oppose the entry of the lessor; though no one attempts an entry. R. 2 Cro. 199.

So it shall be a forcible detainer, if a lessee at will detains with force, after the will is determined. Vide Crompt. 70. b.

Or a mortgagor, after the mortgage is forfeited. Vide Dalt. c. 126.

Or a feoffee of a disseisor, after entry or claim by the disseisee. Vide Crompt. 69. b.

So, if a lessee, with force, resists a distress for rent. Vide Crompt. 69. b. 70.

Or forestalls, or rescues the distress. Vide Crompt. 69. b.

### (B 2.) What not.

But it is not a forcible detainer (*x*), if a lessee at will, after the determination of the will, denies possession to the lessor, when he demands it. Vide Crompt. 70. b.

Or shuts the door against the lessor when he would enter. Vide Crompt. 70. b.

So it is not a forcible detainer, if he keeps out a commoner, by force, upon his own land. Cro. Car. 486.

So, by the st. 8 H. 6. 9., any in possession three years, by himself, or any under whom he claims, may detain with force.

And by the st. 31 Eliz. 11., no restitution shall be given on an indictment of forcible entry, or detainer, where the party hath been three years in quiet possession before the indictment found, and his estate not determined.

But if A. was in quiet possession three years, and then disseised by force, and restored; he cannot afterwards detain with force within three years after his restitution: for his possession was interrupted. R. Dy. 141, 142.

### (C) Remedy, by action.

An action lies upon st. 15 R. 2. 2. against him who makes a forcible entry.

So, upon st. 8 H. 6. 9. against him who makes a forcible entry, or detainer.

Vide Pleader, (2 S 20.)

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(*x*) For a man will not be guilty of the offence of forcible detainer, who merely refuses to go out of a house, and continues therein in despite of another. Hawk. c. 64. s. 30.

## (D) Remedy, by justices of peace.

## (D 1.) Upon view.

So, by the st. 15 R. 2. 2. a justice of peace may go to the place, &c. and if he find any hold forcibly, shall commit, &c. till, convict by record of the justice, they make fine and ransom.

And therefore, any justice of the peace, upon view of the force, may make a record of it, and commit the offender. Vide Dalt. c. 44.

And this, without a writ directed to him to execute the statutes.

And, upon any information, without a complaint of the party.

So every justice may take the sheriff, and *posse comitatus*, to restrain the force. Vide Dalt. c. 44.

He may break open a house to remove the force. Vide Dalt. c. 44.

The record made by a justice upon view, shall be a conviction, and is not traversable. Vide 8 Co. 121. Dalt. c. 44.

And ought to be certified to B. R. or the next assizes, or quarter-sessions. Vide Dalt. c. 44.

And the party convicted shall be there fined. Vide Dalt. c. 44.

But the justice himself cannot fine. Dub. Dalt. c. 44. Vide Sal. 353. (y)

And if a defect appears, in the conviction, to B. R., it shall be quashed. 1 Sid. 156.

## (D 2.) By inquisition.

So, by the st. 8 H. 6. 9., a justice of peace, whether the persons be present or gone, shall inquire of such forcible entry, or detainer: and on such inquiry shall direct warrants to the sheriff, to summon indifferent persons, near the lands, having 40s. *per ann.* to inquire, &c.

And shall return 20s. the first day on each summoned, 40s. the next day, and 5*l.* the next, and so double; on pain of 20*l.*

And therefore, every justice of peace may make inquisition upon a forcible entry, or detainer.

## (D 3.) By indictment.

So an indictment may be for a (z) forcible entry, or detainer, before justices of peace of the county where the land lies, at the quarter-sessions.

But an indictment for a forcible detainer, ought to shew, that the entry was peaceable. R. 2 Cro. 151. Vide post, (D 4.) Cont.

(y) The justices of peace must set the fine, and they must do it before they commit the offender, though they may take a reasonable time to consider of it. If no fine is set by the justices, and the offender is committed, B. R. cannot set the fine, but will quash the conviction. Str. 794. Ld. Raym. 1514.

(z) If a forcible entry or detainer be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force. 2 Burn. Just. For. Ent. and Det. vii.

(D 4.)

(D 4.) What shall be a good one.

The indictment ought to be certain : and therefore, it ought to shew the certainty of the house or land where the entry was (a) : for, if it says, *in unum tenementum*, it shall be quashed. 2 Rol. 46. Vide Indictment, (G 1., &c.)

So it ought to shew, what estate he had in the land where the entry was made (b) : as, before the st. 21 Jac. it ought to shew that he had a freehold. (c)

And since, it ought to say, what estate he has : for perhaps he is only tenant at will. (d) Semb. 1 Sal. 260. R. 1 Sid. 102. (e)

And though it afterwards says, *quod disseisivit*, it is not sufficient : for that is only an implication of a freehold. (f) R. 1 Vent. 306. (g)

So, *possessionatus pro termino*, is not sufficient, without saying, for life, or for years. 1 Vent. 306. (h)

So it ought to say, *adtunc existen'* his estate : for, at the time of the indictment, is not sufficient. R. 2 Cro. 214. 639. (i)

(a) 1. The tenement in which the entry was committed must be described with convenient certainty ; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession. Russell, 419.— 2. Thus an indictment of forcible entry into a *tenement*, which may signify any thing whatsoever wherein a man may have an estate of freehold, is not good. Dalt. 15. 2 Rol. Abr. 46. 2 Rol. Abr. 80. pl. 8. 3 Leon. 102.— 3. So into a house or tenement. 2 Rol. Abr. 80. pl. 4, 5. Rol. Rep. 334. Cro. Jac. 633. Palm. 277.— 4. Or into two closes of meadow or pasture. 2 Rol. Abr. 81. pl. 4.— 5. Or into a rood, or half a rood of land. Bulst. 201.— 6. Or into certain lands belonging to such a house. 2 Leon. 186. 3 Leon. 101. Bro. tit. For. Ent. 23.— 7. Or into such a house, without shewing in what town it lies. 2 Leon. 186.— 8. Or into a tenement, with the appurtenances, called Truepenny in D. 2 Rol. Abr. 80. pl. 7.— 9. But an indictment for a forcible entry in *domum mansualem sive messuagium*, &c. is good, for these are words equivalent, Cro. Jac. 633. Palm. 277.— 10. An indictment for an entry into a close called Serjeant Herne's close, without adding the number of acres, is good ; for here is as much certainty as is required in ejectment.— Bac. Abr. For. Ent. (E) 1 Hawk. c. 64. s. 31.— 11. And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain ; thus an indictment for a forcible entry into a house and certain acres of land, may be quashed as to the land, and stand good as to the house. Bac. Abr. For. Ent. (E) 1 Hawk. c. 64. s. 31.

(b) Otherwise it would be uncertain whether any one of the statutes relative to forcible entries extended to the estate from which the expulsion was ; the 5 R. 2. c. 7., the 15 R. 2. c. 2., and the 8 H. 6. c. 9., extending only to freehold estates ; and the 21 Jac. 1. c. 15., extending only to estates holden by tenants for years, tenants by copy of court roll, and tenants by elegit, statute merchant, and statute staple. Say. 142.

(c) Ld. Raym. 210. 1 Salk. 260. 1 Vent. 89. 2 Keb. 495. Hetl. 73. Latch. 109.

(d) 3 Salk. 169.

(e) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises. 8 T. R. 357.

(f) 3 Salk. 170.

(g) To allege that the party was possessed of a term of years, or of a copyhold estate, and that the defendants disseised him ; or that the defendants disseised J. S. of land then and yet being his freehold, is bad, for it implies that he always continued in possession ; and if so, it is impossible that he could be disseised at all. 1 Hawk. c. 64. s. 39. Bac. Abr. For. Ent. (E).

(h) So seised and possessed. 3 Salk. 170.

(i) An indictment cannot warrant a restitution, unless it find that the party was seised at the time. Bac. Abr. For. Ent. (E). 1 Hawk. c. 64. s. 3. 41. 3 Salk. 169.

And,

And, *adtunc et adhuc existen'*, &c. will be repugnant. Sho. 272.

So it ought to allege an express expulsion (*k*): for it is not sufficient to say, *quod intravit, et cum disseisitum et expulsum extratenuit*; but it ought positively to say, *quod fuit disseisitus*. R. 1 Sal. 260. (*l*)

An indictment for a forcible entry may be quashed upon motion, before a fine is set; not afterwards, without a writ of error. Sal. 450.

But an indictment for a forcible detainer, shall be good, though it does not shew, whether the entry was by force, or peaceably (*m*): for certainty is only necessary in the point charged; and if it is not said, by force, it shall not be intended. Dub. 2 Cro. 20. Vide ante, (D 3.) Cont. (*n*)

So an indictment for a forcible entry is good, though it says, *adhuc detinet*, without shewing, that it was *contra pacem*: for perhaps the detainer was without force. R. 2 Cro. 32.

So it is sufficient to say, *disseisivit*, without adding, *et expulit*. (*o*) R. 2 Cro. 32. (*p*)

*Quod fuit possessionatus pro termino annorum*, without saying, how many years. 1 Vent. 306. (*q*)

#### (D 5.) When restitution shall be made.

By the st. 8 H. 6. 9., a justice of peace, if on inquiry, &c. a forcible entry or detainer is found, shall put the party in possession of the lands so entered or holden.

And the justice shall make restitution, after inquisition found, to the party ousted, by himself, or by his precept to the sheriff. Per 2 J. Ray. 85. Carth. 496.

(*k*) For it is a repugnancy to award restitution of possession to one who does not appear to have lost it. 1 Hawk. c. 64. s. 41.

(*l*) Lord Raym. 610.

(*m*) But it must set forth an entry, for otherwise it does not appear but that the party has been always in possession; in which case, he may lawfully detain it by force. 1 Hawk. c. 64. s. 40. Bac. Abr. For. Ent. (E).

(*n*) 1. The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*; but some have holden, that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*; but it is not sufficient to say only that the party entered *vi et armis*; since that is the common allegation in every trespass. Cro. Jac. 41. Rast. Ent. 354. Bac. Abr. For. Ent. (E). Russell, 419. — 2. No particular technical words are requisite in an indictment at common law; all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace. 8 T. R. 362.

(*o*) Or *expulit* without *disseisivit*. Comb. 70.

(*p*) 1. The time and place of the disseisin must be sufficiently set forth in the indictment; but it appears to be sufficient to state, that the defendant on such a day entered, &c. and disseised, &c. without adding the words then and there; for it is the natural intendment that the entry and disseisin both happened together. Cro. Jac. 41. 1 Hawk. c. 64. s. 42. — 2. A disseisin is sufficiently set forth by alleging that the defendant entered, &c. into such a tenement, and disseised the party, without using the words 'unlawfully' or 'expelled,' for they are implied. Bac. Abr. For. Ent. (E).

(*q*) 1. If a bill, both for a forcible entry and forcible detainer, be preferred to a grand jury, and found not a true bill as to the entry with force, and a true bill as to the detainer, it will not warrant an award of restitution; but it is void, because the grand jury cannot find a bill true for part and false for a part, as a petty jury may. 1 Hawk. c. 64. s. 40. — 2. This, however, does not seem to apply to the case of different counts in the same indictment, but only where the grand jury find 'a true bill,' and 'not a true bill,' upon different parts of one and the same charge. Cowp. 325. Russell, 422.

So

So restitution shall be made upon an indictment at the quarter-sessions. H. P. C. 140.

So B. R. shall make it by a writ to the sheriff, if the indictment be removed into court by a *certiorari*, or certificate of the justice. H. P. C. 140. Vide Dalt. c. 131.

So, justices of gaol-delivery, upon an indictment before them. Sav. 68. (r)

So re-restitution shall be, where the indictment is quashed. Sav. 68. 2 Cro. 151. (s)

So restitution shall be to a disseisor ousted by the force of the disseisee. Vide Dalt. c. 132.

To a lessee, though the lessor, who was disseised, thereby opposes it. Vide Dalt. c. 132.

To a copyholder, though his lord opposes it. Vide Dalt. c. 132. *Cont. before the st. 21 Jac. 15. Dy. 142. a. in marg.*

### (D 6.) How made.

A justice of peace, or sheriff, shall break open a house to make restitution. (t)

### (D 7.) When not.

But no writ of restitution shall be awarded, where the party has possession. Mar. pl. 12.

Nor, to an advowson, common, rent, &c., for it shall only be to land. Vide Dalt. c. 44. (u)

Nor, where he, who used force; has the possession by operation of

(r) 1. The same justice or justices before whom an indictment of forcible entry or detainer shall be found, may award restitution; but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the court of King's Bench; and that court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground, that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. — 2. So, if an indictment be found before the justices of the peace at their quarter-sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to reverge, it may as well be done by them in court as out of it. Russell, 422. Bac. Abr. For. Ent. (F). — 3. But the justices of oyer and terminer, or general gaol delivery, though they may inquire of forcible entries and fine the parties, yet cannot award a writ of restitution. Ibid. 1 Hawk. c. 64. s. 51.

(s) 1. Str. 474. — 2. Vide infra. — 3. Though the party's title is expired since the conviction. Str. 474.

(t) 1. The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it. 1 Hawk. c. 64. s. 49. — 2. The sheriff, if need be, may raise the power of the county to assist him in the execution of the precept; and, therefore, if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced. Id. s. 52. — 3. If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition; but the second writ must be applied for within a reasonable time. Ld. Raym. 482.

(u) Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are divisible and incorporeal, as rent or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is, to have the force removed, and those who are guilty of it punished, which may be done by 15 R. 2. c. 2. Russell, 423. 1 Hawk. c. 64. s. 45. Lamb. Inst. 153. Co. Litt. 323.

law;



law: as, if a disseisee enters, and afterwards, by force, ousts his disseisor; the possession shall not be restored: for it was revested in the disseisee by his entry. Vide Dalt. c. 132.

Nor, if a lessor enters by force upon the lessee, for a forfeiture. Sal. 587.

Nor, to any other than him who was ousted by force: as, to his heir. Vide Dalt. c. 132. (x)

Or any abator, after the death of the ancestor. Vide Dalt. c. 132.

Nor, if the party tenders a traverse to the inquisition. 1 Sid. 287. It shall be stayed, or granted at discretion. H. P. C. 141. It shall be stayed. Sal. 260. Vide Sal. 588. Semb. that it shall be stayed.

But it is said, that it shall be granted. Mod. Ca. 115. (y)

So, upon a *certiorari* delivered to remove an indictment, it shall be stayed. H. P. C. 141. (z)

Or, if the indictment appears insufficient. H. P. C. 140. (a)

And in such case, restitution granted may be stayed before execution. H. P. C. 140. (b)

(x) And restitution is to be awarded only to him who is found by the indictment to have been put out of the *actual* possession, and not to one who was only seised in law. Lamb. Inst. 153. Dalt. c. 83.

(y) 1. If the defendant tender a traverse of the force, which must be in writing, no restitution ought to be till such traverse be tried; in order to which, the justice before whom the indictment is found ought to award a *venire* for a jury; but if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false. Bac. Abr. For. Ent. (G). 1 Hawk. c. 64. s. 58, 59. 2 Salk. 588. — 2. Where the defendant pleads three years' possession in stay of restitution, according to 31 Eliz. c. 11., and it is found against him, he must pay costs. Ld. Raym. 1036.

(z) Upon the removal of the proceedings into the court of King's Bench by *certiorari*, that court may award a restitution discretionally; and will so award, unless the defendant plead very soon, and take notice of trial within the term. C. J. Hardw. 174.

(a) Where a conviction of a forcible entry was quashed in that court for uncertainty, but the restitution was opposed upon an affidavit that the party's title, which was by lease, was expired since the conviction; the court said, that they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. 1 Str. 474.

(b) 1. The same justices who have awarded a restitution on an indictment of forcible entry, &c. or any two or one of them, may afterwards supersede such restitution upon an insufficiency in the indictment appearing unto them; but no other justices or court whatsoever have such power, except the court of King's Bench; a *certiorari* from whence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice. Bac. Abr. For. Ent. (G). 1 Hawk. c. 64. s. 61, 62. — 2. The court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, that court may set it aside, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever *ex rigore juris* demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c. for the power of granting a restitution is vested in the King's Bench only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes, and is never made use of by that court but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. Bac. Ibid. Hawk. Id. s. 63, 64, 65. — 3. The court of King's Bench has been so favourable to one who, upon his traverse of an indictment upon the statute being found for him, has appeared to have been unjustly put out of his possession, that they have awarded him a restitution, notwithstanding it has been shewn to the court that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in the lord's court. Bac. Abr. Ibid. Hawk. Id. s. 66.

So

So restitution shall not be, after a conviction by a justice upon his view. 1 Vent. 308.

Nor, by justices of assize, gaol-delivery, or justices of peace; if the indictment was not found before them. H. P. C. 140. Vide Dalt. c. 44. 131.

So restitution shall not be, unless immediately; not four or five years afterwards. R. Carth. 496. (c)

Nor, by st. (d) 31 El. 11. If by plea it appears, that the party had possession for three years before the inquisition found. R. Ray. 85. (e) Sal. 260. (f)

Though the plea does not shew, how he was possessed. R. Ray. 85. 1 Sid. 149. (g)

### (D 8.) Suppression of riots :— What shall be a riot.

A riot (h) is, (i) when three or more assemble, and do an unlawful act. H. P. C. 137. Vide 3 Inst. 176.

As, if they make a battery upon another. 3 Inst. 176.

Hunt in his park, chase, warren, &c. 3 Inst. 176.

Enter upon his possession, or destroy his corn, herbs, goods, &c. 3 Inst. 176.

So if three or more assemble to do a lawful act in an unlawful manner: as, to abate a nuisance, and they do it with threats, and boisterous behaviour. Vide Dalt. c. 137.

(c) 3 Salk. 313.

(d) 8 H. 6. c. 9.

(e) Ld. Raym. 440.

(f) In the construction of which it has been holden, that such possession must have continued without interruption during three whole years before the indictment. Bac. Abr. For. Ent. (G). 1 Hawk. c. 64. s. 53.

(g) 1. Because, not the *title* but the *possession* only, is material. 1 Hawk. c. 54. s. 56. — 2. It is said, that the three years' possession must be of a lawful estate; and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee having by his laches lost his right of entry. Bac. Abr. For. Ent. (G). 1 Hawk. c. 64. s. 54.

(h) The distinction between a *riot*, a *rout*, and an *unlawful assembly*, seems, at common law to be this. A *riot* is a tumultuous meeting of persons upon some purpose which they actually execute with violence. A *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a motion to execute. An *unlawful assembly* is a mere assembly of persons upon a purpose which, if executed, would make them rioters; but which they do not execute, nor make any motion to execute. 1 Hawk. c. 65. s. 1. 8. 9. 3 Inst. 176. 4 Blk. Com. 146. Russell, 350.

(i) 1. A riot is a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority; with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprize of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. 1 Hawk. c. 65. s. 1. Russell, 350. — 2. This description, says Mr. Russell, is submitted as that which would probably be deemed most correct at the present time; though it is observable, that riot has been described differently by high authority; for Holt C. J. is reported to have said, 'the books are obscure in the definition of riots.' I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, in *terrorem populi*, though no act is done, it is a riot. If three come out of an alehouse, and go armed, it is a riot. 11 Mod. 116.

To ride to market, &c. and they do it in harness, &c. Vide Dalt. c. 138.

If a man, upon menaces made to him, assembles a company to go with him for his defence. Vide Dalt. c. 137.

If he enters land to which he has title, with numbers, and in a forcible (*k*) manner. Vide Dalt. c. 138. (*l*)

If he rides Skimmington in a tumultuous manner. R. 3 Keb. 579.

If an assembly be upon an unlawful occasion, and he who comes upon a lawful cause, joins in an affray which happens, he may be a rioter. Mod. Ca. 43. (*m*) For where the assembly was unlawful, the act of one shall be imputed to all. Per Holt, Sal. 595.

So, if in a journey, the company beat a stranger riding on the road, it will be a riot in all who act: for when the quarrel began, it began to be an unlawful assembly (*n*) R. Sal. 595. (*o*)

(*k*) 1. It seems to be clearly agreed, that in every riot there must be some circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. Russell, 352. 1 Hawk. c. 65. s. 5. — 2. But it is not necessary in order to constitute this crime, that personal violence should have been committed. 2 Camp. 369.

(*l*) It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some private quarrel only; as the enclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements, the title whereof is in dispute, or such like matters relating to the interest or disputes of particular persons, in no way concerning the public. For the proceedings of a riotous assembly on a public or general account, as to redress grievances, pull down inclosures, or to reform religion, and also resisting the king's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the king. Russell, 332. 4 Blk. Com. 147. 1 Hawk. c. 65. s. 6.

(*m*) 1. If any person, seeing others actually engaged in a riot, joins himself to them, and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprize; and it would be endless as well as superfluous, to examine whether every particular person, engaged in a riot, were in truth one of the first assembly, or actually had a previous knowledge of the design. Russell, 355. 1 Hawk. c. 65. s. 3. — 2. And the law is, that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. 2 Camp. 370. Vide 4 Burr. 2073. 1 Hale, 463.

(*n*) 1. Women are punishable as rioters, but infants under the age of discretion are not. 1 Hawk. c. 65. s. 14. — 2. But infants of years of discretion are punishable; and though under the age of eighteen, need not appear by guardian, but may appear by attorney. Ld. Raym. 1284.

(*o*) By st. 1 G. 1. st. 2. c. 5., commonly called the *Riot Act*, and intituled "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters," s. 1. after reciting, that "whereas of late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the public peace, and the endangering of his majesty's person and government, and the same are yet continued and fomented by persons disaffected to his majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters his majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his majesty: therefore for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein;" enacts, "that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord 1715, and being required or commanded by any one or more justice or justices of the peace,

or by the sheriff of the county, or his under sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made) unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy."

§ 2. "That the order and form of the proclamations that shall be made by the authority of this act, shall be as hereafter followeth; (that is to say) the justice of the peace, or other person authorised by this act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded silence to be while proclamation is making, and after that, shall openly and with loud voice make or cause to be made proclamation in these words, or like in effect:

"Our sovereign lord the king chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of king George, for preventing tumults and riotous assemblies. God save the king.

"And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorised, empowered and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be, of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid."

§ 3. "And if such persons so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid, shall continue together, and not disperse themselves within one hour, that then it shall and may be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county, where such assembly shall be, and also to and for every high or petty constable, and other peace officer within such county, and also to and for every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable, and other peace officer of any city or town corporate where such assembly shall be, and to and for such other person and persons as shall be commanded to be assisting unto any such justice of the peace, sheriff, or under-sheriff, mayor, bailiff, or other head officer aforesaid (who are hereby authorised and empowered to command all his majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend, and they are hereby required to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made as aforesaid, and forthwith to carry the persons so apprehended before one or more of his majesty's justices of the peace of the county or place where such person shall be so apprehended, in order to their being proceeded against for such their offences according to law; and if the persons so unlawfully, riotously, and tumultuously assembled, or any of them, shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, by reason of their resisting the persons so dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, that then every such justice of the peace, sheriff, under-sheriff, mayor, bailiff, head officer, high or petty constable, or other peace officer, and all and singular persons, being aiding or assisting to them, or any of them, shall be free, discharged and indemnified, as well against the king's majesty, his heirs and successors, as against all and every other person and persons, of, for, or concerning the killing, maiming, or hurting of any such person or persons, so unlawfully, riotously, and tumultuously assembled, that shall happen to be so killed, maimed or hurt, as aforesaid."

§ 4. And "if any persons unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, shall unlawfully, and with force demolish or pull down, or begin to demolish or pull down any church or chapel, or any building for religious worship, certified and registered according to the statute made in the first year of the reign of the late King William and Queen Mary, intituled, An act for exempting their majesties' protestant subjects dissenting from the church of England, from the penalties of certain laws, or any dwelling-house, barn, stable, or other out-house, that then every such demolishing, or pulling down, or beginning to demolish, or pull down, shall



shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy."

§ 5. Provides, "that if any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly lett, hinder, or hurt any person or persons that shall begin to proclaim, or go to proclaim according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindring, or hurting such person or persons, so beginning or going to make such proclamation, as aforesaid, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that also every such person or persons so being unlawfully, riotously, and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made if the same had not been hindred, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such lett or hindrance so made, having knowledge of such lett or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy."

§ 6. Enacts, "that if after the said last day of July, 1715, any such church or chapel, or any such building for religious worship, or any such dwelling-house, barn, stable, or other out-house, shall be demolished or pulled down wholly, or in part, by any persons so unlawfully, riotously, and tumultuously assembled, that then, in case such church, chapel, building for religious worship, dwelling-house, barn, stable, or out-house, shall be out of any city or town, that is either a county of itself, or is not within any hundred, that then the inhabitants of the hundred in which such damage shall be done, shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down wholly, or in part; and such damages shall and may be recovered by action to be brought in any of his majesty's courts of record at Westminster, (wherein no essoign, protection, or wager of law, or any imparlance shall be allowed) by the person or persons damnified thereby, against any two or more of the inhabitants of such hundred, such action for damages to any church or chapel to be brought in the name of the rector, vicar, or curate of such church or chapel that shall be so damnified, in trust for applying the damages to be recovered in rebuilding or repairing such church or chapel; and that judgment being given for the plaintiff or plaintiffs in such action, the damages so to be recovered shall, at the request of such plaintiff or plaintiffs, his or their executors or administrators, be raised and levied on the inhabitants of such hundred, and paid to such plaintiff or plaintiffs, in such manner and form, and by such ways and means, as are provided by the statute made in the seven-and-twentieth year of the reign of Queen Elizabeth, for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed, shall be levied: and in case any such church, chapel, building for religious worship, dwelling-house, barn, stable, or out-house, so damnified, shall be in any city or town that is either a county of itself, or is not within any hundred, that then such damages shall and may be recovered by action to be brought in manner aforesaid (wherein no essoign, protection, or wager of law, or any imparlance shall be allowed) against two or more inhabitants of such city, or town; and judgment being given for the plaintiff or plaintiffs in such action, the damages so to be recovered shall, at the request of such plaintiff or plaintiffs, his or their executors or administrators, made to the justices of the peace of such city or town at any quarter sessions to be holden for the said city or town, be raised and levied on the inhabitants of such city or town, and paid to such plaintiff or plaintiffs, in such manner and form, and by such ways and means, as are provided by the said statute made in the seven-and-twentieth year of the reign of Queen Elizabeth, for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed, shall be levied."

§ 7. Enacts, "that this act shall be openly read at every quarter sessions, and at every leet or law day."

§ 8. Provides, "that no person or persons shall be prosecuted by virtue of this act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed."

§ 9. Enacts, "that the sheriffs and their deputies, stewards and their deputies, bailies of regalities and their deputies, magistrates of royal burroughs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers, of any county, stewartry, city or town, within that part of Great Britain called Scotland, shall have the same powers and authority for putting this present act in execution within Scotland, as the justices of the peace and other magistrates aforesaid, respectively have by virtue of this act, within and for the other parts of this kingdom; and that all and every person and persons who shall at any time be convicted of  
any



any the offences aforementioned, within that part of Great Britain called Scotland, shall for every such offence incur and suffer the pain of death, and confiscation of moveables: and also that all prosecutions for repairing the damages of any church or chapel, or any building for religious worship, or any dwelling-house, barn, stable, or out-house, which shall be demolished or pulled down in whole, or in part, within Scotland, by any persons unlawfully, riotously, or tumultuously assembled, shall and may be recovered by summar action, at the instance of the party aggrieved, his or her heirs or executors, against the county, stewartry, city or burrough respectively, where such disorders shall happen, the magistrates being summoned in the ordinary form, and the several counties and stewartries called by edictal citation at the market-cross of the head burrough of such county or stewartry respectively, and that in general, without mentioning their names and designations.'

§ 10. Provides, 'that this act shall extend to all places for religious worship, in that part of Great Britain called Scotland, which are tolerated by law, and where his majesty King George, the Prince and Princess of Wales, and their issue, are prayed for in express words.'

By st. 52 G. 3. c. 130. reciting the above act, the 9 G. 1. c. 22., the 9 G. 5. c. 29., the 41 G. 3. c. 24. and the 43 G. 3. c. 58. and stating that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of the said acts, makes the burning certain buildings, &c. used for manufactories, a capital offence, and enacts, by s. 2., that if any person or persons, unlawfully, riotously, and tumultuously assembled together in disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any erection and building or engine which shall be used or employed in the carrying on or conducting of any trade or manufactory, or any branch or department of any trade or manufactory of goods, wares, or merchandise, of any kind or description whatsoever, or in which any goods, wares, or merchandises, shall be warehoused or deposited, that then every such demolishing or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy.

By 39 G. 3. c. 79. s. 1. after reciting that a traitorous conspiracy had long been carried on in conjunction with the persons exercising the powers of government in France, to overturn the laws and government in Great Britain and Ireland, it is enacted, that all societies calling themselves United Englishmen, United Scotchmen, United Irishmen, and United Britons, and the society commonly called the London Corresponding Society, and all other Corresponding Societies of any other city, town, or place, shall be suppressed and prohibited.

§ 2. And all the said societies, and every other society, the members whereof shall according to the rules thereof, or to any agreement for that purpose, be required or admitted to take any oath or engagement deemed unlawful within the meaning of 37 G. 3. c. 123. 'for more effectually preventing the administering or taking of unlawful oaths,' or taking any oath not authorised by law; and every society, the members whereof, shall take, subscribe, or assent to any test or declaration not required by law, or not authorised in manner hereinafter mentioned, and every society of which the names of the members or of any of them, shall be kept secret from the society at large; or which shall have any committee or select body so chosen or appointed, that the members constituting the same shall not be known by the society at large to be such members, or which shall have any president, treasurer, secretary, delegate, or other officer so appointed, that such appointment shall not be known to the society at large, or where the names of all the members, and of all committees or select bodies of members, and of all presidents and other officers, shall not be entered in a book to be kept for that purpose, and to be open to the inspection of all the members of such society; and every society composed of different divisions, or different parts acting separately from each other, or of which any part shall have a separate and distinct president, &c. or other officer appointed by or for such part, or to act as an officer for such part, shall be deemed unlawful combinations and confederacies; and every person who shall become a member of any such society, or being a member, shall act as a member, or directly or indirectly maintain correspondence or intercourse with any such society, or any division, committee, officer, or member thereof, or who shall by contribution of money, or otherwise, aid or support such society, or any member or officer thereof, shall be deemed guilty of an unlawful combination and confederacy.

§ 3. Provided nevertheless, that nothing herein shall extend to any declaration taken, subscribed, or assented to by the members of any society, in case the form thereof shall have been first approved and subscribed by two justices of the county or place where such society shall ordinarily assemble, and shall have been registered with the clerk of the peace, or his deputy (for which shall be paid 1s. and no more,) but such approbation of the justices shall remain valid no longer than until the next

general sessions for such county or place, unless the same shall be confirmed at such sessions; and if not then confirmed, the provisions of this act shall from thenceforth extend to such declarations, and to all persons subscribing the same, so far as they may relate to all acts which may be done by them or any of them, subsequent to the holding of such sessions.

§ 4. Provided that no person who, before the passing of this act, shall have been a member of any such society, shall be liable to any penalty, in case he shall not in any manner act as a member after the passing of this act.

§ 5. But nothing herein shall extend to lodges of Free Masons which before the passing of this act, have been usually holden under that denomination, and in conformity to the rules prevailing amongst such societies; provided that two members of each lodge certify upon oath before a justice, that such society or lodge has, before the passing of this act, been usually held under the denomination of a lodge of Free Masons, and in conformity to the rules prevailing amongst such societies; which certificate, duly attested by the magistrate before whom sworn, and subscribed by the person so certifying, shall, within two calendar months after the passing of this act, be deposited with the clerk of the peace for the county or place where such lodge hath been usually held. Provided also, that this exemption shall not extend to any such lodge, unless the name or denomination thereof, and the usual places and times of its meetings, and the names and descriptions of the members thereof be registered with such clerk of the peace within two months after the passing of this act, and also on or before the 25th March in every succeeding year.

§ 7. And the clerk of the peace or person acting in his behalf shall receive such certificate, and make such registry as aforesaid, and enroll the same among the records of such county or place, and shall lay the same once in every year before the general sessions, who may, if they so think fit, upon complaint upon oath of one credible person, that the continuance of the meetings of such lodge is likely to be injurious to the public peace, direct that such meeting shall be discontinued; and every such meeting held notwithstanding such discontinuance shall be deemed an unlawful combination and confederacy under the provisions of this act.

§ 14. Two justices, upon evidence on oath that any meeting of any society hereby declared to be unlawful, or any meeting for any seditious purposes hath been held at any house, room, or place licensed to sell ale, beer, wine, or spirits, may declare the licence for selling thereof forfeited (E), and the person keeping the same shall, after the day of such declaration, be liable to every penalty and forfeiture he would have been subject to if such licence had expired on that day.

§ 15. And whereas places have of late been used for delivering lectures, and holding debates, which are not within the provisions of 36 G. 3. 8. but which have in many instances been of a seditious and immoral nature, and other places have of late been used for the like purposes, under the pretence of reading books, pamphlets, newspapers, or other publications, it is enacted, that every house, room, field, or other place, at or in which any lecture shall be publicly delivered, or any public debate had on any subject whatsoever for the purpose of collecting money or other valuable thing from the persons admitted or to which any person shall be admitted by payment of money, or by any ticket, or token of any kind delivered in consideration of money or other valuable thing, or in consequence of paying or giving, or having paid or given, or having agreed to pay or give in any manner any money or other valuable thing, or where any money or other valuable thing shall be received from any person admitted either under pretence of paying for refreshment or other thing, or under any pretence or for any other cause, or by means of any device whatever: and every place which shall be opened or used as a place of meeting for the purpose of reading books or other publications, and to which any person shall be admitted by payment of money, &c. &c. shall be deemed a disorderly house or place, within the meaning of the said act of 36 G. 3. c. 8. unless the same shall have been previously licensed in manner hereafter mentioned; and the person by whom such place shall be opened or used for any of the purposes aforesaid shall forfeit 100*l.* for every day or time so opened or used as aforesaid, to the person who shall sue, and be otherwise punished as the law directs in cases of disorderly houses. And every person conducting the proceedings or acting as moderator, president, or chairman, at any such place, or therein debating or delivering any discourse, or furnishing any book, pamphlet, newspaper, or other publication as aforesaid; and also every person who shall pay, give, collect, or receive any money or other thing, or agree so to do, in respect to the admission of any person, or shall deliver out, distribute, or receive any ticket or token as aforesaid, knowing such place to be so opened or used for such purpose as aforesaid, shall, for every such offence, forfeit 20*l.*

§ 16. Every person who shall appear at, or behave as master, or as the person having

having the command, government, or management of any such house or place, shall be deemed to be a person by whom the same is opened or used as aforesaid, and shall be liable to be prosecuted as such, notwithstanding he be not in fact the real owner or occupier.

§ 17. And any justice who shall by information upon oath, have reason to suspect that any house, room, field, or place, or any part thereof, is opened or used for the purpose of delivering lectures, or for public debate, or for reading books, pamphlets, newspapers, or other publications contrary to this act, may go to such place, and demand admittance; and if he shall be refused, the same shall be deemed a disorderly house or place, and all the provisions herein contained, and in the said act of 36 G. 3. c. 8. shall be applied to such house or place; and every person refusing such justice admittance, shall forfeit 20*l*.

§ 18. Provided nevertheless, that two justices at any general or special sessions may, by writing under their hands and seals, grant a licence to any person to open any such house or place for the purpose of delivering, for money, any such lectures as aforesaid on any subject, the same being clearly expressed in such licence; or for reading books, pamphlets, newspapers, or other publications (for which licence 1*s*. shall be paid and no more,) and the same shall be in force for one year, and no longer, or for any less time therein specified; which licence the justices at any general sessions may revoke by their order, a copy whereof shall be served upon the person to whom such licence was granted, or be left at such place, and thereupon the same shall cease and be utterly void.

§ 19. And any justice may go to any such licensed place at the time of delivering, or appointed for delivering lectures therein, or while opened or used for that purpose, and demand admittance, and if he shall be refused, notwithstanding such licence, the same shall be deemed a disorderly house or place within this act; and every person refusing such admittance shall forfeit 20*l*.

§ 20. Any two justices upon evidence on oath that any such licensed place is commonly used for delivering lectures of a seditious or immoral tendency, or that books or other publications of the like nature are there commonly kept and delivered to be read, may declare such licence forfeited, and the same shall from thenceforth be utterly void.

§ 21. And every house or place licensed to sell ale, beer, wine, or spirits, shall also be deemed a place licensed for reading books, pamphlets, and other publications within the meaning of this act: but nevertheless, any two justices, on proof on oath that publications of a seditious or immoral nature are usually distributed for the purpose of being read at such place, may adjudge such licence forfeited (E); and the person keeping such house shall, after such adjudication, be liable to every penalty and forfeiture as if such licence had expired.

§ 22. Provided always, that nothing herein shall extend to any lectures delivered at the Universities, or in the Inns of Court or Chancery, or by the professors of Gresham College; and no payment made to any schoolmaster or other person delivering lectures for the instruction of youth only shall be deemed a payment for admission within the meaning of this act.

§ 13. Every person who shall knowingly permit any meeting of any society hereby declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society, to be held in his house or apartment, shall, for the first offence, forfeit 5*l*., and for every other offence committed after the date of his conviction be deemed guilty of an unlawful combination and confederacy.

§ 8. And every person who shall be guilty of any such unlawful combination and confederacy as in this act described may be proceeded against in a summary way, either before one justice, or by indictment; who, on conviction (F) on the oath of one witness by such justice, shall be committed to the common gaol or house of correction without bail for three calendar months, or shall forfeit 20*l*. as to such justice shall seem meet: which if not forthwith paid into the hands of such justice he may levy the same by distress, together with the costs, and for want of sufficient distress may commit such offender to the common gaol or house of correction, for any time not exceeding three calendar months. And if any such offender be convicted upon indictment, he may be transported for seven years, or may be imprisoned for not exceeding two years, as the court shall think fit.

§ 9. Provided always, that such justice may mitigate such punishment (if he shall see cause) so as not to reduce the same to less than one third, whether it be by imprisonment or fine.

§ 10. But no person prosecuted before a justice shall be prosecuted also by indictment; and if prosecuted by indictment, shall not be prosecuted before a justice.

§ 11. Provided, that nothing herein shall extend to prevent any prosecution by indictment or otherwise for any offence within the meaning of this act, which might have been prosecuted if this act had not been made, unless the offender hath been prosecuted under this act.

§ 34. Provided always, that no person shall be prosecuted or sued for any penalty hereby imposed, unless such prosecution be commenced, or action brought, within three calendar months.

§ 35. All pecuniary penalties hereby imposed exceeding 20*l.* are to be recovered in the courts at Westminster. If not exceeding 20*l.* (for the recovery whereof no provision is herein before contained, may be recovered before one justice where such penalty shall be incurred or the person having incurred the same shall happen to be, in a summary way (G). And in case such last-mentioned penalty shall not be forthwith paid, such justice shall cause the same to be levied by distress and sale of the offender's goods, together with the costs of such distress and sale, and for want of sufficient distress such offender shall be committed to the common gaol or house of correction, for not exceeding six nor less than three calendar months.

§ 36. All pecuniary penalties, whether recovered before a justice or by action, shall be applied half to the informer, and half to the king.

§ 37. And every action and suit, against any justice, peace officer, or other person acting in pursuance of this act, shall be commenced within three calendar months, and shall be laid in the proper county; and if the defendant recover he shall have double costs.

By stat. 57 G. 3. c. 19. § 23. After reciting that it is highly inexpedient that public meetings or assemblies should be held near the houses of parliament, or near the courts of justice in Westminster Hall on certain days; it is enacted, that it shall not be lawful for any person to convene, or to give any notice for convening any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within the distance of a mile from the gate of Westminster Hall, (except such parts of the parish of St. Paul's Covent Garden, as are within such distance) for the purpose of considering of or preparing any petition, &c. for alteration of matters in church or state, on any day on which the two houses, or either house of parliament, shall meet and sit, nor on any day on which the courts shall sit in Westminster Hall. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an unlawful assembly. Provided that this enactment shall not apply to any meeting for the election of members of parliament, or to persons attending upon the business of either house of parliament, or any of the said courts.

§ 24. After reciting that whereas divers societies or clubs have been instituted, in the metropolis and in various parts of this kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity, and the existence of the established government, laws and constitution of the kingdom; and that the members of many of such societies or clubs have taken unlawful oaths and engagements of fidelity and secrecy, and have taken or subscribed, or assented to, illegal tests and declarations; and that many of the said societies or clubs elect, appoint, or employ committees, delegates, &c. to confer or correspond with other societies or clubs, and to induce other persons to become members, and by such means maintain an influence over large bodies of men, and delude many ignorant and unwary persons into the commission of acts highly criminal: And whereas certain societies or clubs calling themselves Spenceans or Spencean Philanthropists, hold and profess for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom; And whereas it is expedient and necessary that all such societies or clubs should be utterly suppressed and prohibited as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of this kingdom, and to the constitution of the government thereof, it is enacted, "that all societies or clubs calling themselves Spenceans or Spencean Philanthropists, and all other societies or clubs, by whatever name or description the same are called or known, who hold and profess, or who shall hold and profess, the same objects and doctrines, shall be and the same are hereby utterly suppressed and prohibited, as being unlawful combinations and confederacies against the government of our sovereign lord the king, and against the peace and security of his majesty's liege subjects."

§ 25. Enacts, "that all and every the said societies or clubs, and also all and every other society or club now established or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of 37 Geo. 3. c. 123., or within the meaning of 52 Geo. 3.

c. 104.,



c. 104., or to take any oath not required or authorised by law; and every society or club, the members whereof or any of them shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test or declaration not required or authorised by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise; either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be unlawful combinations and confederacies, within the meaning of 39 G. 3. c. 79., and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said act; and every person who, from and after the passing of this act, shall become a member of any such society or club, or who, after the passing of this act, shall act as a member thereof, and every person who, from and after the passing of this act, shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the said 39 Geo. 3. c. 79.; and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said act, with regard to the prosecution and punishment of unlawful combinations and confederacies."

§ 26. Provides, that nothing in this act contained shall extend to lodges of Freemasons, complying with the regulations of 39 Geo. 3. c. 79.; nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices present at a general session, or at a general quarter sessions of the peace, pursuant to the regulations of 39 Geo. 3. c. 79., nor to any meeting of quakers; or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed.

§ 27. After reciting statute 39 Geo. 3. c. 79. § 2. enacts, that the said enactment shall not extend to any meeting of quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed.

§ 28. "If any person shall knowingly permit any meeting of any society or club hereby declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society or club, to be held in any house or apartment, building, or other place, to him or her belonging, or in his or her possession or occupation, such person shall, for the first offence, forfeit the sum of five pounds, and shall, for any such offence committed after the date of his or her conviction for such first offence, be deemed guilty of an unlawful combination and confederacy, in breach of this act."

§ 29. "It shall be lawful for any two or more justices of the peace, acting for any county, stewartry, riding, division, city, town or place, upon evidence on oath that any meeting of any society or club hereby declared to be an unlawful combination and confederacy, or any meeting for any seditious purpose, hath been held, after the passing of this act, at any house, room or place, licensed for the sale of ale, beer, wine or spirituous liquors with the knowledge and consent of the person keeping such house, room or place, to adjudge and declare the licence or licences for selling ale, beer, wine or spirituous liquors, granted to the person or persons keeping such house, room or place, to be forfeited; and the person or persons so keeping such house, room or place, shall from and after the day of the date of such adjudication and declaration, and notice thereof given to him, her or them, be subject and liable to all and every the penalties and forfeitures for any act done after that day, which such person or persons would be subject and liable to, if such licence or licences had expired, or otherwise determined on that day."

§ 30. All pecuniary fines, penalties or forfeitures, exceeding 20*l.* incurred under this act, in England, Wales, or Berwick-upon-Tweed, may be recovered by action of debt in any of his majesty's courts of record at Westminster, and in Scotland in the court of session there; and it shall be sufficient to declare in England or con-



clude in Scotland, that the defendant or defender is indebted to the plaintiff or pursuer in the sum of ——— (being the sum demanded by the said action) being forfeited by an act made in the 57th year of the reign of his present majesty, intituled An act for the more effectually preventing seditious meetings and assemblies; and the plaintiff or pursuer, if he shall recover in such action, shall have his full costs or expences; and any pecuniary penalty imposed by this act not exceeding 20*l.*, and for the recovery whereof no provision is herein before contained, may be recovered before any justice of the peace for the county, city, town, or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way: and in case such last-mentioned penalty shall not be forthwith paid, such justice shall by warrant under his hand and seal, and directed to any constable or other peace officer, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale; and in case no sufficient distress can be had or made, such justice shall commit the offender to the common gaol or house of correction for such county, city, town or place, there to remain without bail or mainprise, for any time not exceeding six calendar months, nor less than three calendar months: Provided always, that no person shall be prosecuted or sued for any pecuniary penalty imposed by this act, unless such prosecution shall be commenced, or action brought within three calendar months next after such penalty shall have been incurred.

§ 31. All penalties and forfeitures shall, when recovered, be disposed of thus; one moiety thereof to the plaintiff in any action, or to the informer before any justice, and the other moiety thereof to his majesty.

§ 32. Any action and suit which shall be brought against any justice of the peace, constable, peace officer, or other person, in England, Wales, or the town of Berwick-upon-Tweed, for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed, and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial; and if such action or suit shall be brought or commenced after the time limited, or the venue shall be laid in any other place than as aforesaid, the jury shall find a verdict for the defendant; and in such case or if the jury shall find a verdict for the defendant upon the merits, or if the plaintiff shall become non-suit, or discontinue his action after appearance, or if upon demurrer, judgment shall be given against the plaintiff, the defendant shall have double costs; which he may recover in such manner as any defendant can by law in other cases.

§ 33. Every action and suit which shall be brought or commenced against any person in Scotland, for any thing done or acted in pursuance of this act, shall in like manner be commenced within three calendar months after the fact committed, and shall be brought in the court of session in Scotland; and the defender may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited, the same shall be dismissed; and in such case, or if the defender shall be assoilzied, or the pursuer shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer upon the relevancy, the defender shall have treble costs or expences; which he may recover in such manner as any defender can by law recover costs or expences in other cases.

§ 35. Nothing in this act contained shall be deemed to take away or abridge any provision already made by the law of this realm, or of any part thereof, for the suppression or punishment of any offence whatsoever described in this act.

§ 36. Provides that no person shall be prosecuted under this act, for having been a member of any society or club declared hereby to be an unlawful combination and confederacy, if such person shall not have acted as a member, after the passing of this act; but that nothing in this act shall extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within this act, and which might have been so prosecuted if this act had not been made: provided always that no person who shall be prosecuted and convicted or acquitted of any offence against this act, shall be liable to be again prosecuted for the same offence.

§ 37. In case any proceeding or prosecution shall be instituted, for any offence committed against the 39 Geo. 3. c. 79. or this act, either by action, or by information before any justice or otherwise, the Attorney General in England, or the Lord Advocate of Scotland may order any such proceeding to be stayed; and in case of any judgment or conviction, &c. one of his majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate or remit any fine or forfeiture, or any part thereof.

§ 39. This

§ 39. This act not to extend to Ireland.

By stat. 60 G. 3. c. 6. intituled "An act for more effectually preventing seditious meetings and assemblies; to continue in force until the end of the session of parliament next after five years from the passing of the act, viz. (24th December 1819.)"

§ 1. After reciting, that "whereas in divers parts of this kingdom, assemblies of large numbers of persons collected from various parishes and districts, under the pretext of deliberating upon public grievances, and of agreeing on petitions, complaints, remonstrances, declarations, resolutions, or addresses upon the subject thereof, have of late been held, in disturbance of the public peace, to the great terror and danger of his majesty's loyal and peaceable subjects, and in a manner manifestly tending to produce confusion and calamities in the nation;" it is enacted, 'that no meeting of any description of persons, exceeding the number of 50 persons (other than and except any meeting of any county, or division of any county, called by the lord lieutenant, governor, or custos rotulorum, or the sheriff of such county, or any meeting of any riding of any county called by the lord lieutenant or custos rotulorum of such riding, or by the sheriff of the same county; or any meeting called by the sheriff or steward depute, or substitute, or by the convener of any county or stewartry, or any meeting called by five or more acting justices of the peace of the county, stewartry, or place where such meeting shall be holden; or any meeting of any riding or division of any county having different ridings or divisions, called by five or more justices of such riding or division; or any meeting called by the major part of the grand jury of the county where such meeting shall be holden, at the assizes for the said county; or any meeting of any city, borough, or town corporate, called by the mayor or other head officer of such city, borough, or town corporate; or any meeting of any ward or division of any city, called by the alderman or other head officer of such ward or division, or any meeting of any corporate body), shall be holden for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state; or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address upon the subject thereof; unless in the parish, or when any parish shall be divided into townships, having separate and distinct overseers of the poor, then in the township within which the persons calling any such meeting shall usually inhabit or dwell; nor unless notice in writing of the intention to hold such meeting, and of the time and place when and where, and of the purpose for which the same shall be proposed to be holden, shall be delivered personally to some justice of the peace residing in or near to such parish or township, and usually acting for the district or division within which such parish or township shall be situate, six days at the least before such meeting shall be proposed to be holden as aforesaid; nor unless such notice shall be subscribed by seven persons at the least, being householders usually resident within the parish or township (as the case may be), where such meeting shall be proposed to be holden; nor unless the respective places of abode and descriptions of such persons be inserted in such notice."

§ 2. Provides, "that it shall be lawful for the justice of the peace to whom any such notice as aforesaid shall be delivered, to alter the time and place, or either of them, mentioned in such notice for holding any such proposed meeting, and to fix any other convenient time, being not more than four days from and after the day proposed in the notice, or any other convenient place within the parish or township for which such meeting is intended to be held as aforesaid; and in every such case the said justice of the peace shall notify in writing every such alteration, and either give such notification to the person who shall deliver the notice, or leave such notification at any time within two days after the delivery to the said justice of such notice as aforesaid, at the place of abode specified in such notice, of any one of the seven persons subscribing the same; and the said meeting, if held, shall not in any such case be held on any other time, or at any other place, than shall be so fixed by the said justice of the peace."

§ 3. Enacts, "that it shall not be lawful to adjourn any meeting that shall be holden at any time or place mentioned in any such notice, or so altered as aforesaid to any subsequent time, or to any other place than shall have been so mentioned in such notice, or so altered as aforesaid; and that every meeting which shall be holden by way of or under pretence of being an adjourned meeting, at any other time or place than the time or place mentioned in such notice, or so altered as aforesaid, for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address, upon the subject thereof, shall be deemed and taken to be an unlawful assembly."

§ 4. Enacts, "that no person (other than and except justices of the peace, sheriffs,

under-sheriffs, constables, or other peace officers, or other persons acting under their authority, or in their aid or assistance), shall attend any meeting whatever exceeding the number of 50 persons, which shall be holden for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution or address, upon the subject thereof, unless such person, when the meeting shall be holden for any county, riding, division or stewartry, shall be a freeholder, copyholder, heritor, or householder of, or an inhabitant usually residing in the county or riding, or division of the county or stewartry, within and for which the meeting shall be holden, or a freeman or member of the corporation, if the meeting be of any corporate body, or a householder of, or an inhabitant usually residing, or a freeholder or copyholder having an estate in lands of the annual value of 50*l.*, of which he shall have been in possession 12 months, in the city, borough, or town corporate, parish or township (as the case may be), within and for which any such meeting shall be holden: provided always, that nothing herein contained shall extend, or be construed to extend, to any member of the commons house of parliament, attending any such meeting as aforesaid, in any county, city, borough, town, or place for which he shall be serving in parliament; nor to any person having a right to vote for a member to serve in parliament for any city, borough, town, or place, attending any meeting of such city, borough, town, or place, which may be called by the mayor or other head officer."

§ 5. Enacts, "that if any person shall knowingly and wilfully attend any meeting holden for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address, upon the subject thereof, not being a freeholder, copyholder, heritor, or householder of or inhabitant usually residing in the county or riding, or division of the county, or the stewartry, within and for which the meeting shall be holden, when such meeting shall be holden for any county, riding, division, or stewartry, or not being a freeman or member of the corporation if the meeting be of any corporate body, or a householder of or inhabitant usually residing, or freeholder or copyholder having such estate as aforesaid, in the city, borough, or town corporate, parish or township (as the case may be), within and for which any such meeting shall be holden, and not being such member of the commons house of parliament, attending as aforesaid, such person being convicted thereof, shall be liable to be punished by fine and imprisonment, not exceeding 12 calendar months, at the discretion of the court in which the conviction shall be had."

§ 6. Enacts, "that all justices of the peace, sheriffs and under-sheriffs, mayors, and other head officers aforesaid, are hereby respectively authorised and empowered, within their respective jurisdictions, where any meeting or assembly shall be holden, or be proposed to be holden, for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution or address, upon the subject thereof, to proceed to the place where such meeting or assembly shall be holden, or shall be proposed to be holden, and there to do or order or cause to be done all such acts, matters and things, as the case may require, which they are hereby enabled to do, or to order to be done, or which they are otherwise by law enabled or entitled to do, or to order to be done; and it shall be lawful for all justices of the peace, sheriffs, under-sheriffs, mayors, and other head officers respectively as aforesaid, to require and take the assistance of any number of constables, or other officers of the peace, within the district or place wherein such meeting as herein-before mentioned shall be holden, or any other persons in their aid or assistance, when they shall deem such aid or assistance to be necessary and requisite."

§ 7. Enacts, "that in case any meeting shall be holden in pursuance of any such notice as aforesaid, and such notice shall express or purport that any matter or thing by law established may be altered otherwise than by the authority of the king, lords, and commons, in parliament assembled; or shall tend to incite or stir up the people to hatred or contempt of the person of his majesty, his heirs or successors, or of the government and constitution of this realm, as by law established; every such meeting shall be deemed and taken to be an unlawful assembly."

§ 8. Enacts "that if any person or persons shall attend any meeting whatever, holden for the purpose or on the pretext of deliberating upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint,

plaint, remonstrance, declaration, resolution or address, upon the subject thereof, contrary to the provisions of this act, it shall be lawful for any one or more justice or justices of the peace in and for any county, or the sheriff or under-sheriff of any county, or the mayor or other head officer, or any justice of the peace of any city or town corporate, within which any such meeting shall be held, to make or cause to be made proclamation in the king's name, in the form directed in this act, commanding every person so unlawfully attending any such meeting immediately and peaceably to depart therefrom; and if any person or persons so ordered to depart as aforesaid, shall not, upon such proclamation, depart from any such meeting within the space of a quarter of an hour after such proclamation made, that then and in every such case, every such person so continuing and not departing as aforesaid, shall, upon being thereof lawfully convicted, be adjudged to be guilty of felony, and shall be liable to be transported for any period not exceeding seven years."

§ 9. Enacts, "that the order and form of the proclamation to be made as aforesaid, shall be as hereafter followeth, (that is to say,) the justice of the peace or other person, or one of the justices of peace, or one of the other persons authorised by this act to make the said proclamation, shall, among the said persons assembled, or as near to them as he can safely come, with a loud voice, command or cause to be commanded silence to be, while proclamation is making; and after that shall openly, and with loud voice make or cause to be made proclamation in these words, or to the like effect:

"Our sovereign lord the king chargeth and commandeth every person here assembled, who is not a [freeholder, heritor of——, freeman of——, member of——, householder of——, or inhabitant usually residing, or freeholder in, or copyholder in——, naming the county, riding, division, stewartry, city, borough, town, body corporate, parish or township, as the case may be,] or who is not entitled to attend this meeting, immediately to depart from this meeting to his lawful business.—God save the king."

§ 10. Enacts, "that when any such proclamation as aforesaid shall have been made at any meeting, it shall be lawful for any person lawfully attending such meeting, to seize and apprehend any person not entitled to attend such meeting, who shall not upon the making of such proclamation forthwith depart, and to carry such person before any justice of the peace of the county, riding, division, stewartry, city, or town corporate, within which such meeting shall be held, to be dealt with according to law."

§ 11. Enacts, "that it shall be lawful for any one or more justice or justices of the peace in and for any county, or for the sheriff or under-sheriff of any county, or for the mayor or other head officer, or any justice of the peace of any city or town corporate, within which any meeting shall be held, or persons shall assemble for the purpose of holding any meeting contrary to the provisions of this act, or where any person or persons not entitled to attend any meeting or assembly as aforesaid, shall refuse or neglect to depart therefrom for the space of a quarter of an hour after such proclamation made as aforesaid, to make or cause to be made proclamation in the king's name, in the manner and form hereinafter directed, to command all persons there assembled to disperse themselves, and peaceably to depart to their habitations, or to their lawful business; and if any such persons so assembled as aforesaid shall, to the number of twelve or more notwithstanding such proclamation made, continue together by the space of half an hour after such proclamation made, that then and in every such case every person so continuing, being thereof legally convicted, shall be adjudged guilty of felony, and be liable to be transported for any term not exceeding seven years."

§ 12. Enacts, "that the order and form of the proclamation to be made as aforesaid, shall be as hereafter followeth; (that is to say,) the justice or justices of the peace, or other person authorised by this act to make such proclamation, shall, among the said persons assembled, or as near to them as he can safely come, with a loud voice, command or cause to be commanded silence to be, while proclamation is making, and after that shall openly, and with loud voice, make or cause to be made proclamation in these words, or to the like effect:

"Our sovereign lord the king chargeth and commandeth all persons here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business.—God save the king."

§ 13. Enacts, "that if one or more justice or justices of the peace present at any meeting requiring such notice as aforesaid, shall think fit to order any person or persons who shall attend such meeting in any manner contrary to the provisions of this act, or who shall at such meeting proceed to propound or maintain any proposition for altering any thing by law established, otherwise than by the authority of the king, lords, and commons, in parliament assembled, or shall wilfully and advisedly make any proposition, or hold any discourse for the purpose of inciting and stirring up the people to hatred or contempt of the person of his majesty, his heirs or successors, or the government and constitution



constitution of this realm as by law established, to be taken into custody, to be dealt with according to law; and in case the said justice or justices, or any of them, or any peace officer acting under his or their or any of their orders, shall be forcibly obstructed in taking into custody any person or persons so ordered to be taken into custody, then and in such case it shall be lawful for any such justice or justices thereupon to make or cause to be made such proclamation as last aforesaid, in manner aforesaid; and if any persons to the number of twelve, or more, being required or commanded by such proclamation to disperse themselves, and peaceably to depart as last aforesaid, shall, to the number of twelve or more, notwithstanding such proclamation made, remain or continue together by the space of half an hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony, and the offenders therein shall be adjudged felons, and shall be liable to be transported for any term not exceeding seven years."

§ 14. Enacts, "that if any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt any justice of the peace, or other person authorised as aforesaid, or any person acting in aid or assistance of any justice of the peace who shall attend or disperse any such meeting as aforesaid, or shall be going to attend or to disperse any such meeting, or any justice of the peace or peace officer, or any person or persons acting in aid or assistance of any justice of the peace or other officer who shall begin to proclaim, or be going or endeavouring to make any proclamation authorised or directed to be made under the provisions of this act, whereby such proclamation shall not be made; and also if any persons so being assembled as aforesaid, to whom any such proclamation as aforesaid should or ought to have been made, if the same had not been hindered as aforesaid, shall, to the number of twelve or more, continue together, and not disperse themselves within half an hour after such let or hindrance so made, having knowledge of such let or hindrance so made; and also if any person so being at any such assembly as aforesaid shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt any justice of the peace or other magistrate, or any peace officer or other person acting in their aid or assistance, in the arresting, apprehending, or taking into custody, or detaining, in execution of any of the provisions of this act, any person or persons, or endeavouring so to do, that then and in every such case every person so offending, being thereof legally convicted, shall be adjudged guilty of felony, and be liable to be transported for any term not exceeding seven years."

§ 15. Enacts, "that if the persons assembled at any meeting or assembly held contrary to the provisions of this act, or which shall become and be an unlawful assembly, under the provisions of this act, or any of them, shall happen to be killed, maimed, or hurt, in the dispersing, or endeavouring to disperse, or arresting or apprehending or detaining them, or any of them, or in the endeavouring so to do, by reason of their resisting the persons so dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, that every such justice of the peace, sheriff, under-sheriff, mayor, head officer, magistrate, high or petty constable, or other peace officer, and all and singular persons being aiding and assisting to them or any of them, shall be free, discharged, and indemnified, as well against the king's majesty, his heirs and successors, as against all and every other person and persons, of, for, or concerning the killing, maiming, or hurting of any such person or persons so continuing together as aforesaid, that shall happen to be so killed, maimed, or hurt as aforesaid."

§ 16. Provides, that nothing herein-before contained shall extend to any meeting or assembly which shall be wholly holden in any room or apartment of any house or building.

§ 17. Provides also, that nothing in this act contained shall extend to any meeting held in any county, stewartry, city, borough, town, or place, returning any member to serve in parliament, after the issuing and before the return of any writ for the election of any member to serve in parliament for such county, stewartry, city, borough, town, or place.

§ 18. Declares and enacts, "that it shall not be lawful for any person to attend, proceed to, or be present at any meeting whatsoever, which shall be holden for the purpose or on the pretext of deliberating upon, or proceeding to deliberate upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address, on the subject thereof, armed with any gun, pistol, sword, dagger, pike, bludgeon, or other offensive weapon; and that every person who shall offend in the premises, shall, upon being convicted thereof, be fined and imprisoned for any term not exceeding



ing two years, at the discretion of the court before which such conviction shall be had: provided always, that nothing herein contained shall extend, or be construed to extend to any justice of the peace, sheriff, under-sheriff, mayor, or other head officer aforesaid, or to any peace officer, or to any other person or persons acting in their aid or assistance, who shall attend, proceed to, or be present at any such meeting as aforesaid."

§ 19. Enacts, "that it shall not be lawful for any person to attend, proceed to, or be present at, or return from any meeting whatever, which shall be holden for the purpose or on the pretext of deliberating upon, or proceeding to deliberate upon any public grievance, or upon any matter or thing relating to any trade, manufacture, business, or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address, on the subject thereof, with any flag, banner, or ensign, or displaying or exhibiting any device, badge, or emblem, or with any drum or military or other music, or in military array or order; and that every person who shall offend in the premises, shall, upon being convicted thereof, be fined and imprisoned for any term not exceeding two years, at the discretion of the court before which such conviction shall be had."

§ 20. Enacts, "that the sheriffs depute and their substitutes, stewards depute and their substitutes, justices of the peace, magistrates of royal burghs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers of any county, stewartry, city, or town, within that part of the united kingdom called Scotland, shall have such and the same powers and authorities for putting this present act in execution within Scotland, as the justices of the peace, and peace officers and constables aforesaid, respectively have, by virtue of this act, within and for other parts of the united kingdom."

§ 21. Enacts, "that it shall be lawful for the justices of the peace, assembled at any quarter or general sessions of the peace, in any case in which they shall deem it expedient for the purpose of preventing tumultuous meetings, to divide any parish or township within their jurisdiction, having a population exceeding, in the judgment of the said justices, 20,000 inhabitants, into two or more divisions, for all the purposes of this act, and to assign the boundaries of such divisions; and that a registry of such divisions so made, specifying and describing the boundaries so assigned, shall be entered with the clerk of the peace of the county, riding, or division within which such parish or township is situate, and a duplicate thereof shall be transmitted to the churchwardens and overseers of the poor, or to the minister and elders, or to the kirk session of the parish or township so divided, to be by them preserved and kept with the books of such parish or township, and copies thereof shall be put up, and from time to time (in case of the removal) replaced, upon the doors of the church of such parish or township; and when any such parish or township shall be so divided, each of such separate divisions shall, for all the purposes of this act, be deemed a separate parish or township; and all the clauses, provisions, regulations, matters, and things in this act contained, relating to any assemblies or meetings in parishes or townships, shall apply and be enforced, as to all such separate division of parishes or townships, as fully and effectually as if the same were severally and separately repeated and re-enacted in relation thereto: provided always, that no such division shall contain a population, which in the judgment of the said justices shall consist of less than 10,000 persons."

§ 22. Enacts, "that every extra-parochial place shall be deemed and taken to be a parish or township, for all the purposes of this act; and all the clauses, provisions, regulations, matters, and things in this act contained, relating to any assemblies or meetings in parishes or townships, shall apply and be enforced as to all extra-parochial places, as fully and effectually as if the same were severally and separately repeated and re-enacted in relation thereto."

§ 23. And whereas by an act passed in the 57th year of the reign of his present Majesty, intituled "An Act for the more effectually preventing seditious meetings and assemblies," certain regulations are enacted in relation to meetings in the city or liberties of Westminster, or county of Middlesex, which might prevent any meeting under the provisions of this act in the parishes of Saint John and Saint Margaret, Westminster; it is therefore enacted, "that it shall be lawful to hold any meetings in such parishes respectively, which may be held under the provisions of this act, within the distance of one mile from the gate of Westminster Hall, provided that the same shall not be held in Old or New Palace Yard at any time during the sitting of parliament."

§ 24. Enacts and declares, "that nothing herein contained shall be deemed or construed to render lawful any notice, or any assembly or meeting, or any act or thing which may be done at any assembly or meeting in pursuance of any such notice, or the attendance of any person or persons, which notice, assembly, meeting, act, or attendance, would have been contrary to law if this act had not been made."

§ 25. Enacts, "that nothing in this act contained shall extend to prevent any prosecution

cution by indictment or otherwise, for any thing which may be an offence within the intent and meaning of this act, and which might have been so prosecuted if this act had not been made, unless the offender shall have been prosecuted for such offence under this act, and convicted or acquitted of such offence."

§ 26. "And whereas it is expedient that houses and places used for the purpose of publicly delivering lectures, or of holding debates, should be regulated;" it is therefore enacted, "that every house, room, field, or other place, at or in which any person shall publicly read, or at or in which any lecture or discourse shall be publicly delivered, or any public debate shall be had, on any subject whatever, for the purpose of raising or collecting money, or any other valuable thing, from the persons admitted, or to which any person shall be admitted by payment of money, or by any ticket or token of any kind delivered in consideration of money, or any other valuable thing, or in consequence of paying or giving, or having paid or given, or having agreed to pay or give, in any manner, any money or other valuable thing, or where any money or other valuable thing shall be received from any person admitted, either under pretence of paying for any refreshment or other thing, or under any other pretence, or for any other cause, or by means of any device or contrivance whatever, shall be deemed a disorderly house or place, unless the same shall have been previously licenced in manner hereinafter mentioned; and the person by whom such house, room, field, or place, shall be opened or used, for any of the purposes aforesaid, shall forfeit the sum of 100*l.* for every day or time that such house, room, field, or place shall be opened or used as aforesaid, to such person as will sue for the same, and be otherwise punished as the law directs in cases of disorderly houses: and every person managing or conducting the proceedings, or acting as moderator, president, or chairman, at such house, room, field, or place, so opened or used as aforesaid, or therein debating, publicly reading, or delivering any discourse or lecture; and also every person who shall pay, give, collect, or receive, or agree to pay, give, or receive any money or thing, for or in respect of the admission of any person into any such house, room, field, or place, or shall deliver out, distribute, or receive any such ticket or tickets, or token or tokens as aforesaid, knowing such house, room, field, or place to be opened or used for any such purpose as aforesaid, shall for every such offence forfeit the sum of 20*l.*

§ 27. Enacts, "that every person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the command, or government, or management of any such house, room, field, or place as aforesaid, shall be deemed and taken to be a person by whom the same is opened or used as aforesaid, and shall be liable to be sued or prosecuted, and punished as such, notwithstanding he or she be not in fact the real owner or occupier thereof."

§ 28. Enacts, "that it shall be lawful for any justice or justices of the peace of any county, stewartry, city, borough, town or place, who shall by information upon oath have reason to suspect that any house, room, field, or place, or any part or parts thereof, are or is opened or used for the purpose of publicly reading or delivering lectures or discourses, or for public debate, contrary to the provisions of this act, to go to such house, room, field, or place, and demand to be admitted therein; and in case such justice or justices shall be refused admittance to such house, room, field, or place, or any part thereof, the same shall be deemed a disorderly house or place, within the intent and meaning of this act; and all and every the provisions hereinbefore contained respecting any house, room, field, or place hereinbefore declared to be a disorderly house or place, shall be applied to such house, room, field, or place, where such admittance shall have been refused as aforesaid; and every person refusing such admittance shall forfeit the sum of 20*l.*"

§ 29. Provides "that it shall be lawful for two or more justices of the peace for the county, riding, division, stewartry, city, borough, town or place, where any house, room, or other buildings shall be intended to be opened for any of the purposes aforesaid, by writing under their hands and seals, at the quarter or general sessions of the peace, or at any special session to be held for the particular purpose, to grant a licence, to any person or persons desiring the same, to open such house, room, or other building for the purpose of delivering, for money, any such public reading, lectures, or discourses as aforesaid, or for the purpose of holding debates on any subjects, the same being clearly expressed in such licence; for which licence a fee of one shilling and no more shall be paid; and the same shall be in force for the space of one year and no longer, or for any less space of time therein to be specified; and which licence it shall be lawful for the justices of the peace of the same county, stewartry, city, borough, town, or place, at any general quarter or general sessions of the peace, to revoke and declare void and no longer in force, by any order of such justices, a copy whereof shall be delivered to or served upon the person to whom the said licence so revoked shall have

have been granted, or shall be left at the house, room, or building for which such licence shall have been granted; and thereupon such licence shall cease and determine, and be thenceforth utterly void and of no effect."

§ 30. Provides and enacts, "that it shall be lawful for any justice or justices of the peace of any county, stewartry, city, borough, town, or place, where any such house, room, or other building shall be licensed as herein provided, to go to such house, room, or building so licensed, at the time of any such public reading, or delivering any such lecture or discourse, or of holding any debate therein as aforesaid, or at the time appointed for any such public reading, or delivering any such lecture or discourse, or of holding any debate, and demand to be admitted therein; and in case such justice or justices shall be refused admittance to such house, room, or building, the same shall be deemed, notwithstanding any such licence as aforesaid, a disorderly house or place within the meaning of this act; and all and every the provisions herein-before contained respecting any house, room, field, or place, herein-before declared to be a disorderly house or place, shall be applied to such house, room, or building so licensed as aforesaid, where such admittance shall have been refused as aforesaid; and every person refusing such admittance shall forfeit the sum of 20*l.* to any person who shall sue for the same."

§ 31. Provides and enacts, "that nothing in this act contained shall extend or be construed to extend to any lecture or discourses to be delivered in any of the universities of the united kingdom, by any member thereof, or any person authorised by the chancellor, vice chancellor, or other proper officers of such universities respectively; or to any public reading, or lecture or discourse, to be delivered in the public hall of any of the inns of court or chancery, by any person authorised by the benchers of the inns of court; or by the professors in Gresham college; or to the professors in the college established for the education of the civil servants of the East India company, or the seminaries established for the education of their military service; or to any society or body of men incorporated or established by royal charter, or by authority of parliament; and that no payment made to any schoolmaster, or other person by law allowed to teach and instruct youth, in respect of any public readings, or lectures or discourses, delivered by such schoolmaster, or other person, for the instruction only of such youth as shall be committed to his instruction, shall be deemed a payment of money for admission to public readings, or such lectures or discourses, within the intent and meaning of this act."

§ 32. Provides and enacts, "that it shall be lawful for any two justices of the peace, acting for any county, stewartry, riding, division, city, town, or place, upon evidence on oath that any house, room, or place, so licensed and opened as aforesaid, is commonly used for the purpose of public reading or delivering lectures or discourses of a seditious, irreligious or immoral tendency, to adjudge and declare the licence for opening the same to have been forfeited; and such licence shall thereupon cease and determine and shall thenceforth be utterly void and of no effect."

§ 33. Enacts, "that all or any of the pecuniary fines, penalties, or forfeitures, exceeding the sum of 20*l.* incurred under this act in that part of Great Britain called England, or in Ireland, may be recovered by action of debt in any of his majesty's courts of record at Westminster and Dublin respectively, and in Scotland in the court of session there; and it shall be sufficient to declare in that part of Great Britain called England, and in Ireland, or conclude in Scotland, that the defendant or defender is indebted to the plaintiff or pursuer in the sum of ——— (being the sum demanded by the said action), being forfeited by an act made in the 60th year of the reign of his present majesty, intituled, 'an act [here insert the title of this act];' and the plaintiff or pursuer, if he shall recover in such action, shall have his full costs or expences; and any pecuniary penalty imposed by this act, not exceeding the sum of 20*l.* and for the recovery whereof no provision is herein before contained, shall and may be recovered before any justice or justices of the peace for the county, stewartry, riding, division, city, town, or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way; and in case such last-mentioned penalty shall not be forthwith paid, such justice or justices shall, by warrant under his or their hand and seal, or hands and seals, and directed to any constable or other peace officer, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale; and in case no sufficient distress can be had or made, such justice or justices shall commit the offender to the common goal or house of correction for such county, stewartry, riding, division, city, borough, town, or place, there to remain, without bail or mainprize, for any time not exceeding six calendar months, nor less than three calendar months: provided always, that no person shall be prosecuted or sued for any pecuniary

pecuniary penalty imposed by this act, unless such prosecution shall be commenced, or such action shall be brought, within three calendar months next after such penalty shall have been incurred."

§ 34. Enacts, "that all pecuniary penalties and forfeitures imposed by this act, shall when recovered, either by action in any court or in a summary way before any justice, be applied and disposed of in manner hereinafter mentioned, that is to say, one moiety thereof to the plaintiff in any such action, or to the informer before any justice, and the other moiety thereof to his majesty, his heirs and successors."

§ 35. Enacts, "that the justice or justices of the peace by or before whom any offender shall be convicted under this act, shall cause the said conviction to be made out in the manner and form following, or in any other form of words to the like effect, *mutatis mutandis*; that is to say,

"Be it remembered, that on this \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the reign of \_\_\_\_\_, A. B. of \_\_\_\_\_ is duly convicted before [me or us, as the case may be] \_\_\_\_\_ of his majesty's justices of the peace for \_\_\_\_\_, in pursuance of an act passed in the sixtieth year of the reign of king George the third, intituled an act [set forth the title of the act], for that the said A. B., after the passing the said act, on \_\_\_\_\_ at \_\_\_\_\_, did contrary to the said act [here specify the offence against the act, as the case may be]; wherefore [I or we, as the case may be], the said \_\_\_\_\_ do adjudge that the said A. B. do pay the sum of \_\_\_\_\_ as a penalty for his said offence."

§. 36. Enacts, "that any action and suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, in that part of Great Britain called England, or in Ireland, for any thing done or acted in pursuance of this act, shall be commenced within six calendar months next after the fact committed, and not afterwards; and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their actions after appearance, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases."

§ 37. Enacts, "that every action and suit which shall be brought or commenced against any person or persons in Scotland, for any thing done or acted in pursuance of this act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards; and shall be brought in the court of session in Scotland, and the defender or defenders may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assolized, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall have double costs or expences, which he or they shall and may recover in such and the same manner as any defender can by law recover costs or expences in other cases."

§ 38. Provides, "that no person shall be prosecuted by virtue of this act, for any thing done or committed contrary to the provisions herein-before contained, unless the prosecution shall be commenced within six calendar months after the offence committed."

§ 40. Enacts, "that this act shall commence and have effect within the city of London, and within twenty miles thereof, from the day next after the day of passing this act, and shall commence and have effect within all other parts of the kingdom, from the expiration of ten days next after the day of passing this act; and shall be and continue in force for five years from the day of passing this act, and until the end of the then next session of parliament."

By stat. 60 G. 3. c. 1. intituled "An act to prevent the training of persons to the use of arms, and to the practice of military evolutions and exercise." [11th December 1819.] § 1. After reciting that, "whereas in some parts of the united kingdom, men clandestinely and unlawfully assembled have practised military training and exercise,



cise, to the great terror and alarm of his majesty's peaceable and loyal subjects, and the imminent danger of the public peace;" it is enacted, "that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his majesty, or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing, shall be and the same are hereby prohibited, as dangerous to the peace and security of his majesty's liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had."

§ 2. Enacts, "that it shall be lawful for any justice of the peace, or for any constable or peace officer, or for any other person acting in their aid or assistance, to disperse any such unlawful meeting or assembly as aforesaid, and to arrest and detain any person present at, or aiding, assisting, or abetting any such assembly or meeting as aforesaid; and it shall be lawful for the justice of the peace who shall arrest any such person, or before whom any person so arrested shall be brought, to commit such person for trial for such offence, under the provisions of this act, unless such person can and shall give sufficient bail for his appearance at the next assizes or general or quarter sessions of the peace, to answer to any indictment which may be preferred against him for any such offence against this act, in England and Ireland; and in Scotland every such person shall be arrested and dealt with according to the law and practice of that part of the united kingdom in the case of a bailable offence."

§ 3. Enacts, "that the sheriffs depute and their substitutes, stewards depute and their substitutes, justices of the peace, magistrates of royal burghs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers of any county, stewartry, city, or town within that part of the united kingdom called Scotland, shall have such and the same powers and authorities for putting this present act in execution within Scotland, as the justices of the peace and other magistrates and peace officers and constables aforesaid respectively have, by virtue of this act, within and for other parts of the united kingdom."

§ 4. Provides and enacts, "that nothing in this act contained shall extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within the intent and meaning of this act, and which might have been so prosecuted if this act had not been made, unless the offender shall have been prosecuted for such offence under this act, and convicted or acquitted of such offence."

§ 5. Enacts, "that any action or suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, in that part of Great Britain called England or in Ireland, for any thing done or acted in pursuance of this act, shall be commenced within six calendar months next after the fact committed, and not afterwards; and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their actions after appearance, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases."

§ 6. Enacts, "that every action or suit which shall be brought or commenced against any person or persons in Scotland, for any thing done or acted in pursuance of this



## (D 9.) What a rout.

A rout (from the German word *rot*) is, (*p*) when they assemble for an unlawful design, and move in it, but do not execute it. Vide Dalt. c. 136.

## (D 10.) What an unlawful assembly.

An unlawful assembly is, (*q*) when three or more assemble to do an unlawful act (*r*) but do nothing. (*s*) H. P. C. 137.

(D 11.)

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this act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the court of session in Scotland; and the defender or defenders may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assolized, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall have treble costs or expences, which he or they shall and may receive in such and the same manner as any defender can by law recover costs or expences in other cases."

§ 7. Provides and enacts, "that no person shall be prosecuted by virtue of this act for any thing done or committed contrary to the provisions herein-before contained, unless such prosecution shall be commenced within six calendar months after the offence committed."

(*p*) 1. By some books the notion of a rout is confined to such assemblies only, as are occasioned by some grievance common to all the company; as the inclosure of land in which they all claim a right of common. Russell, 361.—2. But according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. Ibid.—3. In fact, it generally agrees, in all the particulars, with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise. Ibid. 1 Hawk. c. 65. s. 8.—4. And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a rout; inasmuch as they move and proceed in rout and number. 19 Vin. Abr. Riots. (A).

(*q*) An unlawful assembly, at common law, is, according to the common opinion, a disturbance of the peace by persons barely assembling together with an intention to do a thing, which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion towards its execution. Mr. Serjeant Hawkins, however, thinks this much too narrow an opinion; and that any meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly. As where great numbers complaining of a common grievance meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. Russell, 362. 1 Hawk. c. 65. s. 9.

(*r*) 1. An assembly of a man's friends for the defence of his person against those who threaten to beat him, if he go to such a market, &c. is unlawful, for he who is in fear of such insults, must provide for his safety, by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle. Russell, 362. 1 Hawk. c. 65. s. 9. 10. 19 Vin. Abr. Riots, (A) 5. 6. 11 Mod. 116.—2. He is not, however, to arm himself and assemble his friends in defence of his close. Russell, 363.

(*s*) 1. There may be an unlawful assembly, if the people assemble themselves together for an ill purpose *contra pacem*, though they do nothing. Br. Riots, pl. 4.  
2. Ld.

(D 11.) What not.

But it will not be a riot, if three or more assemble to do a lawful act, and (u) they do it in a lawful manner: (x) as, to remove a nuisance. Vide Dalt. c. 137. (y)

Or, to defend a man in his house against violence. Vide Dalt. c. 137.

So, if the servants of the owner of a house enter by force, by command of their master, when the servants of him, who has the custody of the house, oppose them. R. Mo. 787.

So, if they assemble to do an act which seems lawful; as, to remove timber to which they claim title. Vide Dalt. c. 137. (z)

So, if divers, *clamore ríotosé*, prevent an election of officers in a borough; it is not a riot, if the right of election be not shewn: for to make a riot, there ought to be an unlawful act, and an unlawful assembly. R. Sal. 594.

If they break the door of the Guildhall, if it is not shewn whose house it was; for perhaps it belonged to the defendants. R. Sal. 594.

— 2. Ld. Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176.

(u) 1. This proviso is a necessary branch of the proposition. — 2. For if there be violence and tumult, it has been generally holden not to make any difference, whether the act intended to be done by the persons assembled be of itself lawful or unlawful. —

3. Whence it follows, that if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters, as if the act intended to be done by them were ever so unlawful. Russell, 353. 1 Hawk. c. 65. s. 7. 12 Mod. 648.

(x) In some cases in which the law authorises force, it is not only lawful, but also commendable, even perhaps for a private person to assemble a competent number of people, in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse* in order to remove a force in making an entry into, or detaining of lands. Also it seems to be the duty of a sheriff or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute them, to raise such a power as may effectually enable them to overcome any such resistance; yet it is said, not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain that they are highly punishable for using any needless outrage or violence. Russell, 351. 1 Hawk. c. 65. s. 2. 19 Vin. Abr. Riots (A) 4.

(y) 1. And this may be done before any prejudice is received from the nuisance, and they may also enter into another man's ground for the purpose. — 2. Thus where a man having erected a wear across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the wear in order to turn the water, and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot. Dalt. c. 137. 5 Burn's Just. Riot, s. 1. — 3. But if in removing a nuisance the persons assembled use any threatening words, such as they will do it though they die for it, or the like, or in any other way behave in apparent disturbance of the peace, it seems to be a riot. Russell, 354. Dalt. c. 137. 5 Burn's Just. Riot, s. 1.

(z) If the number of persons are not more than are necessary for the purpose, and if there are no threatening words used, nor any other disturbance of the peace; even though another man has a better right to the thing carried away, and the act, therefore, is wrong, and unlawful. 1 Hawk. c. 65. s. 5. 11 Mod. 117. 5 Burn's Just. Riot, s. 1.

So, if divers assemble peaceably, upon a lawful occasion, it will not be a riot, though a sudden affray (a) happens. Mod. Ca. 43. R. Sal. 595. (b)

So, if a man, accompanied with his servants, does an outrage; it is not a riot in the servants, who did not intend mischief: for none shall be a rioter, except him who acts, when the assembly was not with a bad intent. Sal. 595. (c)

Though he had more servants than he usually had. Vide Dalt. c. 136.

If a jury or *posse comitatús* quarrel among themselves. Vide Dalt. c. 136.

If travellers quarrel, and beat one of the company.

So it is not a riot, if several assemble at an alehouse in friendship; though they ought not to do it. Vide Dalt. c. 136.

(a) 1. Affrays are the fighting of two or more persons, in some public place, to the terror of his majesty's subjects. 4 Blk. Com. 144. 3 Inst. 158. 1 Burn's Just. Affray, I. — 2. The derivation of the word affray, is from the French *effrayer*, to terrify; and as in a legal sense it is taken for a public offence to the terror of the people, it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned; in which case it cannot be said to be to the terror of the people. Russell, 388. 1 Hawk. c. 63. s. 1. — 3. And there may be an affray, which will not amount to a riot, though many persons be engaged in it; as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. Russell, 388. 1 Hawk. c. 65. s. 3.

(b) 1. 1 Hawk. c. 65. s. 3. — 2. For to make a riot, the violence and tumult must in some degree be premeditated. Russell, 354. — 3. But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous, — 4. As where it was held, that although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot. 2 Camp. 358. — 4. So though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to arise amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and it seems to be clear, that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another. Russell, 355. 1 Hawk. c. 65. s. 3.

(c) If three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and no more. 19 Vin. Abr. Riots, &c. (A) 15. 2 Salk. 595.

Or, for sport; as, for football, (*d*) bull-baiting, bear-baiting, &c. Vide Dalt. c. 136. (*e*)

Or, for dancing, bowls, cards, dice, &c. though they are not lawful games. Vide Dalt. 136.

So, if three are indicted for a riot, and one only found not guilty, all ought to be discharged. R. Sal. 593.

Though the others made a battery, they shall not be punished for it: for the offence charged was a riot. Sal. 594.

### (D 12.) How suppressed. By one justice of peace.

By the (*f*) st. 34 Ed. 3. 1. Justices of peace shall have power to restrain all evil doers, rioters, &c. and to arrest, pursue, and punish them according to law. Vide Justices of Peace, (B 9.) (*g*)

And therefore, if there be a riot, rout, or unlawful assembly, every justice of peace may require the offender to find sureties for the peace, or good behaviour, and commit him upon refusal. Vide Dalt. c. 82.

Or may order another to arrest him. Vide Dalt. c. 82.

### (D 13.) By more justices.

So, by the st. 13 H. 4. If a riot be made, justices of peace, or two of them, with the sheriff, under-sheriff, and *posse* (*h*) if need be, shall arrest them, and record what they find done in their presence; by which

(*d*) 1. In 2 Chit. Crim. L. 494., there is an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an antient custom of kicking about foot-balls on a Shrove Tuesday, at Kingston-upon-Thames; the first count of which, is, for riotously kicking about a foot-ball in the town of Kingston; and the second for a common nuisance in kicking about a foot-ball in the said town. — 2. Coke C. J. says, that the stage-players may be indicted for a riot and unlawful assembly. 1 Rol. Rep. 109. — 3. And Dalton, citing Rolle, says, that if such players by their shews, occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. Russell, 352. n. 19 Vin. Abr. Riots, (A 8.)

(*e*) So assemblies at wakes, or other festival times. 1 Hawk. c. 65. s. 5.

(*f*) 1. By the common law, the sheriff, under-sheriff, constable, or any other peace-officer, may and ought to do all that in them lies, towards the suppressing of a riot, and may command all other persons to assist them; and by the common law also, any private person may lawfully endeavour to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. 1 Hawk. c. 65. s. 11. — 2. It has been holden also, that private persons may arm themselves in order to suppress a riot. Poph. 121. Kel. 76. — 3. Whence it seems clearly to follow, that they may also make use of arms in suppressing it if there be a necessity. Russell, 384. — 4. However it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of rebellion. 1 Hawk. c. 65. s. 11. — 5. But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do any thing to prevent the perpetration of a felony. 2 B. & P. 265. — 6. In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed, that no indifferent person could interpose, without the authority of a magistrate; in consequence of which much mischief was done, which otherwise might have been prevented. 2 B. & P. 265.

(*g*) Vide supra, (D 8.) (D 10.), in notis.

(*h*) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable. Russell, 385. 4 Blk. Com. 146. 147 1 Hale, 495.

they shall be convict, as in forcible entry. Vide Justices of Peace, (B 9.) (i)

Any two justices in the county may make the conviction, though the two next justices only are bound to do it. Vide Dalt. c. 82.

(D 14.) When upon view. (k)

The justices of peace, for execution of the st. 13 H. 4. 7. ought to go to the place where the riot is made, with the sheriff, &c. for the sheriff ought to join throughout the whole proceeding. R. Ray. 386.

And the justices, with the sheriff, may arrest all present, and take their arms. Vide Dalt. c. 82.

Though they came without intent to do mischief. Vide Dalt. c. 82.

And all riotously arrayed, whom they see in their way to the place, or back again. Vide Dalt. c. 82.

And may make fresh suit after any who escape. Vide Dalt. c. 82.

Or send a warrant for them to find surety, &c. Vide Dalt. c. 82.

So the justices, with the sheriff, ought to make a record of every thing unlawful done in their presence. Kel. 41. a.

And fine and imprison the offenders. Vide Dalt. c. 82. (l)

And the sheriff ought to be a party to the record, if the conviction be before the rioters disperse. R. Sal. 593.

And ought to join in setting the fine upon the offender. R. Ray. 386.

The record ought to shew all the circumstances of the fact in certain.

It ought to shew the conviction to be upon view. R. Ray. 386.

It ought to make the conviction in the present, not the perfect tense 2 Mod. Ca. (m)

The fine shall be upon each offender severally. Vide Dalt. c. 82.

And commitment shall be immediately upon conviction. Kel. 41. a.

After the record made upon view, it shall be certified to B. R. assises, or sessions. Vide Dalt. c. 82.

And is not traversable. Vide Dalt. c. 82.

But justices of peace cannot deliver possession; for they can do nothing but punish and record the force. R. 1 Sid. 156.

And if they do, B. R. will make restitution. 1 Sid. 156.

So, if justices of peace proceed wrongfully, an information will go against them. R. 1 Sid. 156.

And their conviction, if it appears to be bad, may be quashed upon motion, without a writ of error. R. 1 Sid. 156.

(D 15.) By inquisition.

By the st. 13 H. 4. 7. If a riot be, &c. And the offenders be departed before the justices come, they shall inquire of such riot within a month, and hear and determine it.

And the justices may inquire without the sheriff, where the rioters are dispersed. R. Sal. 593.

(i) Vide supra, (D 8.) (D 10.), in notis.

(k) Id. Ibid.

(l) 1. The punishment for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence. 1 Hawk. c. 65. s. 12. — 2. And formerly, in cases of great enormity, it appears that the offenders were sometimes punished with the pillory. Ibid. — 3. But such punishment is now, in such cases, taken away by 56 G. 3. c. 138.

(m) Str. 443.



So they may inquire after the month: for they are only subject to a penalty, if they do it not in that time. R. Sal. 593.

An inquisition is sufficient, if it says, *pro domino rege*, without saying, *pro domino rege, et corpore comitatús*, as an inquisition taken by a grand inquest. R. Sal. 593.

Vide more of this, in Justices of Peace, (B. 10.)

(D 16.) By surety of the peace: — How granted: — Upon a *supplicavit*.

So a riot, or breach of the peace may be restrained, or prevented by sureties found for the peace.

If it appears to the chancery, upon complaint, that any one has cause to pray sureties for the peace against another, a *supplicavit* shall be directed to any justice of peace, or to the justices in general, or to the justices and sheriff, to take of him such sureties, or commit him to prison. F. N. B. 80. Reg. 88. Vide Chancery, (4 R.)

So a *supplicavit* lies from B. R. 1 Keb. 203. 290. Mo. 43.

And the sheriff may break open a house upon a *capias* to find sureties for good behaviour. R. Mo. 606.

If articles are sworn in chancery, upon which a *supplicavit* is granted, and by *habeas corpus* the party being brought to a judge of B. R. is bound to appear in B. R. If the articles are transmitted from the chancery to B. R. or the witnesses appear, and charge him there; he shall be bound in B. R. otherwise not. Skin. 61.

A *supplicavit* shall not be granted, but upon affidavit, that it is not prayed of malice. F. N. B. 79. H.

And if it be for good behaviour also; articles ought to be exhibited. R. 2 Keb. 305. 1 Sid. 67. 1 Lev. 53.

It may be granted upon menace of corporal damage. Reg. 88. F. N. B. 79. G.

Or menace of burning his house. Reg. 88. F. N. B. 79. G.

For going, or riding armed. 1 Keb. 203.

Disturbance of divine service, and carrying the minister to prison. R. 1 Keb. 290.

For dread of damage to him and his men, by such as have discord with him. Reg. 89. a.

(D 17.) How it shall be executed.

The justice executes a *supplicavit* as minister: and therefore ought to pursue his writ strictly.

And the justices themselves to whom it is directed, or one of them, ought to execute it: for he cannot depute another. 2 Rol. 348.

Or, the party, or his friends for him, shall give surety in chancery, and have a *supersedeas* to the *supplicavit*. F. N. B. 81. A.

Or in B. R. when the *supplicavit* goes from thence. R. Mo. 43.

So, upon a certificate of the justices to whom directed, that the party who demands it is contentious, and the other of good fame, a *supersedeas* is usually granted.

After surety taken by recognizance for the peace, the justices ought to return the writ and recognizance. Lamb. 110. Vide Dalt. c. 122.

If surety be given only for one of those against whom a *supplicavit* is granted;

granted; it ought to be returned, that the other *non est inventus*. 2 Rol. 348.

Or, that he who demands it released to him. Lamb. 111.

If the justice does not return the writ or recognizance, a *certiorari* lies for them. F. N. B. 81. B.

Though the writ was not returnable in chancery. F. N. B. 81.

(D 18.) Upon a warrant of a justice of peace: — How it shall be made.

So a justice of peace, (*n*) by warrant, may bring any before him, upon good cause, (*o*) to find surety for the peace. Vide Dalt. c. 118.

Or may demand surety of any present, by parol. Vide Dalt. c. 118.

Or, command another, by parol, to arrest him being present, to find surety. Vide Dalt. c. 118.

A warrant by a justice of peace, to bring any before him to find surety for the peace, may be directed to the sheriff, to a constable, or other officer, or to a stranger. Vide Dalt. c. 118.

It ought to be under his hand and seal, and to contain the cause. (*p*) Vide Imprisonment, (H 6, &c.) Vide Dalt. c. 118.

But a justice of peace cannot injoin another, that he shall keep the peace, under a penalty. (*q*)

(D 19.) How executed.

If a warrant be directed to the sheriff, he may by parol, or precept, command any known officer to execute it. Vide Dalt. c. 169.

(*n*) 1. By the commission of the peace, justices of peace have power to cause to come before them, or any one of them, all those who to any of the king's people concerning their bodies; or the fixing of their houses, have used threats, to find sufficient security for the peace or their good behaviour towards the king and his people; and if they shall refuse to find such security, to cause them in the king's prisons to be safely kept, until they shall find such security. 5 Burn's Just. 284.

(*o*) 1. Articles exhibited must be verified by the oath of the exhibitant; an affirmation therefore is not sufficient. 1 Str. 527. 12 Mod. 243. 5 Chetwynd's Burn, 287. — 2. Nor will the court permit the truth of the allegations to be controverted by the defendant, but will order security to be taken immediately if no objections arise on the face of the articles. 2 Str. 1202. 13 East, 171. *et in notis* Chetwynd. Ibid. — 3. But where an application was made to the court to enforce the subsequent process, and the articles manifestly appeared, from the corroborated affidavit of the defendant, to contain a malicious, voluntary, and gross perjury, the court resisted the application and committed the offender. 2 Burr. 806. 3 Burr. 1922. Chetwynd Ibid. — 4. Nor will the court receive articles of the peace if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood. 2 Burr. 780. Chetwynd Ibid. — 5. On an affidavit of the defendant's being seventy years of age, and unable to travel, a *mandamus* was granted to three justices in Brecon to take security on articles of the peace exhibited in the king's bench. 2 Str. 835. Chetwynd Ibid. — 6. And where articles of the peace were exhibited, and it appeared that the facts charged were done at Portsmouth, the court ordered an indorsement to be made upon the attachment of the peace, authorising and directing any justice in that county to take the security there, specifying the particular sums, wherein the principals and also their sureties should be bound. 2 Burr. 1039. 1 Blk. 233. Chetwynd Ibid.

(*p*) But its validity does not depend upon the truth of the information whereon it is grounded. Foster, 135.

(*q*) Nor commit for not finding security, until the party has been required and refused so to do. 1 Hawk. c. 60. note to s. 9. of 7th edit. 5 Chetwynd's Burn, 286. vide infra, (D 19.)

So, by precept, he may command any, who is not a known officer. Vide Dalt. c. 169.

But if it be directed to a constable, or a stranger, he ought to execute it himself; for he cannot make a deputy. Vide Dalt. c. 169.

If it be directed to two or more, either of them may execute it. Vide Dalt. c. 169.

The officer ought to require him to find surety, before he arrest him. Vide Execution, (C 12.) Vide Dalt. c. 118.

He ought to inform him at whose suit, and for what, it is demanded. R. 6 Co. 54. a.

And if he be not an officer known and sworn, he ought to shew his warrant. Vide Dalt. c. 169.

Otherwise, if he be an officer known and sworn. Vide Dalt. c. 169.

The officer, for executing his warrant, may take the *posse comitatus*. Vide Dalt. c. 172.

And break open a house, if necessary. Vide Dalt. c. 127, 169.

And justify a battery of the person, if he resists.

If a person be taken upon the warrant, the officer may commit him, without other warrant, if he refuses to come before a justice, or to find surety there. R. 5 Co. 59. b. (r)

So the justice may commit him if he does not find, or does not offer surety. (s) Vide Dalt. c. 171. (t)

And where the warrant is general, the officer may bring him to what justice he pleases. Vide Dalt. c. 169. 5 Co. 59. b.

#### (D 20.) A recognizance for the peace:—How taken.

Though no statute directs that surety shall be taken for the peace, yet a recognizance seems the most congruous means for it: for none shall be bound to the king but by record; and by the st. 33 H. 8. 39. all obligations to the king shall be in his name, *solvend domino regi*. F. N. B. 82.

And therefore, justices usually take surety by recognizance for keeping the peace till the next sessions, against the king and all his people, and especially against him who demands it. (u)

And

(r) 1. 1 Hawk. c. 60. s. 12. Dalt. c. 118. — 2. But, says Dr. Burn, notwithstanding these great authorities, it may not be convenient for the justices to leave so much to the constable's judgment, as to determine what shall or shall not be deemed a refusal to find such sureties; for that the constable is constituted a judge in such case by no law. And much less doth it seem advisable to require in the warrant, as is usual, that the constable shall carry the party to gaol, if he shall refuse to find sufficient sureties; it doth not appear how the constable can any way be deemed a competent judge of that; for it is certain that he cannot administer an oath to such sureties, or others, whereby to inform himself of such sufficiency. 5 Chetwynd's Burn, 289. — 3. And Mr. Chetwynd observes, that it is the best way, and now the usual practice, to direct the constable in the first instance, to take the party before the justice, who in case of refusal or neglect to find sureties, may commit him. Chetwynd Ibid.

(s) If he be present in person, he may be required by parol to find sureties, and committed for disobedience; but if he be absent, he cannot be committed without a warrant from some justice in order to find sureties, which warrant must be under seal, shewing the cause for which it was granted, and at whose suit. 1 Hawk. c. 60. s. 9. 5. 5 Chetwynd's Burn, 286.

(t) Supra, (D 18.) in notis.

(u) 1. Mr. Serjeant Hawkins says, that it seems to be the safest way, to bind the party to appear at the next sessions of the peace, and, in the mean time, to keep the

And by the st. 3 H. 7. 1. the justice ought to certify the recognizance at the next sessions; that if the party make default, it may be recorded, and certified, with the recognizance, into Chancery, B. R. or Exchequer.

And therefore, the next sessions is the proper place for the appearance of the party; though the recognizance does not mention before what justices, or in what court, or at what time, he ought to appear. Vide Dalt. c. 119.

So the recognizance may be for life, or for years, upon good cause. Vide Dalt. c. 119.

And if no time is mentioned, it shall be intended for life. Vide Dalt. c. 119. 21 Ed. 4. 40. b.

But the time and sum in which he is to be bound, and the number and sufficiency of the sureties, are in the discretion of the justices. Vide Dalt. c. 119.

So a recognizance to keep the peace, generally, is good, without saying against A. in particular: or, to keep it against A. without saying, against all in general. Vide Dalt. c. 119.

So a recognizance to be levied of goods only, or of lands only, is good: for, only, shall be rejected, and the recognizance shall be general. Vide Dalt. c. 119.

If the sureties prove insufficient, he shall be compelled to find new sureties by recognizance. Vide Dalt. c. 119.

So, if the recognizance be forfeited. Vide Dalt. c. 115.

Otherwise, if a surety dies: for his executor shall be charged. 21 Ed. 4. 40. b. Vide Dalt. c. 119.

So a justice of peace may take money *in deposito* for surety of the peace. Per Berkly, Cro. Car. 446. Vide Dalt. c. 119.

But a recognizance, which does not mention the preservation of the peace, will be void. Vide Dalt. c. 119.

Though it be, that he do not assault, maim, &c. for there are other breaches of the peace. Vide Dalt. c. 119. (x)

### (D 21.) Of whom surety of the peace may be demanded.

Surety of the peace may be demanded against every one under the degree of a peer. Vide Dalt. c. 117.

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peace as to the king and all his liege people, especially as to the party, according to the common form of precedents. 1 Hawk. c. 60, s. 16. — 2. But notwithstanding this authority, says Mr. Chetwynd, in a recent case it has been determined by the Court of King's Bench, that a justice of the peace is authorised to require surety of the peace for a limited time, (e. g. two years), according to his discretion, and that he need not bind the party over to the next sessions only. 2 B. & A. 278. 5 Chetwynd's Burn, 291. — 3. But, continues Mr. Chetwynd, if a recognizance to appear at the sessions be taken, and an order of court for finding sureties applied for, articles of the peace must be exhibited. Chetwynd Ibid. — 4. The practice, he observes, referred to in a former edition of Burn, if any such still prevail, of calling on the party at the sessions at which he is bound to appear, to find sureties to the following sessions, and so on from sessions to sessions, without any fresh complaint, he conceives to be incorrect; and he refers analogically, to what Mr. Justice Ashhurst says, in 1 T. R. 696. Chetwynd Ibid.

(x) 1. It is said, that the fear of one cannot be the fear of another, and therefore that every recognizance must be separate. Dalt. 18. 5 Chetwynd's Burn, 286. — 2. But in M. 23 Geo. the Court of K. B. allowed three women to file joint articles of the peace against three men. 1 Hawk. c. 60. note to s. 5. of 7th edit. 5 Chetwynd's Burn, 286.

Though

Though he be an ecclesiastical person. Vide Dalt. c. 117.

A sheriff, coroner, or other officer of justice. Vide Dalt. c. 117.

Though a justice of peace in the same commission. Vide Crompt. 122. Dalt. c. 117.

Though it be a person attainted, or excommunicated. Vide Dalt. c. 115.

A *feme covert*, or infant within the age of discretion: for the sureties shall be bound for them. Vide Dalt. c. 117.

### (D 22.) And by whom.

So a *feme covert* may demand it against her own husband. (y) Reg. 89. F. N. B. 80. F. 3 Keb. 433. 2 Lev. 128. (z)

Or a husband against his wife. Vide Dalt. c. 117. (a)

So a person attainted, excommunicated, or abjured. Vide Dalt. c. 117.

Attainted in *præmunire*. Vide Dalt. c. 117.

A villein against his lord, *et è contra*. Vide Dalt. c. 117.

A denizen, or alien amy. Vide Dalt. c. 117. (b)

But not by an alien enemy. Vide Dalt. c. 117.

Or a *non compos*; though care shall be taken for his safety. Vide Dalt. c. 117.

### (D 23.) Of whom not.

But surety of the peace shall not be demanded against a peer. Vide Dalt. c. 117. (c)

Nor against one *non compos*, though care shall be taken to prevent his mischief. Vide Dalt. c. 117.

Nor against an alien enemy. Vide Dalt. c. 117.

### (D 24.) What cause for it.

A justice of peace may demand surety, if any in his presence assaults or threatens corporal damage to another. Reg. 88. b. F. N. B. 80. (d)

Or threatens to burn his house. Reg. 88, 89.

If he assaults the justice himself; though it is more proper that another do it. Vide Dalt. c. 116.

(y) And if the marriage be disputed, the court will order the recognizance to be worded so as not to admit the fact. 2 Str. 1231.

(z) 1 Hawk. c. 60. s. 2. Crompt. 118.

(a) 1. 1 Hawk. c. 60. s. 2. Crompt. 118. — 2. And if she cannot find sureties she shall be committed. Crompt. 118.

(b) An infant. Dalt. c. 117.

(c) 1. A peer or peeress cannot be bound over in any other place than the courts of K. B. or Chancery. 4 Blk. Com. 253. — 2. A peeress may demand surety of the peace against her husband. Fost. 359. 2 Str. 1202. 13 East, 171. n. C. T. H. 74. 1 Burr. 631. 703. 1 T. R. 696. 11 Mod. 109. 5 Chetwynd's Burn, 286.

(d) Sergeant Hawkins observes, that it seemeth clear, that wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party's giving him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him, or laid in wait for that purpose; and that he doth not require it out of malice or vexation. 1 Hawk. c. 60. s. 6.

If



If he comes with force into the presence of the justice in the exercise of his office, or goes, or rides in arms (not being a servant to the king, in execution of process, aid of an officer, or upon hue and cry) to the affray of the people against the st. of Northampton. 2 Ed. 3. 7 R. 2. 13. 12 R. 2. 6. or 20 R. 2. 1. Vide Dalt. c. 9.

If he makes a duel, or sends a challenge.

Makes a riot, rout, or unlawful assembly. Vide Dalt. c. 116.

If he quarrels in the presence of the justice. Vide Dalt. c. 116.

Gives the lie to another in Westminster-hall *sedente curiá*. 1 Lev. 107.

If he makes an affray, or terrifies the people. Vide Dalt. c. 116.

If he be brought before him by a constable, for breaking the peace. Vide Dalt. c. 116.

Or upon oath by another of corporal mischief done, or menace of it, or of burning his house, and that he is in fear of it. (e) 2 Lev. 228. (f)

Or that he threatened it to his wife, or children. Vide Dalt. c. 116.

And, if the wife makes such oath, though there are other affidavits to the contrary. 2 Lev. 128.

So, if a justice suspects him inclined to break the peace. Vide Dalt. c. 116.

If he be a common barrator. Vide Dalt. c. 116.

But it is not a cause, (g) that he threatens imprisonment to another, (h) or to burn his goods: for he may have another remedy by action. Vide Dalt. c. 116.

That he has made a battery, or a variance. Vide Dalt. c. 116.

Or, that he is in fear of damage to his servants, or cattle. (i) Vide Dalt. c. 116. (k)

### (D 25.) What, for good behaviour.

By the st. 34 Ed. 3. 1. Justices of peace may take of all not of

(e) But without such fear, surety shall not be granted, since it cannot be demanded for an outrage that is past. Dalt. c. 11.

(f) Though the fact from which the fear arises be pardoned, the court will receive it as a ground upon which to grant the security. Str. 473.

(g) If the magistrate perceives that surety is demanded merely of malice, or for vexation only, without any just cause or fear, he may safely deny it. Dalt. c. 116.

(h) But it seems to be the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault or wrong to the person of a man. And the objection, that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment; and yet there is no doubt but that one threatened to be beaten, may demand the surety of the peace. 1 Hawk. c. 60. s. 7.

(i) 1. Lamb. 83. — 2. In this case the party may have a special writ out of Chancery, directed to the sheriff, that he shall cause such person to find surety, that he shall do no hurt or damage to the other man in his body, or to his servants or goods; and if he will not find surety, that then he shall arrest and detain him in prison until he shall find surety. Dalt. c. 116.

(k) 1. And the reason, as to the servant, is, because then the fear upon which the surety will be granted, is that of the servant not the master; and the servant's own oath before the justice is necessary. 5 Chetwynd's Burn, 285. — 2. And the reason as to the cattle is, that the form of the recognizance is only that the party shall keep the peace towards the king and all his liege people. Ibid. — 3. But it is said, that if a man threaten to hurt another's wife or child, he may crave the peace, by the words of the commission. Dalt. c. 116.

good

good fame sufficient surety for their good abearing towards the king and his people.

And it may be granted by justices of peace, by recognizance, or upon a *supplicavit*, as surety for the peace. Vide Dalt. c. 123.

And for every cause for which surety of the peace is demandable.

And against any of bad fame, if he does that which tends to the breach of the peace.

As, if he be a common barretor. Vide Dalt. c. 124.

If he lies in wait to rob, or puts passengers in fear. Vide Dalt. c. 124.

Going with unusual arms, to the terror of others. R. 1 Keb. 203.

If they are suspected for robbers, or manslaughter. Vide Dalt. c. 124.

Nightwalkers, pilferers, or messengers of thieves: for these are presentable in the leet. Vide Dalt. c. 124.

Dangerous rogues, or vagabonds.

If they practise in poison for others, their cattle, or fowls. Vide Dalt. c. 124.

If they throw down gates, or do outrage in the night. Vide Dalt. c. 124.

Eves droppers by night, or by day. Vide Dalt. c. 124.

Idle persons, who destroy pigeons by engines, or the game, or do trespasses in parks, or warrens. Vide Dalt. c. 124.

If they suborn witnesses. Mar. 11.

Maintain, or resort to bawdy-houses. 13 H. 7. 10.

If they frequent taverns or alehouses, not having means of livelihood. Vide Dalt. c. 124.

Suspected for the father of a bastard. Lamb. 122.

Libellers. Vide Dalt. c. 124. (1)

Common cheats, or cozeners. Vide Dalt. c. 124.

If he abuses a justice of peace in the execution of his office, or his warrant, or refuses to obey him. Vide Dalt. c. 124.

Or gives contemptuous words to a magistrate. 11 Co. 98.

Or provoking words, as, you lie, &c. in Westminster-hall. 1 Lev. 107.

(D 26.) What shall be a forfeiture: — Of a recognizance for the peace.

A recognizance for the peace shall be forfeited by any breach of the peace. Vide Dalt. c. 121.

As, if he does any act to the prejudice of the person of another: as, murder, or any homicide. Vide Dalt. c. 121.

High treason against the person of the king. Vide Dalt. c. 121.

Burglary, or robbery: for these relate to the person. Vide Dalt. c. 121.

Rape, or any unlawful battery, or assault. Vide Dalt. c. 121.

Imprisonment of another. Vide Dalt. c. 121.

Throwing into the water, or any other misuse. Vide Dalt. c. 121.

Threatening of another, in his presence, to beat him. 2 Rol. 199.

Or in his absence, if he afterwards lies in wait for him. Vide Dalt. c. 121.

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(1) Whether a person taken on a secretary of state's warrant for a libel, is compellable to give security for his good behaviour, or only for his appearance, seems to be unsettled. Wils. 29.

If he be concerned in a riot, rout, &c. Cro. El. 86. Vide Dalt. c. 121.

If he rides, or goes in arms, or with unusual arms or attendants, in affray of the country. Vide Dalt. c. 121.

So, if he gives a challenge. 4 Inst. 181.

Or commands, or procures, a breach of the peace, if it be afterwards broken. 4 Inst. 180. Vide Dalt. c. 121.

If he procures another to break the peace. 2 Rol. 199. Vide Dalt. c. 121.

But a justifiable assault, or battery, is not a breach of a recognizance for the peace: as, by correction of his wife, son, servant, apprentice, scholar, prisoner, lunatic, &c. 3 Keb. 433. Vide Dalt. c. 121.

Or, in defence of himself, his wife, son, father, master, servant, or goods, &c. Vide Dalt. c. 121.

By the act of a constable, or other officer, in the execution of justice. Vide Dalt. c. 121.

In the exercise of lawful sports. Vide Dalt. c. 121.

So no act, which does not concern the person of another, though the indictment for it be *contra pacem*; as, larceny, or other felony of the same nature. Vide Dalt. c. 121.

A wrongful taking of the goods of another, a disseisin, or trespass upon his land. 4 Inst. 181.

So, scolding words: for an act must be done. 4 Inst. 180.

#### (D 27.) Of a recognizance for good behaviour.

So a recognizance for good behaviour shall be forfeited by any act, which amounts to a breach of the peace, or requires surety for good behaviour. Vide Dalt. c. 123.

An escape from a constable, being arrested for suspicion of a crime, though not guilty. R. Godb. 22. Vide 2 Leo. 166.

If he puts the people in terror. 2 Rol. 199. Semb. 2 H. 7. 2. b.

So words, which tend to the public prejudice, or which may make a breach of the peace. 2 Rol. 200.

But it will not be a breach of a recognizance for good behaviour, that he enters into the house or land of another, or takes the goods of another. 2 Rol. 199.

Or, if he calls a person, who is guilty of felony, a felon. 2 Rol. 200.

Or calls another knave, or uses other words of passion to another not in office. 2 Rol. 228.

Vide more concerning forfeiture of a recognizance for good behaviour, in Justices of Peace, (B 8.)

#### (D 28.) How superseded.

If any person gives surety of the peace in chancery or B. R. there shall be a *supersedeas* to the justices of peace to take it. F. N. B. 238. E.

So, if he gives it before one justice, he may have from him a *supersedeas* requiring another justice not to take it for the same cause.

After a *supersedeas* from the chancery or B. R. if a justice proceeds, an attachment goes against him.

And if the party be arrested, it will be false imprisonment.

Though

Though the *supersedeas* does not mention the names of the sureties, or the sum in which bound.

(D 29.) How discharged.

If security be given upon a *supplicavit*, and no prosecution within a year and a day, the security shall be discharged. F, g. 268. (m)

So, if the party be committed, after a year he shall be discharged upon slight security. F, g. 268. (n)

How a recognizance for the peace may be discharged by release, or death, vide in Justices of Peace, (B 6. 7.)

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**FORCES.**

Vide PRÆROGATIVE, (C 3.)

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**FORCIBLE MARRIAGE.**

Vide JUSTICES, (S 3.)

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**FORECLOSURE.**

Vide CHANCERY, (4 A 11.)

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**FOREIGN ATTACHMENT.**

Vide ATTACHMENT. — LONDON, (N 1.) — PLEADER, (2 G 5.)

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**FOREIGN COUNTY.**

Vide ACTION, (N 1. &c.) — JUSTICES, (Y 14.) — PLEADER, (S 11.)

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**FOREIGN NATIONS.**

Vide PRÆROGATIVE, (B 1. &c.)

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**FOREIGN OPPOSER.**

Vide COURTS, (D 15.)

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**FOREIGN VOUCHER.**

Vide COURTS, (O 2.) — VOUCHER, (D 3. — H).

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(m) If a party be bound to keep the peace for a twelvemonth, and appear the first day of the term; at which day the time is out, and he then appears; he must be discharged if no indictment is lodged. C. T. H. 98.

(n) 1. It may be discharged on motion, on producing the prosecutor's consent verified by affidavit. C. T. H. 158. — 2. Or consenting by counsel. 1 Burr. 703.

**FOREST.**

## FOREST.

Vide CHASE, per totum.

## FORE-STALLING.

Vide JUSTICES of PEACE, (B 38.)

## FORFEITURE. (a)

## (A) Forfeiture, by alienation, &amp;c.

- (A 1.) By alienation of a particular tenant : — What shall be : — *In pais.* p. 383.
- (A 2.) By alienation by matter of record. p. 384.
- (A 3.) What alienation will not be a forfeiture. p. 385.
- (A 4.) By a claim of the fee. p. 387.
- (A 5.) Or by an affirmance of the fee in a stranger. p. 388.
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(a) Forfeiture is a word often made use of in the law, and in civil cases is usually applied to alienations and dispositions made by those who have but a particular estate or interest in lands or tenements, to the prejudice of those in remainder or reversion. The omission or neglect likewise of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is upon the breach or neglect thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined. Co. Litt. 59. a. 3 Bac. Abr. 729.

(A) For=



## (A) Forfeiture, by alienation, &amp;c.

(A. 1.) By alienation of a particular tenant : — What shall be :  
— *In pais.*

If tenant (*b*) for life or years conveys a greater estate (*c*) than he can lawfully do, whereby the reversion, or remainder, is divested, it will be a forfeiture of his estate : as, if he makes a feoffment. Co. L. 251. (*d*) Vide Copyhold, (M 2, &c.)

If he conveys to another in tail, or for his own life, and livery be made. Co. L. 252. a. 1 Rol. 854. l. 7.

Or, to another for his life, if he himself so long lives : for the other has an estate for his life, though determinable upon the death of the first lessee. 1 Rol. 854. l. 43. Lane, 38.

If tenant *pur auter vie*, by statute-merchant, staple, or *elegit*, makes a feoffment, &c. it will be a forfeiture. Co. L. 252. a.

So, if tenant after possibility, by curtesy, (*e*) or in dower, &c. makes a feoffment, &c. Co. L. 252. a. 1 Rol. 851. l. 35.

So, if tenant for life or for years, and the remainder man for life, join in a feoffment, &c. it will be a forfeiture of both estates. Co. L. 251. b. R. 1 Leo. 262. 1 Rol. 855. l. 15. 2 And. 66. Dy. 339. a. R. 1 And. 45, 46.

So, if he in remainder for life enters upon tenant for life, or years,

(*b*) 1. By the antient feudal law no man could alien without licence from the lord of the fee ; but any alienation or disposition was then a forfeiture ; but in England, where the allodial property prevailed in the Saxon times, they were allowed to alien in some cases, viz. 1°. *In remunerationem servitii*, that is, for services done to the feud, as for services done in the wars by the feudal tenant, or in peace, by ploughing the feud at home ; both these being either for the profit or honour of the feudal lord, they formerly valuing themselves upon the honour and number of their tenants. 2°. In frank marriage with the daughter of the feudatory, or some other of his blood, because this multiplied tenants to the lord. 3°. In frankalmoigne or free alms, the superstition of the times allowing it for the good of the soul. Digest Feud. lib. 2. tit. 26. fol 523. Vigellius lib. 5. cause 32. f. 287. Glanvil. lib. 7. c. 1. 44. Staunf. Prærog. 27. 28. — 2. Which privilege was not only confirmed, but also enlarged and made general by magna charta ; so that by that act the feudatory might alien to whom he pleased, provided he left sufficient to answer the lord's services, which seems to have been a privilege mightily contended for. Ibid. 3 Bac. Abr. 193. — 3. But notwithstanding this law, if tenant for life aliens in fee, this is still a forfeiture, for that statute only permits a lawful disposition, but does not allow any alienation to the prejudice of him in reversion, and therefore where tenant for life takes upon him to transfer the fee-simple, it is a renunciation of the feud and contrary to his oath of fidelity. So if tenant for life aliens to another for the life of the alienee, this is a forfeiture, for it can be no lawful alienation within magna charta, because it is probably to the prejudice of him in the reversion. 2 Inst. 65. Rol. Abr. 854. Co. Litt. 251.

(*c*) 1. Though upon condition. — 2. Hence if lessee for life of lands aliens in fee upon condition, and enters for the condition broken, still the lessor may enter for the forfeiture. Ro. Abr. 856. Co. Litt. 252. Palm. 202. — 3. So if tenant for life aliens upon condition, that if he himself pays 10*l.* that he shall re-enter, and that if he fails in payment, that then the alienee shall have the fee simple ; though he pays the money, yet the reversioner may enter for the forfeiture, because the fee was transferred immediately upon the alienation, which was a renunciation of the feud, and consequently a forfeiture. Ro. Abr. 856.

(*d*) For these estates are still considered in some respects as strict feuds. Gilb. Ten. 38. Wright's Ten. 203.

(*e*) 1. If a tenant by the curtesy aliens in fee, or in tail, or for the life of the grantee, it is a forfeiture of his estate ; and the person in reversion may, by the st. of Westminster, 2. c. 24. have a writ of entry in *consimili casu*. 2 Inst. 309. — 2. But a husband does not forfeit his right to an estate by the curtesy by leaving his wife, and living in adultery with another woman. 3 P. Wms. 276.

and

and makes a feoffment, it will be a forfeiture of his remainder. Co. L. 251. b.

So, if there be joint-tenants for life, and one of them aliens in fee, it will be a forfeiture of his estate.

So, if husband and wife are joint-tenants, and the husband alone aliens in fee, it will be a forfeiture for the life of the husband. 29 Ass. 43.

So, if husband and wife, seised in right of the wife for life, make a feoffment to B. to the use of him and his heirs for the life of the wife *tantum*: for by the feoffment a fee passed, though the use be declared only for the life of the wife. R. 1 Leo. 126. (f)

So, if tenant for life, or years, remainder or reversion to the king, makes a feoffment, &c. it will be a forfeiture; though the remainder, or reversion in the king is not divested. Co. L. 251. b.

So, if tenant for life, remainder to B. in tail, remainder to himself in fee, makes a feoffment, it will be a forfeiture. 1 Rol. 851. l. 30. 854. l. 52.

So, if husband and wife, joint-tenants for life, or seised in right of the wife, make a feoffment, or the husband alone makes it, it will be a forfeiture during the coverture. (g) Vide Baron and Feme, (I 1.)

So, if tenant for life, remainder in tail, remainder in fee, enfeoffs him in remainder in fee, it will be a forfeiture in respect of the mesne remainder. R. 1 Co. 140. a.

So, if he joins with him in the immediate remainder in tail, in a feoffment, and not by fine. 1 Sid. 83.

So, if tenant for life enfeoffs a woman in the immediate remainder and her husband, it will be a forfeiture. Bro. Forf. 21. 1 Rol. 855. l. 10.

Or, him in the immediate remainder and his wife: for the whole estate passes from the tenant for life, and therefore it is not warranted, though he in reversion cannot enter during the estate of the husband. Cont. 41 Ed. 3. 21. a. Acc. Bro. Entry cong. 8. 82. 1 Co. 76. b.

### (A 2.) By alienation by matter of record.

So, if tenant for life (h), or for years, levies a fine (i), it will be a forfeiture. Co. L. 251. b. (k)

So,

(f) 1. Cro. Eliz. 151. — 2. For there being a fee simple conveyed to J. S. by the deed and livery, the words of restraint for the life of the wife refer only to the limitation of the use, so that the fee simple remains still in the feoffee; but this, it seems, is a forfeiture only during the coverture. 3 Bac. Abr. 194.

(g) Ro. Abr. 851. 8 Rep. 44.

(h) 1. If A. be tenant for life, with remainder to B. for life, and A. levies a fine to B.; this is a forfeiture of both their estates. 2 Lev. 202. Co. Read. 3. — 2. And where A. was tenant for life, remainder for life to B., remainder in tail to C., remainder to B. in fee, and B. levied a fine *sur cognizance de droit*, &c. to a stranger, it was adjudged to be a forfeiture of his estate in remainder for life. 1 Rol. Abr. 855. — 3. But where the person who has the next estate of inheritance, joins with the tenant for life in levying a fine, it does not then operate as a forfeiture. 1 Rep. 76. 1 Vent. 160.

(i) 1. *Sur cognizance de droit come ceo*. 1 Inst. 251. b. Gilb. Ten. 38. — 2. So, if tenant for life accepts a fine *sur cognizance de droit*. 9 Rep. 106. b. — 3. But a fine *sur concessit*, levied by a tenant for life, does not operate as a forfeiture of his estate, because it only transfers such an interest as the tenant for life may lawfully pass, without divesting or displacing the estates in remainder or reversion. 2 Mod. 109.

(k) 1. Where a fine is levied by a tenant for life, it operates so, as to divest and displace the estates in remainder, and also the reversion. 1 Inst. 251. b. 327. b. Hard. 401, 402. — 2. But if a tenant for life accepts a fine from a stranger, it does not

So, by the st. 32 H. 8. 31. (l) if he suffers a common recovery.

Though he comes in as vouchee. R. 1 Co. 14. 2 Leo. 61.

Though the recovery, or fine, be afterwards reversed by error. R. 1 Sid. 90.

Though he was disseised before the fine levied, whereby to some intents, *partes finis nihil habuerunt*. Co. L. 252. a. Dub. 4 Leo. 217. R. Mo. 424. Cro. El. 451. Cont. 1 And. 38.

So, if tenant for life, remainder for life, levies a fine to him in remainder for life, *sur conuzance come ceo*, &c. it will be a forfeiture. R. 2 Lev. 202. 2 Jon. 65. R. 2 And. 66.

So, if tenant for life, remainder to B. in tail, remainder to C. in tail, &c. levies a fine, or makes a feoffment to B. and his wife, and B. dies without issue, and the wife enters; it will be a forfeiture to C. R. 1 Rol. 855. l. 10.

So, if tenant for life joins with B. to whom a remainder in tail was limited, when his remainder is gone by the feoffment of his father with warranty. R. 1 Rol. 856. l. 15. Cro. Car. 392.

So, if there be tenant for life, remainder for life, and he in remainder for life levies a fine; it will be a forfeiture of his estate, though the reversion, or remainder, be not divested. R. 1 Leo. 40. Dub. Sti. 192, 193.

So, though the remainder was to A. in tail, and afterwards in fee to him, who had the remainder for life, and levied the fine. R. 1 Rol. 855. l. 20.

So, if there be a lease for years, remainder to A. for life, remainder to B. in tail, remainder to C. for life, &c. and A. and C. levy a fine *sur concessit* for their lives, it will be a forfeiture; for they grant a greater estate than they can lawfully make. Semb. 2 Jon. 70.

So, if tenant for life or years of an advowson, &c. or other thing which lies in grant, levies a fine, it will be a forfeiture; though the reversion is not divested thereby. Co. L. 251. b. 1 Rol. 852. l. 40. (m)

### (A 3.) What alienation will not be a forfeiture.

But, generally, an alienation by a particular tenant is no forfeiture, if the reversion, or remainder, is not thereby divested: and therefore, if tenant for life or years of an advowson, rent, common, or other thing which lies in grant, by deed (n) grants his estate to another in fee, it is no forfeiture. Co. L. 251. b. 1 Rol. 854. l. 9. 12. (o)

So,

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not divest the estate of him in reversion or remainder. 9 Rep. 106. b. 1 Vent. 257, 258. — 3. And where a tenant for life levied a fine, and afterwards devised the premises, and died seised, it was held, that the entry and continuing possession of the devisee, was no disseisin of the reversioner. 12 East, 141.

(l) Vide 14 Eliz. c. 8.

(m) And if a copyholder levies a fine of his copyhold, it will operate as a forfeiture. Co. Sup. c. 11.

(n) It is otherwise if he levies a fine; for though the fine, being of a rent, &c. passes no more than it may lawfully pass, yet, being a public and solemn renunciation of the estate for life in a court of record, this amounts to a forfeiture, and so differs from a grant in *pais*. 3 Bac. Abr. 195. Ro. Abr. 852. Co. Litt. 251.

(o) 1. Of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any disposition or act in *pais* forfeit them; for the grant can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original

So, if a man in remainder, or reversion, for life, of lands, &c. grants his estate by deed to another in fee, it is no forfeiture. Co. L. 251. b. 1 Rol. 854. l. 11.

So, if a *cestuy que use* for life, before the st. 27 H. 8. 10. had made a feoffment, it was no forfeiture. Mo. 38, 39. (p)

So, if tenant for life bargains and sells (q) to another in fee, it is no forfeiture. 2 Leo. 60. (r)

Or, makes a lease and release to another in fee. 3 Mod. 151. (s)

So, if tenant for life, or for years, makes a lease for 1000 years. 2 Leo. 60. (t)

Though he afterwards levies a fine to corroborate the lease; for nothing passes but for his life. Dub. 2 Jon. 99.

So, if tenant for life leases for years to A. who makes a feoffment, and tenant for life releases to the feoffee; it is not a forfeiture of the estate for life. 1 Rol. 855. l. 5.

So, if tenant for life, or years, joins with him in reversion, or re-

grant made to his grantor; by which it must appear what interest he had, and consequently, what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make; and he in reversion therefore can receive no prejudice. 3 Bac. Abr. 195. — 2. If, however, a man be seised of a manor for life, to which an advowson is appendant, and he alien one acre or the whole manor, with the advowson in fee, this is a forfeiture of the advowson; for as it is a forfeiture of the acre or manor to which it is appendant, so it must be also of the advowson, since the alienation makes no severance of them. Ro. Abr. 854. 3 Bac. Abr. 195.

(p) No fine levied by a *cestui que* trust for life, will be allowed in chancery to operate as a forfeiture, because it cannot affect the subsequent remainders. 2 P.Wms. 146. 3 Atk. 729.

(q) A bargain and sale, and covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer. For, as nothing but a use passes by these conveyances; and as no use can be greater than the estate out of which it is created; where a use is granted, greater than the legal estate out of which it is to issue, it is merely void; and the statute executes the possession to so much only of the use as is lawfully granted.

(r) 1. 6 Rep. 14. b. — 2. For though by the statute 27 H. 8. c. 10., deeds enrolled grew a common conveyance for transferring lands, which could not pass at common law without the investiture of livery; yet being a manner of conveyance known before at common law, it was construed to have no new effect given it by the statute, but what the statute expressed. Ibid. 3 Bac. Abr. 195.

(s) 1. A lease and release being a lawful conveyance, that is, passing nothing but what the releasor may lawfully grant. 1 T.R. 738. — 2. So a fine *sur concessit* cannot work a forfeiture, since whatever estate it may profess to grant, it only passes that to which the party is entitled. 2 Taunt. 202.

(t) A lease for years by tenant for life, was never looked upon to be a forfeiture, because the lessee for years was originally but a bailiff to the freeholder, and the tenant for life only had the freehold, and was to answer the services, and he in reversion was no wise affected by it, because there was no investiture or other act of notoriety done to dispossess him of his reversion. But upon the death of tenant for life, the termor's interest ceased, because the person from whom he derived his authority as bailiff, being dead, the authority must necessarily cease with the person that granted it. And in this case, if tenant for life enters upon his lessee, and makes a feoffment to another, this is a forfeiture of his whole estate, but the term for years continues, because the wrongful act of tenant for life shall not prejudice a stranger's interest; and if he in reversion enters, he must take it subject to the charges he had power by law to lay on it; yet in this case, if tenant for life had entered and committed waste, this had been a forfeiture of his estate, and the term had been lost too, but this is by the express words of the statute of Gloucester, which gives the place wasted as a penalty to him in reversion, and cannot be done if the term continues, notwithstanding the waste. 3 Bac. Abr. 194, 195. 8 Rep. 45. Co. Litt. 233.

mainder

mainder in fee, in a feoffment, or fine, or recovery, it is no forfeiture: for each gives that which he lawfully may. R. 6 Co. 15. a. (u)

And therefore, if a fine or recovery be reversed for infancy, &c. of him in reversion or remainder, the conusee shall hold during the life of tenant for life. R. 1 Co. 76. b. 2 Leo. 108.

So, if tenant for life joins with him in the immediate remainder in tail, in a fine, it is no forfeiture; for each gives that which he lawfully may, and it will be a conveyance of the tail, and afterwards of the estate for life. (x) R. 1 Co. 76. Hob. 277. R. 1 Sid. 83. R. 2 And. 66.

So, if an estate be limited to the husband for life, to the wife for life, remainder to the heirs of their bodies, and husband and wife join in a fine. R. Ray. 36. 1 Sid. 83. (y)

Or, to A. for life, remainder to a woman; and A. and the woman intermarry, and join in a fine. R. Cro. El. 828.

So, if an estate be to the wife in tail, remainder to the husband *pur auter vie*, and they join in a fine; it is no forfeiture of the remainder for life, if the wife dies without issue. 1 Rol. 854. l. 47.

So, if an estate be to A. for life, remainder to B. in tail, who join in a fine, and B. dies without issue; the conusee shall hold for the life of A. R. 1 Vent. 160.

So, if a lessor disseises A. his lessee for life, and afterwards leases to B. for life; if B. leases to A. for life, it is no forfeiture: for A. is remitted, and thereby the livery made by B. avoided, and B. has the reversion for life. 1 Rol. 854. l. 22.

So, if tenant for life makes a feoffment, or levies a fine, and limits the use only for his own life, it will not be a forfeiture.

So, if a husband, seised in right of his wife for life, levies a fine, &c. to the use of his wife during her life. R. 1 Rol. 854. l. 35.

So, if a lessee for life levies a fine to A. for the life of himself, to the use of A. for his life, it is no forfeiture: for the limitation is but for his own life, though the use is declared to A. for his life. 1 Rol. 854. l. 40. (z)

#### (A 4.) By a claim of the fee.

So, if a particular tenant claims the fee, it will be a forfeiture: as,

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(u) A forfeiture can only be incurred by doing an act inconsistent with the nature of the tenant's estate; hence a recovery (the tenant to the *præcipe* having been made by lease and release) by tenant for life, does not work a forfeiture of his estate, if there is some subject upon which it may lawfully operate; as where he has a remainder in tail expectant upon the determination of an estate limited after his estate for life; when the recovery operates on that remainder only, and not on the prior limitations. 1 T. R. 738.

(x) Vide 1 Vent. 160.

(y) By marriage settlement, lands were conveyed to trustees and their heirs to the use of husband for life, remainder to the use of trustees to preserve contingent remainders, remainder to the use of the wife for life, remainder to the first, &c. son of the marriage in tail male. The husband and wife levied a fine, (they having then a son an infant,) and mortgaged the land to J. S. The husband died; J. S. brought a bill against the wife and son then of age. The son pleaded the settlement, and insisted that his mother's estate was forfeited, and equity ought not to relieve. The lord chancellor, upon argument, allowed the plea. But the cause coming on to be heard by the master of the rolls, he observed, that the uses and the legal estate were vested in the trustees; and the limitations to the husband, wife, and sons, were but trusts; and a trust for life is not forfeited by a fine (3 Atk. 728.), and so the plea was false, not being warranted by the settlement. He therefore decreed the plaintiff to hold and enjoy during the life of the wife. 2 P. Wms. 147. Pr. Ch. 591.

(z) Cro. Jac. 100.



if he joins the mise, in a writ of right against him, upon the mere right; for tenant in fee only can do it. Co. L. 251. b. 9 H. 5. 14. a. 1 Co. 16. a.

So, if tenant for years brings an assise, *ut de libero tenemento*. Co. L. 251. b.

Or, in debt for rent against him, claims a fee by bargain and sale of his lessor. R. 3 Leo. 169. Mo. 212.

Though the bargain and sale be traversed. R. 3 Leo. 169.

If a recovery be against tenant for years, in a *præcipe quod reddat*, and he brings error, for error in process. Co. L. 251. b.

So, if lessee for life, or years, claims the fee in a *quid juris clamat*. 1 Rol. 852. l. 11.

Though he has colour, or pretence to do it. 1 Rol. 853. l. 12.

(A 5.) Or by an affirmance of the fee in a stranger.

So, if tenant for (z) life, or years, affirms the fee in a stranger: (a) as, if he prays in aid of a stranger. Co. L. 252. a.

Or, attorns, upon record, to the grant of a stranger. Co. L. 252. a. 1 Rol. 852. l. 30.

Or confesses the action in a writ of entry *in casu proviso*, which supposes the reversion in a stranger. Co. L. 252. a.

Or, pleads covinously, to the disherison of him in reversion: as, if in waste by a stranger, he pleads, no waste done. Co. L. 252. a. 1 Rol. 853. l. 27. (b)

Or, in a *præcipe quod reddat* against him, he disclaims. Bro. Forf. de Terre, 92.

Or, confesses the action. 2 Leo. 60. 1 Rol. 853. l. 40.

So, if by covin with the demandant, a *præcipe* is brought against him and B. as joint-tenants, and after the mise joined they make default, whereupon final judgment is given; after judgment reversed by deceit, the estate of the lessee shall be forfeited. 1 Rol. 853. l. 30.

(z) An estate in fee simple is still so far considered as a strict feud, and the tenant thereof so far bound to perform the feudal duties and services which remain due, that if he disclaims upon record to hold his lands of his lord, it will operate as a forfeiture of his estate; and the lord may thereupon have a writ of right upon a disclaimer for the recovery of the land. But if the lord accepts rent from the tenant after the disclaimer, he will be thereby barred of this writ. 1 Inst. 102. a. Finch. 270. Booth, R. A. 133. 3 Leon. 271, 272.

(a) 1. This doctrine is founded on a rule of the feudal law, that if the vassal denied the tenure, he forfeited his feud. This denial may be where the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges it to be in a stranger; for in all these cases he denies that he holds the feud from the lord. But as by the feudal law the vassal was to be convicted of this denial, so in the English law those acts which plainly amount to a denial must be done in a court of record, to make them a forfeiture; because such act of denial appearing on record, is equivalent to conviction upon solemn trial. All other denials that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, were, by our law, rejected, for such convictions might be obtained without any just cause; but the denial of the tenure upon record could never be counterfeited, or abused to any injustice. 1 Cruise, 125. Bac. Abr. Est. for Life, C. — 2. If therefore a tenant for life be disseised, and bring a writ of right, this is a forfeiture of his estate; because by suing that writ, he admits the reversion in fee to be in himself, and by consequence denies that he holds over. So it is if, in a writ of right brought against him, he joins the mise on the mere right; for by taking upon himself the privileges of tenant in fee, he admits the inheritance to be in himself, which is a denial of the tenure. 1 Inst. 251. b.

(b) Because, by this plea, he admits the stranger to be a proper person to punish the waste, if there had been any.

So,

So, if the demandant recovers by render, default, *nient dedire*, or feigned plea (c) of the lessee. 1 Rol. 853. l. 45. 50. (d)

So, if tenant for life accepts from a stranger a fine *sur conusance de droit come ceo*, &c. for thereby he affirms upon record the reversion to be in a stranger; though the reversion is not thereby divested. Co. L. 252. a. 9 Co. 106. b. Per Hale, 1 Mod. 117. 1 Rol. 852. l. 50.

If there be tenant for life, remainder for life, &c. and he in remainder accepts a fine *come ceo*, &c. from the tenant for life; it will be a forfeiture of his remainder. R. 2 Lev. 222.

If tenant for life, by bargain and sale, conveys to B. and afterwards levies a fine, *come ceo*, &c. to him; though nothing passes by the bargain and sale but for the life of the tenant, yet when the bargainee accepts a fine from him, it will be a forfeiture. 1 Leo. 264. 4 Leo. 217.

So, if tenant for life prays in aid, and when the reversioner comes in by process, he pleads that he is not the same person.

So, if the reversioner comes in without process, if he be the same person to whom the reversion belongs; for, by his plea, he supposes the reversion in another. 1 Rol. 853. l. 5.

But it is no forfeiture, if tenant for life vouches a stranger. Bro. Forf. de Terre, 87.

If he accepts a fine upon a release. 4 Leo. 217. 1 Rol. 853. l. 2. Dy. 148. b.

If he attorns to a stranger upon a judgment in a *quid juris clamat*. 1 Rol. 853. l. 23.

Or, attorns upon a grant by a fine of the reversion in mortmain. 1 Rol. 853. l. 25.

So, if tenant for life pleads an attainder and forfeiture by A. from whom the plaintiff in a *quid juris clamat* claims; though the plaintiff shews a reversal, upon which the lessee demurs, and there is judgment against him. 1 Rol. 853. l. 20.

Or, in *quid juris clamat* for a rent of 10l. pleads, that it is but 40s. and it is found against him. 1 Rol. 853. l. 15.

So, if tenant for life loses to a stranger by involuntary misleading. 1 Rol. 853. l. 41.

(A 6.) Entry for the forfeiture: — By whom it shall be.

Entry for a forfeiture ought to be by him, who is next in reversion, or remainder after the forfeited estate. Vide Claim, (A 3. — B 2.) — Condition, (G 1. 2. — O 1. 2.)

As, if tenant for life or years commits a forfeiture, he who has the immediate reversion, or remainder, ought to enter; though he has the fee, or only an estate tail. 1 Rol. 857. l. 45. 50. 858. l. 5.

Though the next remainder was only for life. Co. L. 252. a. 1 Rol. 858. l. 10.

If an estate be given to A. and B. for life, and to the heirs of B.; if A. makes a feoffment, B. may enter. 1 Rol. 858. l. 22.

But if the next in remainder does not take advantage of the forfeiture, after his estate determined, he in a subsequent remainder may enter: as, if A. tenant for life, remainder to B. in tail, remainder to C. in tail,

(c) To the disinherison of the person in reversion.

(d) For the tenant for life is entrusted with the freehold, and is to answer to strangers' *præcipes*, and defend his own, as well as the reversioner's, interest. But when he gives way to the demandant's action, he admits the right of the reversion to be in him, and consequently denies any tenure of his reversioner.

makes a feoffment, and afterwards B. dies without issue before entry, C. may enter. 1 Rol. 857. l. 45. 858. l. 20.

So, if the remainder was to B. for life, and B. dies. Mo. 18.

So, if he in remainder for life will not enter, he in the subsequent remainder, or reversion, may enter in his name, for the preservation of the inheritance. 1 Rol. 858. l. 12.

So, if the lord of a copyholder for life grants a lease for years, to commence after the death, forfeiture, &c. of the copyholder for life, who commits a forfeiture; if the lord will not enter, the lessee may. R. 1 Rol. 858. l. 25.

So, if he in remainder, or reversion dies before entry, his issue, or heir may enter. 1 Rol. 858. l. 15. 37.

So, if he in remainder in tail, releases to the feoffee of tenant for life, and dies, his issue may enter; for though the father was barred by the release, the issue shall not. 1 Rol. 858. l. 2.

#### (A 7.) By whom not.

But he in the next remainder, or reversion shall not enter for the forfeiture, if his estate does not continue.

If an estate be to A. and a *feme covert*, and the heirs of the body of the woman by her husband begotten, and the husband dies without issue, whereby the woman is tenant in tail after possibility; if A. makes a feoffment, the woman cannot enter; for she was seised before *per my et per tout*. 1 Rol. 858. l. 30.

#### (A 8.) At what time it shall be.

If lessee for life makes a feoffment, and dies; entry may be made after his death. 1 Rol. 857. l. 25. Vide Claim, (A 4. — B 3.)—Condition, (G 3.)

If an alienation by tenant for life, or years, be to A. for life, remainder to B. who enters after the death of A.; he in reversion, or remainder may enter upon B. 1 Rol. 857. l. 5.

Or, if B. dies before A. he may enter upon the heir of B. 1 Rol. 857. l. 15.

So, if the alienation be to A. in tail, who dies without issue, he may enter upon the alienor. 1 Rol. 857. l. 20.

So, if the alienation be to A. in fee, who aliens to another, he may enter upon the second alienee, though he was not a party to the forfeiture. 1 Rol. 857. l. 13.

But if tenant for life, of an advowson in gross, levies a fine of it, and the church becomes void before entry, he in reversion, or remainder, has lost the advantage of the avoidance: for it was vested as a chattel before the estate of the tenant for life was defeated (for it cannot be defeated without claim) and it cannot be afterwards divested by the presentation of him in reversion. R. 1 Rol. 857. l. 3.

#### (A 9.) Who are bound by the forfeiture.

A feoffment by a husband, or by husband and wife, of an estate for life, of which the husband is seised in right of his wife, or jointly with his wife, binds only during the coverture. 1 Rol. 851. l. 45. 50. Vide Baron and Feme, (K — R). Vide ante, (A 1.)

#### (A 10.) What does not excuse a forfeiture.

Ignorance of his estate does not excuse.

So

So a forfeiture shall not be excused for want of notice, where no one is bound to give it: as, if husband and wife are seised for life, remainder to B. their son in tail, with the fee expectant, and the husband makes a feoffment with warranty, and dies; if afterwards the wife joins with B. in a fine, it will be a forfeiture of her estate for life: for the estate of B. in tail, and the fee expectant, was bound by the collateral warranty, and B. was, as it were a stranger; though the wife did not know of the warranty, no one being bound to give her notice. R. 1 Rol. 856. l. 15. Cro. Car. 392. (e)

(A 11.) Dispensation: — What shall be.

It shall be a dispensation of the forfeiture, if he in reversion, or remainder be a party to the estate made, and accept it: as, if a husband, seised in right of his wife for life, leases to him in reversion for his own life. 1 Rol. 856. l. 10. Vide Condition, (P) — Copyhold, (M 8).

(A 12.) What not.

But acceptance of an estate by him, who is within age, shall not be a dispensation of the forfeiture: as, if lessee for life, or years, leases to him in reversion (being within age) for his own life, it will be a forfeiture; for the acceptance by the infant shall not prejudice him. 1 Rol. 855. l. 45.

So, if he in the next remainder releases, &c. to the feoffee of tenant for life, or years, it will be a dispensation only for his own estate. 1 Rol. 856. l. 1.

If he in remainder in tail releases, &c. it will be no dispensation as to the issue. 1 Rol. 856. l. 1.

(A 13.) What does not purge the forfeiture.

If lessee for life, or years, makes a feoffment upon condition, and afterwards enters for the condition broken; this does not purge the forfeiture. 1 Rol. 856. l. 35. 40.

(B) *Forfeiture for a crime.*

(B 1.) For high treason: (f) what lands and tenements.

As to a forfeiture of a copyhold, vide Copyhold, (M 1, &c.)

As to forfeiture by outlawry, vide Outlawry, (D 1. &c.)

If a man be attainted for high treason, he forfeits (g) all his lands, and tenements, goods, and chattels.

So,

(e) When a party in possession is ignorant of the existence of an instrument annexing a condition to the estate, and to which he would have a valid title, if there were no such instrument; a neglect of the condition is no forfeiture of the estate. 11 East, 657.

(f) Forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island. 4 Blk. Com. 383.

(g) 1. In order to abolish this hereditary punishment entirely, it was enacted by st. 7 Ann. c. 21, "that after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself;" by which the law of forfeitures for high-treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration.

So, his (h) dignity, though entailed. R. 7 Co. 34. (i) Vide Dignity, (E). (k)

And

duration. The history of this matter is somewhat singular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England; and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English; yet it seemed necessary, that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English house of commons, struggled hard, partly to maintain and partly to acquire a total immunity from forfeiture and corruption of blood, which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, viz. that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood, should take place in Scotland, till the death of the then pretender; and then cease throughout the whole of Great Britain; the lords artfully proposing this temporary clause in hopes, it is said, that the prudence of succeeding parliaments would make it perpetual. This was partly done by the statute 17 G. 2. c. 39. (made in the year preceding the late rebellion) the operation of these indemnifying clauses being thereby still farther suspended, till the death of the sons of the pretender; which event has lately happened. 4 Blk. Com. 384, 385. — 2. By the 54 G. 3. c. 145. "no attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same."

(h) It has been determined by the house of lords, that where a barony is in abeyance between two persons, the attainder of one of them for high treason does not terminate the abeyance, and give to the other a right to the barony. 1795. Barony of Beaumont, printed case.

(i) 1. That case was thus: Charles Nevill, Earl of Westmorland, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament; and died without issue male; upon which Edward Nevill, in 2 Ja. 1. claimed to be Earl of Westmorland, as heir male of the body of the first grantee. It was resolved by all the judges, that although the dignity was within the statute *de donis*, yet that it was forfeited by a condition in law, *tacite* annexed to the estate of the dignity. For an earl has an office of trust and confidence; and when such a person, against the duty and end of his dignity, takes not only counsel, but also arms against the king, to destroy him, and thereof is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever, by force of a condition in law *tacite* annexed to their estates. It was also resolved, that if it had not been forfeited by the common law, it would have been forfeited by the st. 26 H. 8. — 2. Where a person is tenant in tail of a dignity, with remainder in tail to another, and the first tenant in tail is attainted of high treason, the dignity is forfeited, as to him and his descendants; but upon failure of such descendants, it becomes vested in the remainder-man. Hence, where Thomas Percy, who was Earl of Northumberland, to him and the heirs male of his body, remainder to his brother Hugh Percy in the same manner, was attainted of high-treason, and executed, having no issue male; Hugh Percy therefore became Earl of Northumberland. 7 Rep. 34. Vide *infra*, in notis. — 3. In the case of a dignity descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar such claim, for the blood of the person attainted, being corrupted, no pedigree can be derived through him; so that the dignity becomes vested in the crown by escheat, and is thereby destroyed. — 4. Hence, where in 1723 the Reverend Robert Lumley Lloyd claimed the barony of Lumley, which was created by writ of summons in 8 Rich. 2. as heir to Ralph Lord Lumley, the person first summoned to parliament; and it appeared that the title had descended to John Lord Lumley, and that George Lumley his eldest son was attainted of treason, and died in the lifetime of his father, leaving issue, John Lumley, who died without issue; and that Spandian Lloyd



And by the st. 26 H. 8. 13. and 5 & 6 Ed. 6. 11. (*l*) (which is not repealed by the st. 1 Mar. s. 1. ch. 1. (*m*) He shall forfeit all such lands, &c. of which he shall have any estate of inheritance in his own right, in use, or possession. — Which extends to (*n*) his lands in tail, (*o*) as well as in fee simple. (*p*) St. P. C. 187. 2 Lev. 170. R. 7 Co. 34. b. (*q*)

Lloyd was his cousin and next heir, viz. eldest son of Barbara Williams, sister of the said John Lord Lumley; that Spandian Lloyd died without issue, and that Henry Lloyd his next brother had issue Henry his eldest son, who was father to the claimant; the house of lords resolved, that the petitioner had not any right to a writ of summons to parliament, as prayed by his petition. 2 H. P. C. 1. 356. Vide infra.

(*k*) Vide infra, (B 3.) in notis.

(*l*) By st. 34 & 35 Hen. 8. c. 20. estates tail of the gift of the crown were protected from forfeiture for treason. But by st. 5 & 6 Ed. 6. c. 11. the former statute is repealed, as to estates tail of the gift of the crown, which are again made forfeitable for treason.

(*m*) 1. Staund. P. C. 387. 3 Inst. 19. Dyer, 28. 2 Hawk. P. C. 452 1 H. H. P. C. 241. 356. — 2. Which enacts, "that no pains of death, penalty, or forfeiture, shall ensue to any offender, for the doing any treason, petit treason, or misprision of treason, other than such as be within the statute of 25 E. 3. st. 5. c. 2, ordained and provided." — 3. For the words 'other than such,' &c., have been construed not to extend to the pains, &c. mentioned in the beginning of the sentence, but to the offences mentioned in the end of it.

(*n*) The st. 26 Hen. 8. does not extend to attainders by parliament, or where the party stood mute. But by st. 33 Hen. 8. c. 20. estates tail are forfeited by all manner of attainders of treason.

(*o*) At common law conditional fees were liable to forfeiture for high treason as soon as the donee had issue. When, however, the statute *de donis* was made, it was resolved that lands entailed were not forfeited for treason or felony, but for the life of the tenant in tail, one of the causes of the statute being to preserve the inheritance in the blood of those to whom the gift was made, notwithstanding any attainder of felony or treason. 1 Inst. 392. 3 Inst. 19. Stamf. P. C. 187. Plow. 554. Dyer, 289. pl. 55. Co. Litt. 130. 372. 391. Fost. 95.

(*p*) All *customary* estates of inheritance are forfeited by an attainder of treason or felony, unless there be some particular custom to the contrary, as in gavelkind; because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing. And therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court baron to inquire of criminal matters or offences against the king; and such homage is at the will of the lord, and often influenced by him. But if a copyholder be convicted of felony, and presented by the homage, by *special custom* the estate may be forfeited to the lord. But this is *only* by the *special custom*, since the copyholder is not disabled by the conviction to hold the estate, as he is, if he was *attainted*; and therefore since it is by the custom only that such forfeiture accrues, it must be in the manner which the custom has settled it, which is, by presentment of the homage. But if a copyhold is granted for life, and by another copy the reversion is granted to another, *habendum* after the death of the first copyholder, or surrender, forfeiture or other determination of the first estate; the first copyholder commits murder, and is thereof attainted, the king pardons the murder and the attainder and all forfeitures thereby; in this case, he in the reversion is entitled to the estate; for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore, the particular estate of tenant for life being extinguished, the reversion immediately commences. 3 Bac. Abr. 731. Bulst. 13. 2 Brownl. 217. Leon. 1. 1 Godb. 267. 2 Jon. 189. Lev. 263. 2 Keb. 451. 466. 2 Vent. 38. 5 Co. 117. Co. Cop. s. 58. Pollexf. 615. to 621.

(*q*) Estates for life are forfeited by attainder of treason or felony; and lord Hale says, that if tenant for life be attainted of treason, the king hath the freehold during the life of the party attainted. In the case of felony, the profits of the land are forfeited during the life of the tenant for life. 1 H. P. C. 251. 3 Inst. 19.

So he forfeits his right of entry into any lands or tenements. St. P. C. 187, 188. Vide post, (B 2.) (r)

Entry for a discontinuance. (s)

If tenant in tail discontinues in fee, (t) the right to the entail is forfeited. R. 2 Rol. 504. John. 71. (u)

So an annuity of inheritance shall be forfeited; for it is an hereditament. R. 7 Co. 34. b. (x)

So, where since 26 H. 8. 13. and 5 & 6 Ed. 6. 11. it is enacted, that all the lands, tenements, hereditaments, &c. of A. shall be forfeited; this extends to lands which A. had in tail. R. 2 Mod. 133. 2 Jon. 57. 1 Vent. 299.

Though the entail was to A. and his wife, and the heirs of their bodies, and the wife survives. R. 1 And. 39.

So he forfeits all evidences and charters which concern the lands or tenements forfeited, and the king shall have them. St. P. C. 187. b. (y)

So, if a condition be given to the king, as forfeited for high treason,

(r) Yet the king shall not be adjudged in possession, by virtue of such a right, without an office, and a *scire facias* or seizure on such office; for the words in the statute 33 H. 8, c. 20. 'the king shall be deemed in possession without office,' &c. shall have this construction, that he shall be in possession without office, in the same manner as he should have been on an office found at common law. But at common law, if a disseisee had been attainted of high treason, the king should not have been in possession without office, and a *scire facias* or seizure thereon. 3 Rep. 11. 4 Rep. 58. 9 Rep. 95.

(s) If one attainted of high treason is seised of a defeasible estate tail, and hath also a right to an antient entail, which is discontinued, he forfeits both; for the first is within the express words of 26 H. 8. c. 13. and the other within those of 33 H. 8. c. 20. and it does not follow, that because naked rights to lands in the hands of a discontinuee, or of the heir of a disseisor, are not within the meaning of the statute, therefore a right in the party himself is not; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be prejudicial to strangers, whom the statute, by an express saving, plainly intends to favour. But a forfeiture of the offender's right to his own lands can prejudice none but himself and his heirs. Hob. 334. Palm. 351. 2 Ro. Rep. 305.

(t) If tenant in tail of the gift of the crown makes a feoffment in fee, and then is attainted of high treason, the right of the entail is forfeited; for it could not be discontinued, because the reversion continued always in the crown; and though it be put in abeyance by the feoffment, as to any benefit which the feoffor could have claimed from it; yet since it is not turned to a right of action, but would have still continued in him for the benefit of the heir, if there had been no attainder, it shall likewise continue in him for the benefit of the crown. Cro. Car. 427. Vide Plowd. 552.

(u) 1. 3 Rep. 2, 3. 7 Rep. 17. — 2. Where a tenant in tail, with remainder to a subject, discontinues his estate before his attainder, his issue, having only a right of action, is not affected by it. Cro. Car. 428. 3 Rep. 2. — 3. But where the immediate reversion is in the crown, the tenant in tail cannot create a discontinuance; so that a right of entry remains in the issue, which is forfeited by the attainder. Ibid.

(x) The inheritance of things not lying in tenure, as of rent charge, rent seck, commons, &c. are forfeited to the king by an attainder of high treason, and the profits of them are also forfeited to him by an attainder of felony during the life of the offender, and the inheritance shall be extinguished by his death; for it cannot escheat, because it lies not in tenure, neither can it descend, because the blood is corrupted. 3 Inst. 19. 21. 2 Hawk. c. 49. s. 4.

(y) A warranty may be destroyed by the attainder of the warrantor. Thus, if tenant in tail is disseised, and releases to the disseisor, with warranty, and afterwards is attainted, and dies leaving issue; in this case the issue may enter on the disseisor; for the warranty did not descend to the issue in tail, because the father, by the attainder, became incapable of transmitting any thing by descent. Lit. s. 745. 1 Inst. 391. b.

the king may tender gold, to defeat a settlement upon condition to be void by a tender of the feoffor. R. 7 Co. 13. 1 And. 294. (z)

So, if by statute all lands, rights, interests, &c. are forfeited, an estate tail is forfeited. (a) R. (b) 2 Lev. 170. (c)

But

(z) 1. A power of revocation may, in some cases, be forfeited to the crown, by an attainer for high treason, and by that means become vested in the king. Thus if a person is tenant for life with a power of revocation over the estates in remainder, and he is attainted of high treason, his estate for life, and his power of revocation will both be forfeited. — 2. In a case of this kind, if the execution of the power of revocation be attended with circumstances inseparably annexed to the person of him to whom the power is given, it cannot be executed by the crown. — 3. Hence, where Thomas Duke of Norfolk conveyed his estate to trustees, to the use of himself for life, remainder to the use of his eldest son in tail, with several remainders over, with a proviso, that it should be lawful for the duke to revoke those uses, by any writing under his proper hand, subscribed by three witnesses; and the duke was afterwards attainted of high treason; it was determined that this power of revocation, although forfeited, could not be executed by Queen Elizabeth; because the circumstances prescribed in the execution of the power were so inseparably annexed to the person of the Duke that no one but himself could execute them. 7 Rep. 13. 1 Vent. 128. — 4. But if the execution of a power of revocation be not attended with circumstances inseparably annexed to the person of him to whom the power is given; there, in case of an attainer for high treason, the power may be executed by the crown, as in the following case. — 5. Sir Francis Englefield left the kingdom in the first year of Queen Elizabeth by licence, and remained abroad beyond the time of his licence. The queen, by her warrants under the privy seal, required him to return, and upon his not complying, seised his lands. Sir Francis Englefield, by indenture executed at Rome, and made between him and Francis Englefield his nephew, covenanted, for the advancement of his blood, &c. to stand seised to the use of himself for life, remainder to the use of his said nephew and the heirs male of his body, remainder to the use of the right heirs of his nephew; with a proviso, that as his nephew was an infant, so that his proof was not then seen, and because the uncle did not think it convenient to settle the said inheritance in the nephew absolutely, so long as the uncle should live, therefore if the uncle, by himself, or by any other, should, during his natural life, deliver or offer to the nephew, a gold ring, to the intent to make void the uses, then all the uses should be void. Sir Francis Englefield was afterwards indicted for high treason, for compassing the queen's death, on which he was outlawed, and in 28 Eliz. an act of attainer for high treason was passed against him. Queen Elizabeth, by letters patent, reciting the settlement, and power of revocation on tender of a gold ring, appointed two persons to deliver a gold ring to Francis Englefield which he refused. The question was, whether this tender of a gold ring to Francis Englefield, was a good revocation of the uses. It was argued, that the execution of this power was not given to the queen by the act of attainer, because it was inseparably annexed to the person of Sir Francis Englefield. For although the tender of a ring was a thing that might be done by any person, yet as that circumstance was only a mark of the intention of Sir Francis Englefield, which intention must arise from the opinion he himself should form of his nephew's future disposition and conduct, therefore, no person but Sir Francis himself could direct the tender of the ring. But the judges held, that the whole force and effect of the power of revocation depended on the tender of the ring, so that the queen might lawfully execute the power, and therefore judgment was given for the crown. 7 Rep. 11. — 6. Lord Coke observes, that the counsel of Francis Englefield were not satisfied with this judgment, and therefore advised a writ of error; but at the next parliament a special act was passed, to establish the forfeiture in the queen. And Lord Hale has observed upon this case, that if Sir Francis Englefield had died before the queen had made the tender, then the condition which was only limited to him during his life, had been determined, and the queen could not have tendered; for the attainer could not lengthen the condition, longer than the first limitation. 1 H. P. C. 245. Vide Palm. 429. Lat. 24. 1 Vent. 130. — 7. A., who is tenant for life, with power to make leases for three lives, or twenty-one years, makes a lease to trustees for ninety nine-years, if he so long live, for payment of his debts; and appoints them his attornies, to make leases pursuant to the power; A. is outlawed for high treason; and agreed that the authority given to the trustees was destroyed by the attainer. Bunb. 92.

(a) 1. If A. entails his estate in Scotland on himself for life, remainder to B. his eldest

But he does not forfeit lands and tenements, which he has *en autre droit* : as, in right of his church. St. P. C. 187. b.

Or, in right of his wife. St. P. C. 187. b. — Cont. Semb. Lane 54.

So, by the common law, (*d*) he does not forfeit an use, or lands in trust for him. (*e*) 12 Co. 2. Dub. Hard. 405. 1 Sid. 260. R. Hard. 495. Vide 2 Cro. 513. (*f*)

So

est son, and the heirs male of his body, remainder to the heirs male of A.'s own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of A., with prohibitive, irritant, and resolute clauses; and A. dies, leaving B. and another son C.; and B. is attainted of high treason: the estate is forfeited to the crown during his life, and the continuance of such issue male of his body as would have been inheritable to the said estate tailzie, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of A. after the substitutes determined; and after the death of B., and failure of his issue male, C. shall succeed by virtue of the substitution to the heirs male of the body of A. Foster, 102. — 2. If the estate is limited to A. and the heirs male of his body, without any previous limitation to his son B., and B. on his father A.'s death, become entitled as heir of his body, and is attainted of high treason, the whole entail is forfeited by his attainder, as long as there are heirs male of the body of A. Foster, 102.

(*b*) 1. 2 Jon. 57. 2 Mod. 130. 3 Keb. 459. 651. 712. Vent. 299. Pollex. 181. — 2. But it is holden, that the statutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to lands in tail. Co. Lit. 130. — 3. It is agreed that a saving against corruption of blood in a statute concerning *felony* saves the land to the heir, because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood: also the saving of the land to the heir saves the corruption of blood and loss of dower. Hale's P. C. 8. 3 Inst. 47. — 4. But a saving against the corruption of blood in a statute concerning *high treason*, does not save the land to the heir, because the land goes to the king by way of *immediate forfeiture*, and not by way of escheat. Salk. 85.

(*c*) Estates in remainder are not forfeited by the attainder of the person having the first estate tail; and therefore if a tenant in tail, with remainder over, be attainted of high treason, the crown will thereby acquire a base fee, as long as there is issue of the person attainted; but upon failure of heirs of the body of the person attainted, inheritable to the estate tail, the person in remainder, or his issue, will become entitled. Plowd. 557.

(*d*) 1. Before the statute of uses, the king was not entitled to any use upon an attainder for high treason of the *cestui que use*, as is mentioned in the preamble of that statute; so that afterwards trusts were, by an analogy drawn from uses, also protected from forfeiture, upon an attainder of the *cestui que* trust for high treason. — 2. But by the st. 33 H. 8. c. 20. it is enacted, "that if any person shall be attainted or convicted of high treason, the king shall have as much benefit and advantage by such attainder, as well of uses, rights, entries, and conditions, as of possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament." — 3. Lord Hale has observed, that at the time when the statute was made, there could be no use but that which is now called a trust; and although it was determined in Abington's case, that a trust estate of freehold was not forfeited by attainder of treason, yet that resolution could not be reconciled with the statute, 33 H. 8. as the uses there mentioned could be nothing but trusts; therefore he was of opinion, that upon an attainder for high treason of the *cestui que* trust of an inheritance, the equity or trust was forfeited; though possibly the land itself was not forfeited. 1 H. P. C. 248.

(*e*) 1. Although the statute of 33 H. 8. c. 10. made attainders at common law as effectual as parliamentary attainders, as well in regard to uses as possessions; yet in the King v. Dacombe, the judges all held, and so it was resolved in Abington's case, that a trust in a freehold was not forfeited by an attainder of treason. Cro. Jac. 513. — 2. With this decision, says Mr. Sugden, Lord Hale quarrels, and gives it as his opinion, that the st. of 33 H. 8. extends to trusts, such as were then in practice and retained in chancery. 1 H. H. P. C. 248. — 3. And accordingly, in a case which came before him, when he was chief baron, he and baron Turner agreed, that a trust in fee, or fee tail, was forfeited under the statute by attainder of treason. 2 Freem. 120. Hardr. 495. Sed vide Id. 494. — 4. And so the law is laid down by modern writers. — 5. But the observation in Sand's case was merely an *obiter dictum*, and there

is



So he does not forfeit (*g*) rights of action (*h*) for the recovery of an estate in a stranger.

So he does not forfeit lands, which he has as trustee for another. Cont. Lane 39. 54. Vide Roy, (D) (*k*)

So, if a term attends the inheritance, which was in trust for a felon; the inheritance not being forfeited, the term shall not be so. R. Hard. 495. Vide post, (B 2.)

So he does not forfeit the right, which a stranger has, to lands in his possession. Jon. 71.

So, if a man tenant in tail levies a fine to the same uses, where the estate tail is not forfeited, this seisin in fee, for an instant at the time of the fine, shall not make a forfeiture. R. 2 Lev. 170. (*l*)

### (B 2.) What goods and chattels.

So, for high treason, (*m*) he forfeits all goods and chattels, which he had in possession in his own right. (*n*)

Or, to which he had right. St. P. C. 188.

So, a term for years, and goods in trust for him. (*o*) 1 Sid. 260. R. 1 And. 294. 2 Cro. 512, 513. Vide ante, (B 1.) (*p*)

So

is an express decision the other way, which may be thought to be founded in reason, because it is not pretended that the statute of 26 H. 8. can embrace trusts which have succeeded to uses (the uses referred to in that act having been destroyed by the st. of uses, 27 H. 8. c. 10.) and it does not appear to have been the intention of 33 H. 8. to create a forfeiture of any equitable estates which had sprung up since the act of 26 H. 8. the statute had other objects. Sugden's Gilb. Uses, 78. n.

(*f*) 1 Vide Lane, 39. 3 Inst. 19. — 2. Except where land had been fraudulently conveyed with intent to avoid a forfeiture. 2 Ro. Abr. 34. — 3. When a trustee is attainted of *felony*, it is clear that, though the legal estate be forfeited, the *cestui que* trust is entitled to relief in equity. Carter, 67.

(*g*) 1. An annuity granted *pro consilio impendendo*, is not forfeitable. Plowd. 381. — 2. Neither is an office granted for life, and requiring skill and confidence; but such office in fee may be forfeited, without the aid of the statutes, because the grantor in giving an estate descendible to all the heirs of the grantee, however qualified, appears not to have been induced to make his grant from the consideration of the peculiar merit of the persons who are to execute the office. Plowd. 379.

(*h*) Nor a writ of error to reverse an erroneous common recovery. 3 Rep. 2, 3. Leon. 270, 271. Moore, 125. Hob. 340. Cro. Eliz. 389. Cro. Car. 428. 7 Rep. 13. Litt. Rep. 100.

(*k*) Where a surrender is made to one, who is convicted of felony, and hanged before admittance, the lands are not forfeited to the lord, but descend to the heir of the surrenderor. 2 Wils. 13.

(*l*) A. who is tenant for life, with power to make leases for three lives or twenty-one years, makes a lease to trustees for ninety nine years, if he so long live, for payment of his debts; and appoints them his attornies, to make leases pursuant to the power; A. is outlawed for high treason; the trustees shall not make the leases to the nominees of the crown. Bunb. 927.

(*m*) 5 Rep. 109.

(*n*) 1. The reason given is, to compensate the king for the trouble and charge he has been at, in holding courts and bringing the offenders to justice. 3 Bac. Abr. 731. Staundf. Prærog. 45, 46. 12 Rep. 12. — 2. Adam Smith, in the third volume of his Wealth of Nations, observes, that the judicial authority of such a sovereign, (speaking of the second period of society,) far from being a cause of expence, is for a long time a source of revenue to him. p. 81.

(*o*) 1. So if a bond be taken in another's name, or a lease be made to another in trust for a person who is afterwards convicted of treason or felony, these are as much liable to be forfeited, as a bond made to him in his own name, or a lease in possession. Cro. Jac. 312. Hob. 214. — 2. So likewise the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited,



So he forfeits bonds, and other securities for money ; and the king, or his grantee, may maintain an action in his own name. St. P. C. 188. a. 12 Co. 2.

So, debts due upon contract. St. 188. a. 12 Co. 2.

So, a right to have an action. St. 188. a. Vide ante, (B 1.) But it was held that a *chose en action* is not forfeited. Sav. 40. Nor a right to an action in gross. Jon. 71.

So he forfeits goods in his possession, of which the property is not known : as, if A. bails money, or corn out of a sack or bag, to B. who is afterwards attainted, the king shall have it ; for being out of a bag, one cannot be known from another. St. P. C. 188. a.

So, goods in his hands, which he stole, though the property is not in him. St. 188. a.

But a right to have an action for a wrong to his person, is not forfeited : as, for a battery. St. P. C. 188. a.

So goods, in the hands of a man attainted, by bailment, &c. if they can be known, shall be restored to the owner, if he shews the bailment before the justices, and upon inquest it be found so. St. 188. a.

So he does not forfeit goods which he has as executor, or administrator. St. 188. b. (q)

So, if a man, indicted for high treason, stands mute, or refuses to answer, he shall have the same judgment by attainder, as if he was convicted by verdict, or confession. Co. L. 391. a.

So, if a man be killed in levying war against the king ; he forfeits his lands, goods, and chattels. St. 189. a.

So, if he be killed in pursuit upon an escape, or upon his arrest, he forfeits his goods and chattels. Vide post, (B 3.) (r)

So, if a man be attainted for high treason, his blood is corrupted. (s) Co. L. 41. a. 391. b. Vide Discent, (C 13.) (t)

And

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feited, if fraudulently made with an intent to avoid a subsequent forfeiture, but it shall be forfeited so far only, as it is reserved to the benefit of the party himself, if made *bonâ fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court where it is not expressly found. 2 Keb. 564. 608. 644. 763. 772. Lev. 279. Lane, 54. 113. Mod. 16. 38. Hardr. 466. And. 294. Raym. 120. 2 Ro. Abr. 34. 343. March. 45. 88. Sid. 260. 403. Keb. 909. 3 Bac. Abr. 732. — 3. But the power of revocation of the trust of a settlement reserved to the grantor, is not liable to be forfeited, if it depend upon something personal to be done by the grantor himself, as, making the deed of revocation under his hand and seal. 2 Keb. 564. Lev. 279. Mod. 16. 38. Vent. 128.

(p) Tenant at will has nothing to forfeit. 1 Wils. 176.

(q) 1. Cro. Car. 566. — 2. So a term limited to executors, and not vested in the party himself, is not forfeitable. 2 Leon. 5, 6. And. 19. Moore, 100. Dy. 309, 310.

(r) 1. Upon the coroner's inquest taken on view of a dead body, and finding him guilty either as principal or as accessory *before* the fact, and that he fled for the same ; thereby he forfeits his goods absolutely, and the issues of his lands till he be acquitted or pardoned. Staund. P. C. 813. Hale's P. C. 271. Keilw. 68. Dyer, 239. 5 Rep. 110. — 2. *Secus*, if he be found accessory *after* the fact, for the indictment is so far void. Staund. P. C. 184. — 3. Where the coroner cannot have the view of the body, the king shall entitle himself to the goods and chattels upon a presentment. 5 Rep. 109.

(s) 1. The doctrine of corruption of blood, does not take place in the descent of estates tail ; for notwithstanding the forfeiture of lands entailed by attainder of high treason, yet the blood of the person attainted is not corrupted so as to impede the descent ; because, says Mr. Yorke, the forfeiture of estates tail came in by the construction of the st. 28 H. 8. and though the judges resolved, that the general words of that statute comprehended these estates, yet such laws being of a penal kind, notwithstanding

And his wife shall lose her dower; (*u*) for the st. 1 Ed. 6. 12. which gives her dower, is repealed by 5 & 6 Ed. 6. 11. Vide Dower, (A 2.)

And she shall lose her dower against the feoffee of the husband, as well as against the lord by escheat. Co. L. 41. a. (*x*)

So, her dower *ad ostium ecclesiæ*, or, *ex assensu patris*. Co. L. 41. a.

So, dower by custom. Co. L. 41. a. (*y*)

Where by statute corruption of blood is prevented in cases of high treason, the forfeiture of lands and goods continues; for they are directly forfeited, and not by way of escheat: and therefore the forfeiture remains without express words. R. 1 Sal. 85. Vide post, (B 3.)

### (B 3.) For *petit* treason, or felony.

So, if a man be attainted for *petit* treason, or felony, he forfeits all

withstanding they are to be construed so as to attain their full effect, yet they are to be construed strictly; and, however they might extend to make estates tail liable to forfeiture, where they are actually in the offender's possession, and consequently in his power to alienate; they could by no rules of construction be extended to bring consequential disabilities on the heir, where the estates have not been in the offender's possession. Law of Forfeiture, 82. fourth edition. — 2. Thus, where there was grandfather, father, and son; the grandfather was tenant in tail; the father was attainted of high treason, and died in the life time of the grandfather; and afterwards the grandfather died; it was agreed, that the land should descend to the son, notwithstanding the attainder of the father; for the father had not the land, either in possession or in use, in which two cases only, the act of 26 H. 8. gave the forfeiture; and his attainder was not any corruption of blood for the land in tail. 3 Rep. 10. Jenk. 82. 206. Cro. Eliz. 28.

(*z*) 1. In the case of entailed dignities, no corruption of blood takes place. A dignity in tail, therefore, may be claimed by a son surviving an attainted father, who never was possessed of the dignity. For the son may in such a case claim from the first acquirer, *per formam doni*, as heir male of his body, within the description of the gift, without being affected by the attainder of his father, or any other lineal or collateral ancestor. 2 H. P. C. 356. — 2. In 1764 John Murray presented a petition to his majesty, stating that his grandfather John Marquis of Athol, was by letters patent created Duke of Athol, to him and the heirs male of his body. That the said Duke of Athol died in 1725, leaving James his eldest son, who succeeded to the title, and George his second son, who was the petitioner's father. That the said George was in the year 1745 attainted of high treason by act of parliament, and died in 1760, leaving the petitioner his eldest son. That James the second Duke of Athol, died in 1764, without leaving any issue male. That the petitioner had consulted many gentlemen learned in the law, particularly the honourable Charles Yorke, Sir Fletcher Norton, and Mr. De Grey, whether the said attainder, under the circumstances of the case, could be any bar to the petitioner's succeeding to the said title upon the death of his said uncle, James Duke of Athol; and the said gentlemen were unanimously of opinion, that as by the law of England in a like case, no objection could arise from the said attainder; and as by the st. of 7 Anne, all persons attainted of treason in Scotland were liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason in England, the petitioner would be clearly entitled to succeed to the said honours. The petitioner therefore prayed, that proper directions should be given for having the petitioner's right declared and established. This petition was referred to the house of lords, who resolved that the petitioner had a right to the title claimed by his petition. Journ. v. 30. 466. 469.

(*u*) But not her jointure. 1 Inst. 37.

(*x*) The widow of a man attainted of treason, shall not be endowed of lands which he had aliened before the treason; though they are not forfeited. Dyer, 140. 1 Inst. 41. a. n.

(*y*) 1. If a woman be attainted of treason or felony, she will thereby lose her dower; but if pardoned she may then demand it, though her husband should have aliened in the mean time. For when this impediment is once removed, her capacity to be endowed is restored. 1 Inst. 33. 13 Rep. 23. — 2. So if a woman be attainted of treason or felony, she loses her jointure. 1 Inst. 37.

his

his lands and tenements, which he had in fee in his own right. Co. L. 41. a. (z)

Or, if he be outlawed, (a) or abjures the realm. Co. L. 390. b. (b)

So, the profits of lands, which he had in tail, during his life; (c) but not his estate or freehold. Dub. 2 Leo. 123. 126. 3 Leo. 185. 4 Leo. 112. (d)

So he forfeits all his goods and chattels. (e) Co. L. 41. a. (f)

So,

(z) The profits of lands, whereof one attainted of felony is seised of an estate of inheritance in his wife's right, are forfeited to the king, and nothing shall go to the lord. 3 Inst. 19. Fitz. Assise, 166. Forfeiture, 23. 4 Ass. pl. 4.

(a) 1. The goods of persons outlawed are forfeited to the king; for the retiring from the inquiries of justice is holden so criminal in the eye of the law, that it is punished with the loss of goods so long as the outlawry stands in force. 5 Rep. 110, 111. — 2. So if a person make default till the award of an *exigent*, either upon appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded. Fitz. Coron. 181. Forfeiture, 28. Staundf. P. C. 183. 184. Staunf. Prærog. 47. Bro. Coron. 8. Finch, 352. Ro. Abr. 793. 41 Ass. pl. 13. 22 Ass. pl. 11. Cro. Eliz. 4. 72. — 3. And it is holden that the law is the same as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited, they are not saved by an acquittal at the trial. Hale's P. C. 271. — 4. But by a reversal of the award of the *exigent*, they are saved, whether such reversal be for an error either in fact or in law, as for the imprisonment of the defendant at the time when the process was awarded, or for a defect in the indictment, appeal, or process. 5 Rep. 110, 111. 43 E. 3. 17. Hale's P. C. 271. Co. Litt. 259. Cro. Ja. 464. Staunf. Prærog. 47.

(b) 1. If a man be *felo de se*, he forfeits his goods and chattels; for when a man thus forsakes life, all his goods and chattels are *derelict*; and therefore the king shall have them, as the maintainer of public justice. 5 Rep. 109. Fitz. Coron. 289. 312. Staunf. P. C. 184. 3 Inst. 56. 227. Plowd. 260. 3 Bac. Abr. 733. — 2. If a felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own goods, or goods stolen by him. 5 Rep. 109. 3 Inst. 134. Cro. Eliz. 694. — 3. And there is this difference between goods waived, strays, and the like, and goods forfeited for felony or flight; that goods forfeited for felony are not in the king without an office found of such felony or flight, because the property cannot alter without matter of record; but goods waived are in the king without office, because there the property is in no body; and therefore by public agreement they are put out of the finder, in whom they were by the state of nature, and are vested in the king as a recompense for his trouble and charge in the execution of justice. 5 Rep. 109.

(c) 1. The st. 26 H. 8. only extends to cases of high treason; therefore, as to felonies, the stat. *de donis* still remains in force. 1 Inst. 392. — 2. Lord Coke says, if tenant in tail of lands holden of the king, be attainted of felony, and the king, after office, seizeth the same, the estate tail is in abeyance. 1 Inst. 345.

(d) A title of nobility, limited by patent in tail, is an estate tail within the protection of the statute *de donis*, whether it be conferred from any place or not, and consequently is not forfeited by an attainder of felony. 2 Eden, 373.

(e) Nor are they subject to the felon's debts, unless expressly made liable by letters of administration, granted with the consent of the king, advocate general, &c. under the authority of the royal sign manual. Dougl. 542.

(f) The forfeiture of goods and chattels accrues in every one of the higher kinds of offence; in high treason or misprision thereof, petit treason, felonies of all sorts whether clergyable or not, self-murder or felony *de se*, outlawry for treason or felony, petit larceny, standing mute when arraigned of felony, and striking in Westminster-hall, or drawing a weapon upon a judge there, sitting in the king's courts of justice; by *præmunire*; by pretended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at play. For flight also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by law. But the jury very seldom find the flight: forfei-

So, a lease for years in trust for him. Hard. 405. Semb. cont. 1 Sid. 403.

So, a *chose en action* : as, a bond, covenant for payment of money, &c. R. Noy, 155.

But he does not forfeit (*g*) things not held of any one ; as, fairs, markets, common rents charge or seck, warren, corody, &c. of which he is seised in fee ; but the king shall have them for his life, and afterwards they are extinct : for they cannot descend, where the blood is corrupted, nor escheat, where there is no tenure. 3 Inst. 21.

So, if he be convicted for *petit* treason, or felony, he forfeits all his goods and chattels. Co. L. 391. a.

So, if he fled, or was sued to the *exigent*, though he be afterwards acquitted. Vide supra. Vide Waife, (B). (*h*)

So, if he be arrested for treason, or felony, and escapes, and in the pursuit is killed ; upon presentment before the coroner, or justices of B. R. &c. he forfeits his goods and chattels. St. 189. a.

So, if he be killed in resistance upon the arrest. St. 189. a.

But for *petit* larceny a man does not forfeit his lands, or goods. Co. L. 41.

So, if he be found guilty of grand larceny, and has his clergy, or be burnt in the hand, another found guilty, as accessory to the same felony, does not forfeit his lands, or goods ; for he ought to be discharged, the principal not being attainted. R. Cro. Car. 567.

So, by the st. 1 Ed. 6. 12. A wife does not lose her dower by the attainder of her husband for felony.

So the goods of a wife, married after conviction and clergy had, are not forfeited. Noy, 6.

So, in felony, where a statute prevents corruption of blood, the forfeiture of lands is prevented as a consequence ; for the forfeiture is by way of escheat, for defect in the descent by reason of the corruption of the blood. 1 Sal. 85. Vide ante, (B 2.)

So, if a man be pardoned before conviction, he does not forfeit his goods, or the profits of his lands. 5 Co. 110. b.

So, if a man be found guilty of homicide *se defendendo*, he shall lose his goods and chattels. H. P. C. 41. (*i*)

So,

ture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty. 4 Blk. Com. 387.

(*g*) 1. A trust is not forfeited by the attainder of *cestui que* trust for felony. — 2. Freeman Sands being attainted of felony, for the murder of his brother, and having a trust estate in lands held of the king, of which Sir George Sands had the legal estate ; the attorney general preferred an information in the exchequer against Sir G. Sands, to have a conveyance of the legal estate to the king. The court resolved, that although Freeman Sands had the trust of the land at the time of his attainder, yet inasmuch as Sir G. Sands continued seised of the lands, and so was tenant to the king, though subject to the trust, yet the trust was not forfeited to the crown ; but that Sir G. Sands should hold the lands for his own benefit, discharged from the trust. 1 Hale, 249.

(*h*) Upon a jury's finding that the defendant fled at the same time that they acquit him upon an indictment for a capital felony, or, as some say, larceny, before justices of oyer, &c. he forfeits his goods. But such a finding causes no forfeiture of the issues of the land, because by the acquittal the land is discharged ; neither will it have any effect as to the goods, if the indictments were insufficient, or if the flight be disproved on a traverse, which, as all agree, may be taken to any such finding, except that by a coroner's inquest, and, as some say, even to that, as well in respect of the flight, as of the particulars of the goods. Keilw. 68. 5 Co. 110. Hale's P. C. 271. Staunf. 184.

(*i*) 1. A person convicted of manslaughter and making purgation, as was the antient practice,

So, if he be indicted for it before the coroner, and that he fled. 2 Inst. 316. Dy. 238. b.

So, if he be indicted for homicide *se defendendo*, or by misadventure, and be outlawed. 2 Inst. 316.

Though upon verdict after his arraignment it be found that he did not fly; for this does not controul the finding before the coroner. R. Dy. 238. b.

But in homicide *se defendendo*, there shall be a pardon of course for his goods. H. 40. 2 Inst. 316.

And by the st. 24 H. 8. 5. If any kill a person, who lies in wait to murder, or rob him, or to commit burglary, he shall not forfeit his goods or chattels. (k)

So, in an appeal, as well as upon an indictment, a man found guilty *se defendendo*, or by misadventure, shall have a pardon of course. 2 Inst. 316.

And the king cannot refuse it; and therefore, it shall be granted by the chancellor, without the king's warrant. 2 Inst. 317.

Yet if it be found that a man made an assault upon another near the highway, without saying that it was *ad murdrandum*, it is not sufficient to excuse his goods. R. Bend. pl. 86. 1 And. 41.

#### (B 4.) When the forfeiture shall be seised.

After conviction, the sheriff, or his bailiff, &c. may seise the goods of a felon convict, for the king. Co. L. 391. a. St. P. C. 192. b. Vide post, (B 7. 8.)

So, by the st. 25 Ed. 3. st. 5. c. 14. After indictment of felony, and *capias* returned *non est inventus*, a second *capias* shall go returnable in three weeks, comprising also, that the sheriff seise his goods, and keep them till the return of the writ; and if then he render not, nor be taken, he shall lose his goods: if taken, or he render, his goods are saved.

So, by the st. *de officio coronatoris*, 3 (4) Ed. 1. If any be found guilty of homicide the coroners shall go to his house, and *inquirant quæ catalla et blada habeat, quam terram, et quantum valet per annum, et appreciari faciant ut vendi possint, et deliberentur villatæ, ut inde respondeant coram justiciariis*. St. P. C. 50. c. 192. b.

But by the st. 1 Ric. 3. 3. no sheriff, bailiff, &c. shall seise the goods of a felon, before he be convict for the felony. Co. L. 391. a. St. P. C. 193.

And this was a declaration of the common law. Hard. 97. St. P. C. 52.

If he may seise, inrol, and deliver to the vill; he cannot remove. St. P. C. 192. b.

practice, or burnt in the hand according to the present, forfeits his goods and chattels but not his lands, for the king hath lost a subject; and therefore the party is punishable, though in a more gentle manner than when there is a sedate and deliberate revenge. 5 Rep. 110. — 2. A person convicted of heresy forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. Doct. & Stud. l. 2. c. 29. Hale, P. C. 5.

(k) Nor lands or tenements.

(B 5.) To



(B 5.) To whom the forfeiture shall be.

By the common law, if a man be attainted for high treason, the forfeiture shall be to the king, of whatever lord the lands are held. St. P. C. 197. a. Co. L. 13. a.

So, if a man be attainted for petit treason, or felony, the king shall have year, day, and waste. (l) Vide Ann, Jour, & Wast.

But upon an attainder for petit treason, or felony, the forfeiture of the lands and tenements of the felon shall be to the lord of whom the lands are held. (m)

So, if a man has by grant *jura regalia*, the forfeiture of lands in fee simple for an offence, which was high treason at the time of the grant, shall be to the patentee. R. Dy. 289. (n)

(B 6.) To what time it shall relate.

If a man be attainted for treason, or felony, by verdict, or confession, the forfeiture (o) relates to the time of the offence, (p) to avoid all alienations afterwards. Co. L. 390. b. Stamf. 192. a.

Otherwise, if he be attainted upon an appeal, by verdict or confession. Vide infra.

So, if he be attainted by outlawry upon an indictment. Co. L. 390. b. 13. a. R. 30 H. 6. 5. a.

(l) 1. Formerly the king had only a liberty of committing waste on the lands of felons by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods.—2. But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the First, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit. Mirr. c. 4. s. 16. Flet. l. 1. c. 28.—3. And, therefore, Magna Carta, 9 H. 3. c. 22. provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste.—4. But the st. 17 E. 2. *de prerogativa regis*, seems to suppose, that the king shall have his year, day, and waste, and not the year and day instead of waste.—5. Which Sir Edward Coke, and the author of the Mirror before him, very justly look upon as an encroachment, though a very antient one, of the royal prerogative. Mirr. c. 5. s. 2. 2. Inst. 37.—6. This year, day, and waste, are now usually compounded for; but otherwise they regularly belong to the crown. 4 Blk. Com. 385, 386.

(m) 1. For such crime was by the feudal law deemed a breach of the tenant's oath of fealty in the highest manner, his body with which he had engaged to serve the lord being forfeited to the king, and thereby his blood corrupted, so that no person could represent him; and consequently dying without heir, the lord is in by escheat. 3 Inst. 19.—2. But the lord cannot enter into the lands, holden of him, upon an escheat for petty treason or felony, without a special grant, till it appear by due process, that the king has had his prerogative of the year, day, and waste. Staunf. P. C. 191. 2 Hawk. c. 49. s. 5.

(n) The lord of the manor, or other private person, may have *bona felonum et fugitivorum*, but they must be claimed by way of grant, and not by prescription; no man can prescribe for them; for every prescription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance. 5 Co. 109. 46 E. 3. 16.

(o) As to real estate.

(p) 1. If the time proved varies from that laid in the indictment, and the jury find the defendant guilty generally, the forfeiture shall relate to the time laid, till the verdict be falsified by the party interested, as it may be in this respect, though not as to the point of the offence. Hale's P. C. 264. 270. 3 Inst. 230.—2. But, if the jury find the defendant guilty on the day on which the fact is proved, whether before or after the day laid in the indictment, in such case the forfeiture shall relate to the day so specially found. Kelynge, 16. Hale, P. C. 264. 2 Inst. 318. 3 Inst. 230.

So, if a man be convict in a *præmunire*. Dub. Cro. Car. 173. Jon. 217.

So, if a man be a fugitive beyond sea, it relates to the time of his flight. R. 2 Cro. 82.

So, if a man be *felo de se*, the forfeiture relates to the fact. (q) 1 Lev. 8. (r)

And is vested in the king before inquisition found. R. 1 Lev. 8. R. 2 Cro. 82. (s)

But the forfeiture of goods and chattels relates to the time of the conviction. (t) St. P. C. 192. a. Co. L. 391. (u)

So, upon presentment of the coroner, of a *fugam fecit*, the forfeiture relates to the day of the presentment. St. 192. a.

So, if it be found by verdict that he fled, to the time of the verdict. St. 192. a.; to the time of the indictment, or acquittal. 5 Co. 109. b.

So the forfeiture, as to the mesne profits of lands, relates only to the conviction. Co. L. 390. b. (x)

So the forfeiture by outlawry upon an appeal; for the time of the offense is not mentioned in the count. Co. L. 390. b. 13. a.

### (B 7.) When it shall not be seised.

But lands or goods of any indicted for treason, or felony, cannot be

(q) That is, the time the mortal wound was given. Plowd. 260. 5 Rep. 110. Hale's P. C. 29.

(r) A *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. 3 Inst. 55.

(s) Lands, whereof a person attainted of treason dies seised in fee, become actually vested in the crown without any office; because they cannot descend, on account of the corruption of blood of the person last seised; and the freehold shall not be in abeyance. 2 Hawk. c. 4. s. 1.

(t) Unless the party were killed in flying from, or resisting, those who had arrested him; in which case it is said, that the forfeiture shall relate to the time of the offence. 3 Bac. Abr. 738.

(u) 1. There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. — 2. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore, in those cases, the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. — 3. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law. 3 Inst. 232. — 4. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards: so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction: for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly the st. 13 Eliz. c. 5., will reach them, for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration. So in case he happens to be convicted, the law will recover them for the king. 4 Blk. Com. 387, 388.

(x) Plowd. 488.

seised

seised into the king's hands before attainder. (y) 2 Inst. 48. Vide ante, (B 4.) (z)

Neither can they be granted before, by the king to another. 2 Inst. 48.

So a man ought to live upon his goods, and the profits of his lands, till he be attainted. 2 Inst. 48. St. P. C. 192, 193.

(B 8.) In what manner seised.

After conviction by judgment, or outlawry, for high treason, &c. commission goes to persons named by the king, or the attorney general, to inquire, what lands and tenements the offender had at the time of the treason committed, and the value; and that they seise them into the king's hands. (a)

And the inquisition taken thereon shall be returned to the court of

(y) 1. It is said to be the better opinion, that at this day before indictment, the goods of the offender cannot be searched and inventoried, nor can they, after indictment, be seised and taken away till the felon is convicted; for till the conviction the property remains in the felon. 3 Bac. Abr. 739. 3 Inst. 229. Bridg. 77. Hale's P. C. 269. — 2. However, that according to the general tenour of the old books, the goods of one arrested for treason or felony may, by the purview of an antient statute, which seems to continue still in force, be immediately inventoried and appraised; after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and for want of such surety by his neighbours, till he be convicted, or found to have fled, &c. whereby they are actually forfeited, vide 2 Hawk. P. C. c. 49. s. 35. and the authorities there cited. — 3. By 1 R. 3. c. 3. no sheriff, under-sheriff, or escheator, bailiff of franchise, or any other person, shall take or seize the goods of any person arrested or imprisoned for suspicion of felony, before that the same person so arrested and imprisoned be convicted or attainted of such felony according to law, or else the same goods otherwise lawfully forfeited, upon pain to forfeit the double value of the goods so taken to him that is so hurt in that behalf, by action of debt, to be pursued by like process, judgment, and execution, as is commonly used in other actions of debt sued at the common law; and that no essoign or protection be allowed in any such action; nor that the defendant in any such action be admitted to wage or do his law. — 4. This statute is in affirmance of the common law. Bract. 136, 137. 43 E. 3. 24. Fitzh. Tresp. pl. 7. Barre, pl. 196. 8 Rep. 171. — 5. And hath been adjudged to extend as well to the seizure of money, as of any other chattel. Raym. 414. — 6. It seems plain from this statute, that goods may be seized as soon as they are forfeited; and it seems the whole township is answerable for them to the king, and may seize them wherever they can be found. Co. Litt. 391. 2 Hawk. c. 49. s. 40., and the authorities there cited. — 7. And at common-law it was no plea for such township, that the goods were delivered to the custody of J. S. who embezzled them, &c.: but it is enacted by 31 Edw. 3. c. 3., that if any man or town be charged in the exchequer by estreats of the justices of the chattels of fugitives and felons, and will allege in discharge of him another which is chargeable, he shall be heard and right done to the other. 2 Hawk. c. 49. s. 41.

(z) 1. Though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason. Co. Litt. 13. 4 Blk. Com. 382. — 2. But if the chief justice of the King's Bench, (the supreme coroner of all England,) in person, upon the view of the body of him killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited. 4 Rep. 57. 4 Blk. Com. 382.

(a) 1. Lands whereof a person attainted of treason dies seised in fee, become actually vested in the crown without any office, because they cannot descend, on account of the corruption of blood of the person last seised; and the freehold shall not be in abeyance. 2 Hawk. c. 4. s. 1. Co. Litt. 2. 4 Co. 58. Leon. 21. — 2. But by the common law such lands were not vested in the actual possession of the king during the life of the offender. 3 Co. 10. Stamf. P. C. 191. Bro. Coron. 208. 210. Leon, 21. Co. Litt. 2.

exchequer, and filed in the office of the king's remembrancer. Lut. 997.

So, after conviction for felony, a *scire facias* shall go against the vill, or any other, who has the goods in his custody. St. P. C. 194.

But if any one has title to the goods or lands found by inquisition to be the goods or lands of the offender, he may make his claim, by pleading his title. Lut. 998. Vide Prærogative, (D 83. 84.)

To which the attorney general shall demur, or reply. (b)

### (C) Forfeiture by penal statutes.

So, in all cases, where a penalty, or forfeiture is given by act of parliament, without saying, to whom it shall be, or a limitation for a recompence for the wrong to the party, it belongs to the king. (c)

If the penalty or forfeiture is given for a non-feasance, as well as for a mis-feasance.

And therefore, where by the st. 5 & 6 Ed. 6. 16. If any sell an office, &c. he forfeits his right, interest, &c. in such office, deputation, gift, or nomination to it; in such case, the gift, or nomination, belongs to the king. R. 2 Vent. 267.

Vide more concerning Forfeiture, in Chancery, (3 L.—4 D 2.)—Copyhold, (H 7.—M 1, &c.)—Forceable Entry, (D 26. 27.)—Franchises, (G 3.)—Liberties, (C 1. 2.)—Market, (I)—Officers, (K 2. 8. 11, &c.)—Patent, (F 3.)—Prærogative, (D 60.)

## FORGERY.

### (A) Forgery, what shall be.

(A 1.) By the common law. *infra*.

(A 2.) By the st. 5 El. 14, &c. p. 409.

### (B) Remedy for Forgery.

(B 1.) By action. p. 437.

(B 2.) By indictment. p. 437.

### (A) Forgery, what shall be.

(A 1.) By the common law.

Forgery is (a), where a man fraudulently (b) writes, or (c) publishes

(b) 1. On certificate of commissioners of forfeited estates, that defendants were possessed of lands forfeited, and did not disclose them according to statute; the court would not grant *scire facias*, but said that the proceeding must be as for lands forfeited for high treason. Bunb. 14. — 2. But by st. 4 G. 1. on such certificate, the exchequer is to proceed as on an inquisition; and the court afterwards ordered a *scire facias* on such certificate, as on an inquisition found. *Ibid*.

(c) 1. Str. 828. — 2. And where the statute does not express how it shall be recovered, it must be sued for in the exchequer. Str. 828. — 3. Where the statute only enacts the forfeiture, the court cannot make a rule for payment; it must be recovered by action. Str. 50.

(a) 1. Sir William Blackstone's definition of forgery, at common law, is the fraudulent making or alteration of a writing to the prejudice of another man's right.

4 Com.

lishes a false deed (*d*) or writing (*e*), to the prejudice (*f*) of the right of another. (*g*)

So,

4 Com. 247, 248. — 2. By later writers, the word *making* has been used as a generic term, including every *alteration* of, or *addition* to, a true instrument, and by these it has been defined to be, a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit. 2 East, P. C. c. 19. s. 1. p. 852. 2 Leach, 785. 2 East, P. C. c. 19. s. 49. p. 965.

(*b*) Which is the essence of the offence. 2 East, P. C. c. 19. s. 1. p. 853. s. 43. p. 948. s. 47. p. 960. 2 Leach, 367. 775. Vide 3 P. Wms. 419.

(*c*) 1. By the English law, a publication or uttering of the forged instrument, is not necessary to complete the crime of forgery. 2 East, P. C. c. 19. s. 4. p. 855. 2 Russell, 1412. — 2. And this reason has been given, that the very making with a fraudulent intention, and without lawful authority of any instrument which, at common law, or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium by which the *intent* is usually made manifest, yet it may be proved as plainly by other evidence. Ibid. — 3. Thus, in a case where the note, which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. 1 Leach, 173. 2 East, P. C. c. 19. s. 44. p. 951. 2 N. R. 93. n. — 4. And it appears to have been holden by Le Blanc J., that though the note, in the case before him, had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury, under all the circumstances of the case, whether the note had been made innocently, or with an intent to defraud. 2 Leach, 987. — 5. These cases, however, do not establish, that the crime of forgery, like that of treason, consists in the *intention*; since a making or alteration is necessary to the offence; but only that the intention is an *essential* ingredient. And if it be said, that the making or alteration is important only as a medium to establish the intent; it is answered, that then any other medium would (as it will not) serve the purpose; there being no necessary connection between evidence and its subject-matter. — 6. The making, therefore, and the intention, are the circumstances which constitute the crime. But why is not an uttering necessary? To this question, one impressed with a veneration for antiquity would reply, that the law which made uttering not essential, had in view the importance of deterring from the first approaches to crime, and intended to shew that no gradations of guilt could be indulged with impunity. Another, not under that impression, would answer, that forgery, in its original, was the fabrication of deeds and charters proving a title in one man to another's inheritance. The injury which these writings were calculated to occasion, was not the less from the want of being made public: on the contrary, by suppressing them until the supposed witnesses, &c. were dead, the means of detection were much diminished. To complete the offence, therefore, (which then was civil only,) it was not necessary to make use of them. But whatever be the original of the law, the law itself is a most salutary one, as deterring from crime.

(*d*) 1. Counterfeiting matter of record, is forgery at common law. 1 Rol. Abr. 65. 76. Yelv. 146. Cro. Eliz. 178. 8 Mod. 66. — 2. So any authentic matter of a public nature. — 3. Thus a privy seal. 1 Rol. Abr. 68. pl. 33. Cro. Car. 326. 1 Jones, 325. — 4. A licence from the barons of the exchequer to compound a debt. 1 Rol. Abr. 65. pl. 5. 2 Bulst. 137. — 5. A certificate of holy orders. 1 Lev. 138. — 6. Or a protection from a parliament man. 1 Sid. 142. — 7. And finally it is now settled, that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 Str. 747. 2 Ld. Raym. 1461. 2 East, P. C. 861.

(*e*) 1. Forgery may be committed by the false making of the will of a living person, though a will is ambulatory during the life of a party, and can have no validity as a will until his death. 10 St. Tr. 183. 2 East, 949. 1 Leach, 99. Fost. 116. 1 Leach, 449. 2 East, P. C. 48. — 2. So it may be committed of an instrument on unstamped paper. 1 Leach, 257. 2 East, P. C. 955, 956. 979. 1 Leach, 258. n. 2 Leach, 703. 707. n. — 3. But the false instrument must carry on the face of it the semblance of that for which it is counterfeited, so as to deceive persons using ordinary observation; which, however, is sufficient. 2 East, P. C. 858. 950, 951, 952, 953. 1 Leach, 175. 2 N. R. 93. n. 2 Leach, 1048. 4 Taunt. 300. 1 Leach, 20. — 4. And it is no objection that



So, if he erases words out of a deed. (*h*)

If

the instrument is not available by reason of some collateral objection not appearing upon the face of it. 2 East, P. C. 942. 956. 2 Leach, 883. — 5. But it will not be forgery, where the false instrument has no semblance of the true one, or is illegal in its very frame. Dougl. 502. 1 Leach, 204. 431. 2 East, P. C. 883. 952. 954. 981. 4 Taunt. 303. 2 Leach, 590.

(*f*) Vide 2 Str. 901. 1 East, P. C. 86. 1 Hawk. c. 70. s. 7. 2 East, P. C. 862. 948. 1 Leach, 367. 1 Sid. 142. 1 Ld. Raym. 737.

(*g*) 1. It seems that the intent need not be to defraud any particular person; a general intent to defraud is sufficient. 3 T. R. 176. 1 Leach, 216. n. — 2. And it has been holden, that in an indictment for forgery it is sufficient to aver a general intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial. 1 Leach, 77. — 3. Hawkins observes, that the notion of forgery does not seem so much to consist in the counterfeiting of a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. 1 Hawk. c. 70. s. 2.

(*h*) 1. Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure even of a letter in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery, and this, although it be afterwards executed by another person ignorant of the deceit. 2 East, P. C. 855. — 2. And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versa*, will also be forgery. Ibid. — 3. Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it of his own head. Noy, 101. Moor, 759, 760. 3 Inst. 170. 1 Hawk. c. 70. s. 2. — 3. So if a man insert in an indictment the names of those against whom in truth it was not found. 3 Mod. 66. 1 Hawk. c. 70. s. 2. — 4. Or if finding another name at the bottom of a letter, at a considerable distance from the other writing, he cause the letter to be cut off, and a general release to be written above the name, and then take off the seal, and fix it under the release. 3 Inst. 171. 1 Hawk. c. 70. s. 2. — 5. And it seems, that if a party make a copy of a receipt, add to such copy material words, not in the original, and then offer it in evidence on a suggestion of the original being lost, he is guilty of forgery. 5 Esp. C. 100. — 6. The fraudulent allegation of a material part of a deed is forgery, as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S.; or the making a bond for 500*l.* expressed in figures, seem to have been made for 5000*l.* Moor, 619. 1 Hawk. c. 70. s. 2. 2 East, P. C. 986. Vide 3 Inst. 169. Bac. Abr. Forg (A) in notis. — 7. So altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment. 4 T. R. 320. 1 East, P. C. 853. — 8. And upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; it was decided, that where a note of country bankers was made payable at their house in the country, or at their bankers in London, and the London banker failed, it was forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequently to the failure. 2 Taunt. 328. 2 Leach, 1040. — 9. Expunging, by means of lemon juice, an indorsement on a bank-note, is a rasing within 8 & 9 W. 3. c. 29. s. 36. 3 P. Wms. 419. — 10. As to forgery by subsequent alteration of a forged deed, see 2 East, P. C. 855. — 11. By making a false deed in a man's own name. 3 Inst. 169. 1 Hawk. c. 70. s. 2. Moor, 665. — 12. By indorsing a bill of exchange by a person of the same name with the payee. 4 T. R. 28. — 13. By uttering a note made in the same name as that of the prisoner. 2 Leach, 775. 2 East, P. C. 963. Sed vide 6 Evan's stat. 580. 1 Leach, 229. 2 East, P. C. 856. — 14. Where a note, charged to be forged, though made by the prisoner in an assumed name and character; was her own note, made and offered as her own, and not as the note of another in contradistinction to herself, the offence was holden forgery. 1 Leach, 57. 2 East, P. C. 962. — 15. So assuming the name and character of an existing person, and drawing a bill of exchange. 6 Evans, St. 580. — 16. So uttering a forged deed, purporting to be a power of attorney from a non-existing person. Post. 116. — 17. So indorsing a fictitious name on a bill of exchange. 2 East, P. C. 958. 1 Leach, 83. — 18. So a forged order on a bank in a fictitious name. 1 Leach, 94. 2 East, P. C. 940. — 19.

Nor

If he falsifies a copy of a deposition upon record, by erasing the words (*that did*), whereby the deposition is made more positive. 3 Rush. App. 2. 39. (i)

If a devise be to A. for life, remainder to B. in fee, if a man writing the will omits the estate for life. Mo. 760.

But if a man alters a deed to his prejudice, it will not be a forgery: as, if the obligee makes the obligation to be for a less sum. 1 Sal. 375. (k)

If a man indorses exchequer bills, as received for customs, where he is not an officer; for he prejudices himself only. R. 1 Sal. 375.

So, if he omits to insert in a will, &c. a legacy, or other thing; if the devise made be not altered thereby, it is no forgery. R. Mo. 760.

If he writes a will for a person non-sane, and delivers it to him; it is no forgery, but a misdemeanor, if he knew it. Mo. 760.

(A 2.) By the st. 5 El. 14. &c.

By the st. 5 El. 14. (l), (by which all former statutes for forgery

Nor is it material whether additional credit is gained by using the false name. 1 Leach, 172. 2 East, P. C. 959. — 20. So it is forgery to give to the drawee of a bill of exchange a receipt in a false name, as for the prisoner's own name, for the contents of the bill, such bill being indorsed in blank, if it be done fraudulently and to escape detection, although no additional credit be thereby gained to the prisoner. 1 Leach, 214. 2 East, P. C. 960. — 21. In one case it was holden to be forgery to draw a draft upon a banker in a fictitious name assumed by the party at the time, for the purpose of fraud, and to avoid detection, though the credit were given to the person of such party. 1 Leach, 226. 2 East, P. C. 967. — 22. But it appears to have been doubted, whether it was forgery, where the prisoner, whose name was Aickles, had a month before taken the house in which he lived in the name of Mason, and passed off a promissory note in that name, which he averred to be his, dated some time before, but not payable till after the time of his trial; though the jury found that he assumed the name of Mason, by which he was never known before, for the purpose of the fraud. 1 Leach, 438. 2 East, P. C. 968. — 23. Yet where the name made use of by the prisoner in the forged instrument was assumed by him with the intention of defrauding the prosecutor, it was holden forgery. 2 Russell, 1437. — 24. And if the name used by the prisoner be assumed for the purpose of fraud, and to avoid detection, it will be as much a forgery as if the assumed name were the name of a person of known credit. 2 Russell, 1439. — 25.

(i) 1. Falsely and fraudulently making or altering any matter of record, is forgery at common law. 1 Hawk. c. 70. s. 1. 8. 3 Bac. Abr. Forgery, (B). Rol. Abr. 65. 76. Yelv. 146. Cro. Eliz. 178. — 2. As where a man inserts in an indictment the names of those against whom in truth it was not found. 3 Mod. 68. 1 Hawk. c. 70. s. 2. — 3. And even if the offence should not constitute a forgery; yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power. 2 East, P. C. c. 19. s. 9. p. 866. — 4. The defacing or rasure of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment. 3 Inst. 71, 72. 1 Hale, 646. 1 Hawk. c. 71. s. 1. — 5. And it has been holden, that any person making, or knowingly using, a false affidavit, taken abroad (though a forgery could not be assignable on it here) in order to mislead our own courts, and to prevent public justice, is punishable by indictment for a misdemeanour. 8 East, 364. Vide 2 East, P. C. c. 19. s. 7. p. 862. 2 Russell, 1518.

(k) Yet this, it seems, would be forgery, if by the circumstances of the case it should any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person. 8 Hawk. c. 70. s. 4. 3 Bac. Abr. Forg. (A).

(l) 1. This statute appears to have been considered, some years ago, as having nearly fallen into disuse. 2 East, P. C. c. 19. s. 33. p. 919. — 2. The books in which the cases upon its construction are collected are, 3 Inst. c. 75. p. 168. et seq. 1 Hale, 682. et seq. 1 Hawk. c. 70. s. 12. et seq. 3 Bac. Abr. Forgery, (C). 2 East, P. C. c. 19. s. 33. p. 919 et seq. Et vide 2 Str. 901. 2 East, P. C. c. 19. s. 33. p. 921.

are

are repealed, any, who shall, of his own head, or by fraud with others, &c. forge, make, or cause to be forged, &c. any false deed, charter, or writing sealed, court-roll, or will, to the intent to molest, &c. the freehold, or inheritance, right, &c. of lands, freehold or copyhold: or shall publish, or give it in evidence, knowing it to be forged, being convict by action founded on this statute at the suit of the party grieved, or otherwise according to course of law, or by information in the Star-Chamber, shall (m) pay double costs and damages to the party grieved, be set on the pillory, have both his ears cut off, his nostrils slit and seared with hot iron, forfeit his lands, &c. to the queen for life, and suffer perpetual imprisonment.

And if any of his own head, or by fraud with others, forge, or cause, or assent to be forged, any charter, deed, or writing, to the intent any may claim an interest for years in lands, &c. not copyhold, or an annuity, in fee, tail, for life or lives, or years; or any obligation, release, or other discharge of debt, action, &c. or shall publish or give in evidence such deed, writing, obligation, &c. knowing it to be forged, being convict as aforesaid, shall (n) forfeit double costs and damages to the party grieved, be set on the pillory, &c. lose one ear, and be imprisoned for a year without bail, &c. (o) And the second offence is made felony, without benefit of clergy.

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(m) 1. The punishment of forging is now, for the most part, capital. — 2. A consequence of the judgment for forging is, an incapacity to be a witness until restored to competency by the king's pardon. 1 Hawk. c. 70. s. 1. 4 Blk. Com. 247. 3 Bac. Abr. Forgery. 2 East, P. C. c. 19. s. 69. — 3. And the statute 12 G. 1. c. 29. provides, that in case persons convicted of forgery shall afterwards practise as attornies, solicitors, or law agents, the court where the suit or action is brought shall, on complaint, examine the matter in a summary way, in open court, and cause the offender to be transported for seven years.

(n) 1. By s. 7. if any person or persons being hereafter convicted or condemned of any of the offences aforesaid, by any the ways or means above limited, shall after any such his or their conviction or condemnation, afterwards commit or perpetrate any of the said offences in form aforesaid, that then every such second offence or offences shall be adjudged felony; and the parties, being convicted or attainted thereof, shall suffer such pains of death, forfeiture, &c., as in cases of felony, without benefit of clergy. — 2. There must be a conviction by judgment of a first offence, before the second offence be committed, to make it felony; and the record of the first conviction must be set out in the indictment for the second offence, in order that it may appear to be a conviction for some offence within the statute. 3 Inst. 172. 1 Hale, 686. 2 East, P. C. c. 19. s. 32. p. 919. — 3. The seventh section, however, includes one who, having been convicted of forging a deed, afterwards knowingly publishes the forged deed of another. Id. ibid.

(o) The law of forgery, as it is now administered, depends upon a variety of statutes passed since that of Elizabeth. They have been classed, by Mr Russell, as relating to, I. *Records and Judicial Process*. — II. *The Public Funds and the Stocks of Public Companies*. — III. *The Securities of the Bank of England*. — IV. *The Securities of other Public Companies*. — V. *Stamps*. — VI. *Official Papers, Securities, and Documents*. — VII. *Private Papers, Securities and Documents*.

I. *Records and Judicial Process*.

1. The st. 8 Hen. VI. c. 12. s. 3. enacts, "that if any record, or parcel thereof, writ, return, panel, process, or warrant of attorney, in the king's court of chancery, exchequer, the one bench or the other, or in his treasury, be wilfully stolen, taken away, withdrawn, or avoided by any clerk, or other person, by reason whereof any judgment shall be reversed; that such stealer, taker away, withdrawer, or avoider, their procurers, counsellors, and abettors, being thereof indicted, and by process thereupon made thereof duly convict, by their own confession, or by inquest to be taken of lawful men, whereof the one-half shall be of the men of any court of the same courts, and the other half of other, shall be adjudged for felons, and shall incur the pain of felony. And that the judges of the said courts of the one bench or of the other, have power to hear and determine such default before them; and thereof to make punishment,

ment, as afore is said.' — 2. By the 21 Jac. 1. c. 26. s. 2. all persons who "shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," being thereof convicted or attainted, shall be adjudged felons, and suffer death without benefit of clergy. The attainder is not to work corruption of blood or loss of dower. And the act is not to extend to any judgments acknowledged by attornies of record for any persons against whom any such judgments shall be given. A bail taken before a judge is not a bail within this statute till it be filed of record. — 3. The statute 52 Geo. III. c. 143. enacts "that if any person shall make, forge or counterfeit, or cause or procure to be made, forged or counterfeited, the mark or hand of the receiver of the prefiners at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

*II. The Public Funds and the Stocks of Public Companies.*

The stat. 8 Geo. 1. c. 22. s. 1. recites that frauds and abuses had been committed by forging and counterfeiting the hands of some of the proprietors of the shares in the capital stock and funds of bodies politic or corporate, established by acts of parliament, or the hands of persons entitled to dividends or annuities; and enacts, "that if any person or persons whatsoever shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly or wilfully act or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument to transfer, assign, sell or convey any such share or shares, or any part of such share or shares of and in such capital stock or stocks as aforesaid, or any of them, or to receive any such annuity or annuities, dividend or dividends as aforesaid, or any of them, or any part thereof, or shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any the name or names of any the proprietors of any such share or shares in stock, or of any the persons entitled to any such annuity or annuities, dividend or dividends as aforesaid, in or to any such pretended letter of attorney, instrument or authority, or shall knowingly and fraudulently demand or endeavour to have any such share or shares in stock, or any part thereof, transferred, assigned, sold, or conveyed, or such annuity or annuities, dividend or dividends, or any part thereof, to be received by virtue of any such counterfeit or or forged letter of attorney, authority or instrument, or shall falsely and deceitfully personate any true and real proprietors of the said shares in stock, annuities and dividends, or any of them, or any part thereof, and thereby transferring or endeavouring to transfer the stock or receiving or endeavouring to receive the money of such true and lawful proprietor, as if such offender were the true and lawful owner thereof; then and in every or any such case, all and every such person and persons (being thereof lawfully convicted in due form of law) shall be adjudged guilty of felony, and shall suffer as in cases of felony, without benefit of clergy."

— 2. The stat. 31 Geo. 2. c. 22. s. 77. recites that doubts might arise whether the punishment inflicted by the 8 Geo. 1. c. 22. s. 1. extended to the commission of the like forgery and offences, in relation to such capital stocks and funds as had been established by the authority of parliament since the passing of that act, and might be thereafter established; and then enacts, "that if any person or persons whatsoever shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument, to transfer, assign, sell or convey any share or shares, or any part of any share or shares, of or in any such capital stock or funds of any body or bodies politic or corporate established, or which shall be established, by any act or acts of parliament; or to receive any dividend or dividends attending any share or shares, or any part of any share or shares, of or in any such capital stock or funds as aforesaid; or to receive any annuity or annuities, in respect whereof any proprietor or proprietors have or shall have any transferable share or shares of or in any capital stock or stocks which now are or hereafter shall be established by any act or acts of parliament, in proportion to their respective annuities; or shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any the name or names of any the proprietors of any such share or shares in stock, or of any the persons intitled to any such annuity or annuities, dividend or dividends as aforesaid, in or to any such pretended letter of attorney, instrument or authority; or shall knowingly or fraudulently demand, or endeavour to have, any such share or shares in stock, or any part thereof, transferred, assigned, sold or conveyed, or such annuity or annuities, dividend or dividends, or any part thereof,



thereof, to be received by virtue of any such counterfeit or forged letter of attorney, authority or instrument; or shall falsely and deceitfully personate any true and real proprietors of the said shares in stock annuities and dividends, or any of them, or any part thereof, and thereby transferring or endeavouring to transfer the stock, or receiving or endeavouring to receive the money, of such true and lawful proprietor, as if such offender were the true and lawful owner thereof; then and in every or any such case, all and every such person and persons, being thereof lawfully convicted in due form of law, shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy." By the 4 Geo. 3. c. 25., which statute continued the corporation of the Bank, the same provisions are extended to "any capital stock or stocks of any body or bodies politic or corporate which now are or hereafter shall be established by any act or acts of parliament, or any share, &c." — 3. Upon which statute of 31 Geo. 2., it has been held, that the obtaining and indorsing a dividend warrant at the Bank, in the name of a stock holder, is a personating of a proprietor, and thereby endeavouring to receive the dividend; though no attempt was made to receive the money at the pay office. 1 Leach, 434. 2 East, P. C. c. 20. s. 2. p. 1005. — 4. The statute 33 Geo. 3. c. 30. recites, that the laws then in being had been found insufficient to prevent forgeries and frauds in the transferring stocks, annuities, and other public funds, transferable at the Bank of England; and that further provision was necessary: and that it was also necessary, in order to prevent such forgeries and frauds, that the public accounts between the Bank of England, and the proprietors of stock, &c. should be secured from falsification, by means of false entries, the alteration of words or figures, or by any other ways or means; and then makes several enactments for the remedy of the evils recited. The first section enacts, "that if any person or persons shall wilfully make or assist in making any transfer of any interest, part or share of or in any stock or stocks, annuity or annuities, or other funds, transferable at the Bank of England, in any of the books of the said governor and company of the Bank of England, in which transfers of stock, annuities or other funds as aforesaid are made, in the name or names of any person or persons not being the owner or owners, or proprietor or proprietors, of such stock, annuities or other funds, transferable as aforesaid, with intent to defraud the said governor and company of the Bank of England, or any other body politic or corporate, or any person or persons whatsoever, such person or persons so making or assisting in making such transfer as aforesaid, shall be deemed guilty of felony, and shall suffer death as a felon or felons, without benefit of clergy." — 5. By the second section it is further enacted, "that if any person or persons shall falsely make forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or shall willingly act or assist in the falsely making, forging or counterfeiting of any transfer of any interest, part or share of or in any stock or stocks, annuity or annuities or other funds, transferable, or which, by any act or acts of parliament, shall hereafter be made transferable at the Bank of England, or of or in the capital stock belonging or which hereafter shall or may belong to the said governor and company of the Bank of England, called bank-stock, or shall utter or publish as true any such false forged or counterfeited transfer as aforesaid, knowing the same to be false, forged or counterfeited, with intent to defraud the said governor and company of the Bank of England, or any other body politic or corporate, or any person or persons whatsoever; all and every person or persons whatsoever so offending shall be deemed guilty of felony, and shall suffer death as a felon or felons, without benefit of clergy." — 6. By the third section, it is further enacted, "that if any person or persons shall wilfully make or assist in making any false entry, or shall wilfully alter or assist in altering, any word or figure in any entry in the books of account kept by the said governor and company of the Bank of England, wherein the several accounts of the owners or proprietors of stock, annuities or other funds, transferable at the Bank of England, are entered and kept, or shall in any manner wilfully falsify the accounts of such owners and proprietors in the books of the said governor and company, wherein such accounts are entered and kept, with intent to defraud the said governor and company of the Bank of England, or any other body politic or corporate, or any person or persons whatsoever, every such person or persons so offending shall be deemed guilty of felony, and shall suffer death without benefit of clergy." — 7. The fourth section recites that, in order to cover and conceal forgeries and frauds in transfers, dividend warrants had been sometimes made out for different sums than the sums really due; and enacts, "that if any clerk, officer or servant of, or other person or persons employed or intrusted by the said governor and company, shall knowingly or willingly make out or deliver, or cause or procure to be made out or delivered, or willingly act or assist in the making out or delivering, of any dividend warrant for greater or less amount than the person or persons, on whose behalf or pre-



pretended behalf such dividend warrants shall be made out, is or are entitled to, with intent to defraud the said governor and company of the Bank of England or any other body politic or corporate, or any person or persons whatsoever, all and every such person or persons so offending, and being in due form of law convicted of any such offence or offences as aforesaid, shall be transported for seven years." — 8. Upon the second section of which statute a question arose; a prisoner being found guilty on an indictment charging him with forging a transfer of stock, objections that the stock had never been accepted by the person in whose name it stood, and that the transfer was not witnessed according to the rules and directions of the Bank, were over-ruled. 2 East, P. C. c. 19. s. 9. p. 874. 2 Leach, 732. — 9. The 37 Geo. 3. c. 122. relates to the forging or counterfeiting the names of witnesses to letters of attorney, or other authorities or instruments for the transfer of stocks, or funds transferable at the Bank of England, or under the management of the South Sea company, or East India company, or for the receipt of dividends upon any of such stocks or funds. It enacts, "that if any person or persons whatever shall falsely make forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or shall willingly act or assist in the falsely making, forging or counterfeiting the name or names, handwriting or handwriting of any person or persons as, or purporting to be, the witness or witnesses, attesting the execution of any letter of attorney or other authority or instrument, to transfer, assign, sell or convey, any interest, part or share of or in any stock or stocks, annuity or annuities or other funds, or the dividends thereof, transferable, or which, by any act or acts of parliament, shall hereafter be made transferable at the Bank of England, or of or in the capital stock belonging, or which hereafter shall or may belong to the governor and company of the Bank of England, called Bank-stock, or to the governor and company of merchants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fisheries as aforesaid, or under their care or management, or of or in the capital stock belonging or which hereafter shall or may belong to the said united company of merchants of England trading to the East Indies, commonly called East India stock, or of any letter of attorney or other authority or instrument, to receive any dividend or dividends on any of the said stocks, annuities or other funds, or shall utter or publish as true any such letter of attorney or other authority or instrument, containing such false, forged or counterfeited name or names, handwriting or handwriting of such attesting witness or witnesses as aforesaid, knowing such name or names, handwriting or handwriting, to be false, forged or counterfeited, all and every person or persons whatever so offending, and being in due form of law convicted of any such offence or offences as aforesaid, shall be adjudged guilty of felony, and shall be transported for seven years, or shall be adjudged to suffer such lesser punishment as the court, before whom such offender or offenders shall be tried, shall think fit to award." — 10. Besides the statutes above set forth, there may be briefly noticed the 9 Geo. I. c. 12. s. 4., which makes it a capital felony to forge orders, receipts, &c. relating to the payment of *annuities* payable at the exchequer, as mentioned in the act. — 11. And the 35 Geo. III. c. 66., with the 37 Geo. III. c. 46., which contain regulations for transferring the payment of certain *annuities* and dividends from Ireland to the Bank of England, make the forging or altering receipts for subscriptions to loans or debentures, under these acts, a capital offence, re-enact the provisions of the 8 Geo. I. c. 22. s. 1. and the 33 Geo. III. c. 30. and make the forging or uttering any dividend warrant, or warrant for the payment of any annuity, &c. payable in pursuance thereof, capital offences. — 12. The 52 Geo. III. c. 129. also, which is intituled an act for amending the 48 Geo. III. c. 142. and the 49 Geo. III. c. 64. in enabling the commissioners for the reduction of the national debt to grant life-annuities, recites those acts, specifies the terms on which the life-annuities shall be granted, declares before whom the necessary affidavits or affirmations and certificates shall be taken; and enacts that, if any person shall forge, &c. any such affidavit, affirmation or certificate, or produce to any person acting under the authority of the acts or utter the same, knowing the same to be forged, &c. such person shall be guilty of felony, without benefit of clergy. — 13. In the acts by which the different *loans* have been raised, common clauses have usually been inserted, in substance nearly the same, by which it is made a capital offence to forge certificates, debentures, receipts, &c. mentioned in the acts. The 53 Geo. III. c. 53. s. 32. enacts, "that if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or certificates, debenture or debentures, directed to be made out by this act, or any assignment thereof, or indorsement thereon, or shall alter any number, figure or word in any such certificate or debenture, or in any assignment thereof or indorsement thereon, or utter or publish as true any such false, forged, counterfeited or altered certificate or certificates, debenture

or debentures, or assignment or assignments thereof, or indorsement or indorsements thereon, with intent to defraud his majesty, or the governor and company of the Bank of England, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering or publishing, as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy." The succeeding section enacts, "that if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any receipt or receipts, for the whole of or any part or parts of the said contributions for the purchase of debentures, either with or without the name or names of any person or persons being inserted therein, as the contributor or contributors thereto, or payer or payers thereof, or of any part or parts thereof, or shall alter any number, figure or word therein, or utter or publish as true any such false, forged, counterfeited or altered receipt or receipts, with intent to defraud the governor and company of the Bank of England, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." Some enactments respecting the forgery of *dividend warrants* have occurred in the statutes already mentioned. But there is a general provision as to the forgery of these instruments contained in the 45 Geo. III. c. 89. s. 2.; which will be stated at large in the next division, as it relates not only to dividend warrants, but to the forgery of bank-notes and other securities of the Bank of England. — 14. The forgery or counterfeiting of any *exchequer-bill* is made a capital felony by the several acts passed, usually every year, authorising the issue of such securities. Latterly it has been enacted, that the clauses of the 48 Geo. III. c. 1., entitled "An act for regulating the issuing and paying off of exchequer-bills," shall be extended to the acts subsequently passed; and one of those clauses (s. 9.) contains the following provision respecting the forgery, &c. of exchequer-bills. It enacts, "that if any person or persons shall forge or counterfeit any exchequer-bill or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer-bill with such counterfeit indorsement or writing thereupon, or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his majesty, his heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate or exchange the same or any of them, or any other person or persons, body or bodies politic or corporate; then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon and shall suffer as in cases of felony without benefit of clergy."

### III. *Securities of the Bank of England.*

1. The first statute made especially to protect Bank of England securities is 8 & 9 W. 3. c. 20. s. 36. — 2. Afterwards came the 15 G. 2. c. 13. s. 11. — 3. And now the 45 G. 3. c. 89. by its second section enacts, "that if any person or persons shall forge, counterfeit, or alter any bank-note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the governor and company of the Bank of England, or any indorsement thereon, or shall offer or dispose of or put away any such forged, counterfeit, or altered note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, or demand the money therein contained or pretended to be due thereon, or any part thereof, of the said company, or any their officers or servants, knowing such note, bill, dividend warrant, bond or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said governor and company, or their successors, or any other person or persons, body or bodies politic or corporate whatsoever, every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy." — 4. The sixth section enacts, "that if any person or persons shall purchase or receive from any other person or persons any forged or counterfeited bank note, bank bill of exchange, bank post-bill,

or

or blank bank note, blank bank bill of exchange, or blank bank post-bill, knowing the same to be forged or counterfeited, or shall knowingly or wittingly have in his, her or their possession or custody, or in his, her or their dwelling-house, out-house, lodgings, or apartments, any forged or counterfeited bank note, bank bill of exchange, or bank post-bill, or blank bank note, blank bank bill of exchange, or blank bank post-bill, knowing the same to be forged or counterfeited, (without lawful excuse, the proof whereof shall lie upon the person accused,) every person or persons so offending, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years." — 5. The 13 G. 3. c. 79. s. 1. enacts, that "if any person or persons, (other than the officers, workmen, servants or agents, for the time being, of the said governor and company, to be authorised and appointed for that purpose by the said governor and company, and for the use of the said governor and company only,) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using; or (without being authorised and appointed as aforesaid,) shall knowingly have in his, her or their custody or possession, (without lawful excuse, the proof whereof shall lie upon the person accused,) any frame, mould or instrument for the making of paper, with the words *Bank of England*, visible in the substance of such paper; or shall make, or cause or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the said words, *Bank of England*, shall be visible; or if any person, (except as before excepted) shall, by any art, mystery or contrivance, cause or procure the said words, *Bank of England*, to appear visible in the substance of any paper whatsoever, or knowingly aid or assist in causing the said words, *Bank of England*, to appear in the substance of any paper whatsoever; every person so offending in any of the cases aforesaid, and being thereof lawfully convicted, shall, for such offence, be deemed and adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy." — 6. The second section of the same statute recites, that unwary and other persons had taken in payment, and otherwise had received notes, inland-bills, and bills of exchange, with certain words and characters so nearly resembling the notes and bills of the said governor and company, as to appear to such persons to be the notes or bills of the Bank of England, which, if continued to be done, would be to the great prejudice of public credit; and then enacts, that "if any person or persons, without being authorised and appointed as aforesaid, shall engrave, cut, etch, or scrape in mezzotinto, or shall cause or procure to be engraved, cut, etched, or scraped in mezzotinto, or shall knowingly aid or assist in the engraving, cutting, etching, or scraping in mezzotinto, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon wood, or any other material, or any plate whatsoever, any promissory note inland-bill or bill of exchange, or blank promissory note, inland-bill or bill of exchange, or part of a promissory note, inland-bill or bill of exchange, containing the words, *Bank of England*, or *Bank post-bill*, or any word or words expressing the sum or amount, or any part of the sum or amount of such promissory note, inland-bill or bill of exchange, in white letters or figures on a black ground; or shall use any such plate so engraved, cut, etched, or scraped in mezzotinto, or shall use any other instrument for the making or printing any such promissory note, inland-bill or bill of exchange or blank promissory note, inland-bill or bill of exchange, or part of a promissory note, inland-bill or bill of exchange; if any person, without being authorised and appointed as aforesaid shall knowingly have in his, her or their custody, any such plate or instrument, or shall knowingly and wilfully utter or publish any such promissory note, inland-bill or bill of exchange, blank promissory note, inland-bill or bill of exchange; every such person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be committed to the common gaol of the county or place where the offence shall be committed, for any space not exceeding six months." — 7. By the third section it is provided, "that nothing herein contained shall extend, or be construed to extend to such person or persons who being at any time hereafter possessed of any such note or bill, shall only utter the same by carrying the same for payment to the issuer or issuers, drawer or drawers, acceptor or acceptors, indorser or indorsers thereof respectively, or using proper means to compel the payment of any such note or bill." — 8. The 45 G. 3. c. 89. s. 3. enacts, "that if any person or persons, (other than the officers, workmen, servants, or agents, for the time being of the governor and company of the Bank of England, to be authorised and appointed for that purpose by the said governor and company and for the use of the said governor and company only,) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using, or (without being authorised or appointed as aforesaid,) shall knowingly have in his, her or their custody or possession (without lawful excuse, the proof whereof shall lie upon the party accused) any frame, mould or instrument for the making of paper with curved or waving bar lines, or with the laying wire-lines thereof in a waving or curved shape,

or

or with any number, sum, or amount, expressed in a word or words in Roman letters visible in the substance of such paper; or shall manufacture, make, use, vend, expose to sale, publish or dispose of, or cause or procure to be manufactured, made, used, vended, exposed to sale, published or disposed of, or aid or assist in the manufacturing, making, using, vending, exposing to sale, publishing, or disposing of, or (without being authorised or appointed as aforesaid) shall knowingly have in his, her, or their custody or possession, any paper whatsoever, with curved or waving bar-lines, or with the laying wirelines thereof in a waving or curved shape, or having any number, sum or amount expressed in a word or words in Roman letters appearing visible in the substance of such paper; or if any person or persons (except as before excepted) shall, by any art, mystery, or contrivance, cause or procure the numerical sum or amount of any bank note, bank bill of exchange or bank post-bill, blank bank note, blank bank bill of exchange or blank bank post bill, in a word or words to appear visible in the substance of the paper whereon the same shall be written or printed, or shall knowingly aid or assist in causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post-bill, blank bank note, blank bank bill of exchange, or blank bank post-bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law shall be adjudged a felon, and shall be transported for the term of fourteen years." — 9. The fourth section of this act provides that nothing therein contained shall extend "to restrain or prevent any person or persons from issuing or negotiating any bill or bills of exchange, promissory note or promissory notes, having the sum or amount thereof expressed in guineas, or in a numerical figure or figures, denominating the sum or amount thereof, in pounds sterling, appearing visible on the substance of the paper upon which the same shall be written or printed." — 10. And the fifth section provides also that the act shall not restrain or prevent any person or persons "from making, using, vending, exposing to sale, publishing or disposing of any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not contrived in such manner as to form the ground work or texture of the paper, or to imitate or resemble the waving or curved laying wire lines or bar lines of the said paper of the governor and company of the Bank of England, or to imitate or resemble the watermarks used by the governor and company of the Bank of England in the bank notes, bank bills of exchange, and bank post bills, issued by the said governor and company." — 11. The seventh section of this act relates to persons engraving plates, &c. and enacts "that if any person or persons shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon any wood or any other materials, or any plate whatsoever, any bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, purporting to be the note, or bill of exchange, or bank post bill, or blank bank note, or blank bank bill of exchange, or blank bank post bill, or part of the note or bill of exchange, or bank post bill of the governor and company of the Bank of England, without an authority in writing for that purpose from the said governor and company of the Bank of England; or shall use any such plate so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the making or printing any such bank note, bank bill of exchange, or bank post bill, or blank bank note, or blank bank bill of exchange, or blank bank post bill, or part of a bank note, or bank bill of exchange, or bank post bill, without such authority in writing as aforesaid; or if any person or persons shall, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate, instrument, or device, or shall, without such authority as aforesaid, knowingly, and wilfully utter, publish, dispose of, or put away any such blank bank note, blank bank bill of exchange, or blank bank post bill, or part of such bank note, bank bill of exchange, or bank post bill, every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years." — 12. The 52 Geo. III. c. 138. s. 5. was passed for the further prevention of frauds practised by the imitation of the notes and bills of the Bank of England. It enacts "that if any person shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved cut, etched, scraped, or by any other means or device make, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon wood or any other materials,



materials, or upon any plate whatsoever, any word or words, figure or figures, character or characters, the impression taken from which shall resemble or be apparently intended to resemble the whole or any part of any of the notes or bills of the said governor and company commonly called bank notes and bank post bills, or shall contain any word, number, figure, or character, in white on a black, sable or dark ground, without an authority in writing for that purpose from the said governor and company, to be produced and proved by the party accused, or shall (without such authority as aforesaid) use any such plate, wood or other material so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the making or printing upon any paper or other material, any word or words, figure or figures, character or characters, which shall be apparently intended to resemble the whole or any part of any of the said notes or bills of the said governor and company, or any word, number, figure, or character in white on a black, sable, or dark ground; or if any person or persons shall (without such authority as aforesaid) knowingly have in his, her or their custody, any such plate, instrument or device, or shall knowingly and wilfully utter, publish or dispose of, or put away any paper or other material containing any such word or words, figure or figures, character or characters as aforesaid, or shall knowingly or wittingly have in his, her or their custody or possession any paper or other material containing any such word or words, figure or figures, character or characters as aforesaid (without lawful excuse, the proof whereof shall lie upon the person accused), every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years." — 13. The sixth section excepts paper, other than paper resembling notes or bills, in the custody of any person previous to the passing of the act. — 14. Where one of the prisoners knowingly delivered a forged bank note to the other prisoner for the purpose of its being knowingly uttered by her, and she uttered it accordingly, it was holden that the prisoner who delivered such note might be convicted of having *disposed* of and put away the same, on the st. 15 G. 2. c. 13. s. 11. — 15. In an indictment for disposing of and putting away forged bank notes, knowing, &c. it is not necessary to aver to whom the notes were so disposed. 2 Taunt. 384. 2 Leach, 1019. — 16. And this offence may be completed, though it appear that the notes were furnished by the prisoners to agents employed by the bank to procure them from the prisoners, and that the notes were delivered to such agents as forged notes for the purpose of being disposed of by them. *Ibid.*

#### IV. *Securities of other Public Companies.*

1. The statute 9 Ann. c. 21. s. 57. relates to forgeries upon the South Sea Company, and enacts, "that if any person or persons shall forge or counterfeit the common seal of the said company, or shall forge, counterfeit, or alter any bond or obligation under the common seal of the said company; or shall offer to dispose of or pay away any such forged, counterfeited or altered bond, (knowing the same to be such,) or shall demand the money therein contained or pretended to be due thereon, or any part thereof, of the said company, or any of their officers, (knowing such bond or obligation to be forged, counterfeited, or altered,) with intent to defraud the said company or their successors, or any other person or persons whatsoever," every such offender shall be guilty of felony, without benefit of clergy. And the 6 G. 1. c. 4. s. 6. contains similar provisions. — 2. The statute 6 G. 1. c. 11. s. 50. recites that the South Sea Company might issue out receipts under the hand or hands of one or more of their officers, from time to time, upon or for subscriptions to be taken by the said company for increasing their capital, pursuant to the 6 G. 1. c. 4., and might also issue out warrants under the hand or hands of one or more of their officers, for the dividend from time to time to be made to the proprietors of the stock of the said company; and then enacts, "that if any person or persons shall forge, counterfeit or alter any such receipt or receipts, warrant or warrants, or any indorsement or writing, indorsements or writings thereupon or therein, or shall tender any such forged, counterfeited or altered receipt or receipts, warrant or warrants, or any such receipt or receipts, warrant or warrants, with such counterfeit indorsement or writing thereon or therein, knowing the same to be so forged, counterfeited or altered, to the said company, or any of their officers, or shall offer to alienate or dispose of the same, knowing the same to be forged, counterfeited or altered, and with intent to defraud the said company or any other person or persons, bodies politic or corporate," every such person so offending shall be adjudged a felon, without benefit of clergy. — 3. The statute 12 G. 1. c. 32. s. 9. relates to the East India as well as the South Sea Company; and enacts, "that if any person or persons shall forge or counterfeit or procure to be forged or counterfeited or willingly act or assist in the forging or counterfeiting any bond or obligation under the common seal of the united company of merchants of England trading to the East Indies, or any indorsement or assignment thereon,



thereon, or on any bond or obligation under the common seal of the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery; or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever;" every such person so offending shall be guilty of felony, without benefit of clergy.— 4. Especial provisions have also been made respecting forgeries affecting some of the insurance companies; thus, 6 G. 1. c. 18. s. 13., as to forging the securities of the London and Royal Exchange assurance companies.— 5. 39 G. 3. c. 85. s. 22., as to forging those of the Globe Insurance Company.— 6. 4 G. 3. c. 37. s. 15., the English Linen Company.— 7. 26 G. 3. c. 106. s. 26., the British Society for extending the Fisheries.— 8. 13 G. 3. c. 38. s. 28., revived by 38 G. 3. c. 17. s. 23., the governor and company of the British Cast Plate Glass Manufactory.— 9. Which provisions however have been rendered of less importance, by the statutes applying to forgeries committed with the intention of defrauding any corporation whatever.

#### V. Stamps.

1. The statute 53 G. 3. c. 143. then enacts, "that if any person shall forge, or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, die or plate, which in pursuance of any act or acts of parliament shall have been provided, made or used by or under the direction of the commissioners appointed to manage the duties on stamped vellum, parchment and paper, or by or under, the direction of any other person or persons legally authorised in that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said commissioners for the ace of spades, to be used with any playing cards; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, the impression, or any resemblance of the impression, of any such mark, stamp, die or plate as aforesaid, upon any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, with any such forged or counterfeited mark, stamp, die or plate as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties, or any part of the duties under the care and management of the said commissioners; or if any person shall utter or sell, or expose to sale any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, having thereupon the impression of any such forged or counterfeited mark, stamp, die or plate, or any such forged or counterfeited impression as aforesaid, knowing the same respectively to be forged or counterfeited; or if any person shall privately or secretly use any such mark, stamp, die or plate, which shall have been so provided, made or used, by or under such direction as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties, or any part of the duties under the care and management of the said commissioners; every person so offending, shall be adjudged guilty of felony, without benefit of clergy."— 2. The eighth section of this statute enacts, "that if any person shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate of gold or silver to another, or to any vessel or ware of base metal, any impression made with any mark, stamp or die, provided, made or used by or under the direction of the said commissioners of stamps, or by or under the direction of any other person or persons legally authorised in that behalf, for denoting any duty or duties, or the payment of any duty or duties granted to his majesty on gold or silver plate; or shall stamp or mark, or cause or procure to be stamped or marked, any vessel or ware of base metal with any mark, stamp or die, which shall have been forged or counterfeited in imitation of, or to resemble any mark, stamp or die so provided, made or used as aforesaid; or shall sell, exchange or expose to sale, or export out of Great Britain, any wrought plate of gold or silver, or any vessel or ware of base metal, having thereupon the impression of any forged or counterfeited mark, stamp or die, for denoting any such duty or duties, or the payment of any such duty or duties, or any forged or counterfeited impression of any mark, stamp or die, so provided, made or used as aforesaid, or any impression of any such mark, stamp or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged or counterfeited, or transposed or removed as aforesaid; or shall wilfully and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp or die, for denoting any such duty or duties, or the payment thereof;" every person so offending shall be adjudged guilty of felony, without benefit of clergy,— 3. By the ninth section it is enacted, "that if any person (not  
being

being lawfully appointed or authorised so to do) shall make, or cause, or procure to be made, or shall knowingly aid or assist in the making, or, without being so appointed or authorized as aforesaid, shall knowingly have in his, her or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any frame, mould, or instrument, for the making of paper, with the words 'excise office' visible in the substance of such paper, or shall make or cause, or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the words 'excise office' shall be visible; or if any person (except as before excepted) shall by any art, mystery or contrivance, cause or procure the said words 'excise office' to appear visible in the substance of any paper whatever; or if any person (not being so appointed or authorised as aforesaid) shall engrave, cast, cut, or make, or shall cause or procure to be engraven, cast, cut, or made, any mark, stamp, or device, in imitation of or to resemble any mark, stamp, or device, made or used by the direction of the commissioners of excise in England or Scotland, or the major part of them respectively, for the purpose of printing, stamping, or marking of any paper to be used as or for a permit or permits to accompany any exciseable commodity or commodities removing or removed from one part of Great Britain to any other part thereof, in pursuance of the directions of any of the several statutes requiring such permit," every person so offending shall be adjudged guilty of felony without benefit of clergy. — 4. The late stamp act 55 G. 3. c. 184. s. 7. includes the cutting or getting off the impression of any stamp from paper, &c. with intent to use the same upon any other paper, &c. chargeable with the duties thereby granted; and makes this also a capital offence. This section (without referring to the former general act of the 52 G. 3. c. 143.) enacts, "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made or used, in pursuance of this act, or in pursuance of any former act or acts, relating to any stamp duty or duties, or shall forge, counterfeit or resemble, or cause or procure to be forged, counterfeited or resembled the impression or any part of the impression of any such stamp or die as aforesaid, upon any vellum, parchment or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties hereby granted, or any part thereof; or if any person shall utter or sell or expose to sale any vellum, parchment, or paper, having thereupon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any stamp or die which shall have been so provided, made or used as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the said duties, or any part thereof; or if any person shall fraudulently cut, tear, or get off, or cause or procure to be cut, torn, or got off, the impression of any stamp or die which shall have been provided, made or used in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper, whatsoever, with intent to use the same for or upon any other vellum, parchment or paper, or any instrument or writing, charged or chargeable with any of the duties hereby granted; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, shall be adjudged guilty of felony without benefit of clergy." The eighth section enacts that all the powers, &c. pains and penalties contained in and imposed by the several acts relating to the duties by this act repealed, and the several acts relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties by this act granted, as far as the same shall be applicable, &c. — 5. The statute 55 Geo. III. c. 185. entitled "An act for repealing the stamp office duties on advertisements, almanacks, newspapers, gold and silver plate, stage coaches, and licences for keeping stage coaches, now payable in Great Britain; and for granting new duties in lieu thereof," declares that the duties thereby granted shall be under the care and management of the commissioners of stamps in Great Britain, and requires the commissioners to provide and use proper and sufficient plates, stamps, or dies, for denoting the duties thereby granted: and enacts that the powers, &c. pains and penalties contained in and imposed by the acts relating to the duties by this act repealed, and to any prior duties of the same kind or description, shall be of full force and effect, with respect to the duties by this act granted as far as the same shall be applicable, &c. The sixth section then enacts, "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any plate, stamp, or die, or any part of any plate, stamp, or die, which shall have been provided, made or

used, in pursuance of this or any former act, for expressing and denoting any of the duties granted by this or any former act, on almanacks, newspapers, and licences to keep stage-coaches; or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression, or any part of the impression of any such plate, stamp, or die, upon any paper whatsoever, or shall stamp or mark, or cause or procure to be stamped or marked any paper whatsoever, with any such forged or counterfeited plate, stamp, or die, as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties hereby granted on almanacks, newspapers, and licences or keep stage-coaches, or any part thereof; or if any person shall utter, or sell, or expose to sale any paper, having thereupon the impression of any such forged or counterfeited plate, stamp, or die, or part of any plate, stamp, or die, or any such forged, counterfeited, or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any plate, stamp, or die, which shall have been so provided, made or used as aforesaid with intent to defraud his majesty, his heirs, &c. then every person so offending, and every person knowingly and wilfully aiding, abetting or assisting any person or persons in committing any such offence as aforesaid," shall be adjudged guilty of felony without benefit of clergy. — 6. The seventh section further enacts, "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited any mark, stamp or die, which shall have been provided, made or used in pursuance of this or any former act, relating to any duties on gold or silver plate made or wrought in Great Britain, for the purpose of marking or stamping any such gold or silver plate, in the manner directed by any such act, or shall forge counterfeit or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression of any such mark, stamp or die, upon any such gold or silver plate, with intent to defraud his majesty, his heirs, &c., or if any person shall mark or stamp or cause or procure to be marked or stamped, any such gold or silver plate, or any vessel or ware of base metal, with any such forged or counterfeited mark, stamp or die as aforesaid, or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, stamp or die, which shall have been provided, made or used in pursuance of this or any former act, for the purpose of marking or stamping of any such gold or silver plate as aforesaid; or if any person shall sell, exchange or expose to sale, or export out of Great Britain, any such gold or silver plate or any vessel or ware of base metal, having thereupon the impression of any such forged or counterfeited mark, stamp or die as aforesaid, or any forged, counterfeited or resembled impression of any mark, stamp or die, so provided, made or used as aforesaid, or any impression of any such mark, stamp or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged or counterfeited, or transposed or removed as aforesaid; or if any person shall wilfully and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp or die, as aforesaid, or shall privately and secretly use any mark, stamp or die, so provided made or used as aforesaid, with intent to defraud his majesty, &c." every person so offending, and every person knowingly and wilfully aiding, abetting or assisting any person or persons committing any such offence as aforesaid, shall be adjudged guilty of felony without benefit of clergy. — 7. Besides the statutes which relate to the forging, &c. the stamps and marks on plate, by which the duty payable to the crown is denoted, there are others which relate to the offences of forging, &c. the assay marks or stamps required to be affixed to gold and silver manufactures, in order to denote their standard value. Offences of this kind were first made punishable by the 12 G. 2. c. 26. s. 8, by pecuniary forfeiture, and imprisonment in default of payment. But that provision was repealed by the stat. 31 G. 2. c. 32. s. 14.; which statute by s. 15. made the forging or counterfeiting the stamp, &c. used for marking plate in pursuance of the 12 G. 2. c. 26. s. 8. by the goldsmiths' company, &c. the marking plate, &c. with a forged or counterfeited stamp, the transposing the stamp, &c. impressed, from one vessel to another, the selling or exporting plate, with a forged, counterfeited, or transposed mark, and the having such stamp, &c. in possession a capital felony. This section of the 31 G. 2. c. 32. after having been amended by the 32 G. 2. c. 24. was repealed by 13 G. 3. c. 59. s. 1. 2 Russell, 1565. — 8. And the second section of that statute enacts, "that if any person whatsoever, shall cast, forge or counterfeit, or cause or procure to be cast, forged or counterfeited, any mark or stamp used, or to be used, for the marking or stamping gold or silver plate, in pursuance of any act or acts of parliament now in force by the company of goldsmiths in London, or by the wardens, or assayer or assayers at York, Exeter, Bristol, Chester, Norwich or Newcastle-upon-Tyne, or by any maker or worker of gold or silver plate, or any or either of them; or shall cast, forge or counterfeit,

or cause or procure to be cast, forged or counterfeited, any mark, stamp or impression, in imitation of or to resemble any mark stamp or impression made, or to be made, with any mark or stamp used, or to be used, as aforesaid, by the said company of goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or workers of gold or silver plate, or any or either of them; or shall mark or stamp, or cause or procure to be marked or stamped, any wrought plate of gold or silver, or any wares of brass or other base metal silvered or gilt over, and resembling plate of gold or silver, with any mark or stamp which hath been or shall be forged or counterfeited at any time, in imitation of, or to resemble any mark or stamp used, or to be used, as aforesaid, by the said company of goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate to another, or to any vessel of such base metal as aforesaid, any mark, stamp or impression, made or to be made, by or with any mark or stamp used, or to be used, as aforesaid, by the said company of goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; or shall sell, exchange or expose to sale, or export out of this kingdom, any wrought plate of gold or silver, or any vessel of such base metal as aforesaid, with any such forged or counterfeit mark, stamp or impression thereon, or any mark, stamp or impression which hath been, or shall be transposed or removed from any other piece of plate, at any time, knowing such mark, stamp or impression, to be forged, or counterfeited, or transposed or removed as aforesaid; or shall wilfully or knowingly have or be possessed of any mark or stamp which hath been, or shall be forged or counterfeited at any time in imitation of or to resemble any mark or stamp used, or to be used, as aforesaid, by the said company of goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; every person offending in any, each or either of the cases aforesaid, and being thereof lawfully convicted, shall, by order of the court before whom such offender shall be convicted, be transported to some of his majesty's colonies or plantations in America, for the term of fourteen years." — 9. The 24 G. 3. sess. 2. c. 53. and 38 G. 3. c. 69. contain provisions nearly in a similar form to the 13 G. 3. c. 59. — 10. The statute 12 Geo. III. c. 48. enacts, "that if any person or persons shall write or engross, or cause to be written or engrossed, either the whole or any part of any writ, mandate, bond, affidavit, or other writing, matter or thing whatsoever, in respect whereof any duty is or shall be payable by any act or acts made, or to be made in that behalf, on the whole or any part of any piece of vellum, parchment, or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing written in such writ, mandate, affidavit, bond, or other writing, matter or thing, as aforesaid, or fraudulently cut, tear, or get off any mark or stamp, in respect whereof or whereby any duties are or shall be payable, or denoted to be paid or payable aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter or thing, in respect whereof any such duty is or shall be payable, or denoted to be paid or payable as aforesaid," every person so offending, and every person aiding, abetting, &c. to commit any such offence shall be deemed to be guilty of felony, and be transported to some of his majesty's plantations beyond the seas for a term not exceeding seven years. And it further enacts, that if any such person so convicted or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he shall be apprehended. — 11. The 49 G. 3. c. 81. s. 1. enacts, "that if any person or persons whatever shall upon any cover or wrapper of or belonging to or used with or upon any label affixed to any ream or quantity of paper, or upon any pasteboard, millboard, scaleboard, or glazed paper, counterfeit, forge, or resemble the mark or impression or any stamp or device provided or directed to be used in pursuance of the said act of the thirty-fourth year of his said majesty's reign, or shall have in his, her, or their custody or possession, any such counterfeit stamp, or device, knowing the same to be counterfeited, or shall have in his, her, or their custody or possession, or shall utter, vend, or sell any paper with a counterfeit or forged mark or impression of any such stamp or device on the cover or wrapper of such paper, or on any label affixed thereto, or any pasteboard, millboard,



scaleboard, or glazed paper, with a counterfeit or forged mark, or impression of any such stamp or device upon such pasteboard, millboard, scaleboard, or glazed paper, or upon any label affixed thereto, knowing the same to be so counterfeited or forged, or shall upon any ream or quantity of paper which has not been duly entered with the proper officer or officers, and charged with the duty of excise imposed for or in respect of such paper, knowingly put or place any cover or wrapper, having thereon such counterfeit or forged mark or impression, or any such counterfeit label, every person, so in either of the said cases offending, and being thereof duly convicted, shall, in lieu and instead of the said penalty of five hundred pounds, be adjudged a felon, and shall for such his, her, or their offence, be transported as a felon or felons for the space of seven years."

— 12. The statute 10 Ann. c. 19. s. 97. directed the commissioners of the customs to provide certain seals or stamps for imported linens; and the commissioners for managing the duties on silks, calicoes, linens, and stuffs, to provide proper seals or stamps of another kind for marking such silks, &c. and enacted, that if any person should counterfeit or forge any stamp or seal, provided or made "in pursuance of that act," or counterfeit the impression of the same, upon any of the commodities "chargeable by that act, thereby to defraud the crown of the duties thereby granted, the offender should be guilty of a capital felony; and further, that if any person should, during the continuance of the act, sell any printed, painted, stained, or dyed silks, calicoes, linens, or other stuffs, with a counterfeit stamp, knowing the same to be counterfeited, with intent to defraud the crown, such offender should forfeit 100*l.*, and stand in the pillory for two hours." — 13. The st. 13 G. 3. c. 56. s. 5., reciting the 10 Ann. c. 19., 12 Ann. st. 2. c. 9., 3 G. 1. c. 7. s. 1. and 6 G. 1. c. 4. s. 1. and reciting that doubts had arisen, whether persons counterfeiting or forging any stamp or seal to resemble any stamp or seal, renewed or altered by the commissioners of excise, in pursuance of the authority of the said act of the twelfth year of Queen Anne, or counterfeiting or resembling the impression of such renewed or altered stamp or seal, are subject to the penalties and pains of death, in the said acts enacted and declared; and evil-minded persons had thereby been encouraged to counterfeit such renewed and altered stamps and seals; for obviating all such doubts enacts, "that if any person or persons whatsoever shall, at any time or times hereafter, counterfeit or forge any stamp or seal already provided by the said commissioners, or which shall hereafter be by them provided, renewed, or altered, or shall counterfeit or resemble the impression of the same, upon any of the said commodities chargeable by the said acts, thereby to defraud his majesty, his heirs, or successors, of any of the said duties thereby granted," then every such person so offending shall be adjudged a felon, and shall suffer death without clergy. — 14. Subsequent statutes, relating to the duties of the customs and excise, have contained similar provisions, either by re-enactment, as in 27 G. 3. c. 31. s. 13, 14. or by express reference, as in 43 G. 3. c. 69. s. 4. 2 Russell, 1571. — 15. As to the cases on the *construction* of these acts: — see a case raising a question upon the words "intent to use" in the st. 12 G. 3. c. 48. 1 Leach, 383. — 16. See a case on the construction of the words "any paper liable to the said duties," in the st. 23 G. 3. c. 49. s. 20. 1 Leach, 352. 2 East, P. C. c. 19. s. 19. p. 893. — 17. The words "duties of excise," and "duties under the management of the commissioners of excise," held to be synonymous. 2 East, P. C. c. 19. s. 19. p. 895. — 18. On an indictment on the statutes, 12 G. 2. c. 26. s. 8., 31 G. 2. c. 32. s. 14., and 24 G. 3. c. 53. s. 16. for removing from one silver knee-buckle to another silver knee-buckle certain stamps, marks, and impressions; to wit, the king's head, and the lion rampant, with intent to defraud the king, against the statute, &c. on producing the silver knee-buckle in evidence, it appeared that the mark was a lion passant, instead of a lion rampant; and the court held the variance fatal. 1 Leach, 416. — 19. The engraving a counterfeit stamp, similar in some parts, though dissimilar in others to the legal stamp, cutting out the dissimilar parts, concealing the space from whence the dissimilar parts were cut out, and then uttering the similar parts as a genuine stamp; was holden to amount to a forgery and guilty uttering. 2 Leach, 1048. 4 Taunt. 300. — 20. It is sufficient in an indictment for forging a stamp, to describe the stamp as a stamp provided and used in pursuance of a certain act of parliament. Ibid.

#### VI. *Official Papers, Securities and Documents.*

1. By the stat. 32 Geo. 2. c. 14. the receiver of the prebends at the alienation office was directed to receive the post-fine at the same time to every writ of covenant sued out for the passing of fines in the common pleas, and to indorse the receipt of the same thereon, with his name and mark of office. The ninth section then enacted, that if any person should make, forge, or counterfeit, or cause or procure, &c. the mark or hand of such receiver, whereby such receiver or any other person or persons should or might be defrauded, or suffer any loss thereby, every person convicted of such offence should be deemed guilty of felony, and suffer death without benefit of clergy. The more recent stat. 52 Geo. 3. c. 143. s. 5. enacts, "that if any person shall make forge or counterfeit,

or



or cause or procure to be made, forged or counterfeited, the mark or hand of the receiver of the prebends at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." — 2. The statute 42 Geo. 3. c. 116. consolidated the former acts for the redemption and sale of the land tax; and it enacted (by s. 194.) "that if any person shall forge, counterfeit, or alter, or cause, or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract or contracts for the redemption or sale of any land tax, or any assignment or assignments of any such land tax, or of any such contract or contracts, or of any portion of land tax therein comprised, or any certificate or certificates of the commissioners of land tax or of supply, or of any chief magistrate authorised by this act to make out such certificate or certificates, or of the surveyor-general of the land revenue of the crown, or of the duchy of Cornwall, or any certificate or certificates, receipt or receipts, of the cashier or cashiers of the governor and company of the Bank of England, or any certificate or certificates, or attested copy of any certificate or certificates directed by this act to be made out by the proper officer, or shall wilfully deliver or produce to any person or persons acting under the authority of this act, or shall utter any such forged, counterfeited, or altered contract or contracts, assignment or assignments, certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited or altered, with intent to defraud his majesty, his heirs, &c. or any body or bodies politic or corporate, or company or other person or persons whomsoever," then and in every such case, all and every person or persons so offending shall be adjudged guilty of felony, without benefit of clergy. The statute 52 Geo. 3. c. 143. s. 6. enacts "that if any person shall forge, counterfeit or alter, or cause or procure to be forged, counterfeited or altered, or knowingly or wilfully act or assist in the forging, counterfeiting or altering any contract, assignment, certificate, receipt or attested copy of any certificate made out or purporting to be made out by any person or persons authorised to make out the same by any act of parliament touching the redemption or sale of the land tax, or of any part thereof; or if any person shall wilfully utter any such forged, counterfeited or altered contract, assignment, certificate, receipt or attested copy of certificate, knowing the same to be forged, counterfeited or altered, with intent to defraud his majesty, his heirs or successors, or any body or bodies politic or corporate, or other person or persons;" every person so offending shall be adjudged guilty of felony without benefit of clergy. — 3. The statute 23 Geo. 3. c. 70. s. 9. made the forgery of excise permits, &c. a capital felony: and a clause nearly similar is contained in the recent statute of 52 Geo. 3. c. 143. s. 9. which enacts, that if any person not being authorised shall make, &c. or knowingly have in possession, without lawful excuse, any frame, &c. for the making of paper, with the words "excise office" visible in the substance of such paper, or shall make, &c. any paper in the substance of which the words "excise office" shall be visible; or shall cause or procure the said words "excise office" to appear visible in the substance of any paper whatever; or if any person (not being lawfully appointed or authorized so to do,) "shall engrave, cast, cut or make, or shall cause or procure to be engraven, cast, cut or made, any mark, stamp or device, in imitation of or to resemble any mark, stamp or device made or used by the direction of the commissioners of excise in England or Scotland, or the major part of them respectively, for the purpose of printing, stamping or marking of any paper to be used as for a permit or permits to accompany any exciseable commodity or commodities removing or removed from one part of Great Britain to any other part thereof in pursuance of the directions of any of the several statutes requiring such permit;" every person so offending shall be adjudged guilty of felony without benefit of clergy. — 4. The tenth section of the statute 52 Geo. 3. c. 143. enacts, "that if any person shall, with intent to defraud his majesty, falsely make, forge, counterfeit or alter, or cause or procure to be falsely made, forged, counterfeited or altered, or willingly assist in falsely making, forging, counterfeiting or altering any debenture, or any certificate for the payment or return of any money, or any part of any such debenture or certificate, or any signature thereon, in any case in which such debenture or certificate is by any act or acts of parliament relating to the duties of customs or excise required or directed to be given or granted; or shall wilfully, with such intent as aforesaid, utter, publish or make use of any such debenture or certificate, or part thereof, so being wholly or in part falsely made, forged, counterfeited or altered;" every person so offending, shall be adjudged guilty of felony without benefit of clergy. — 5. The statute 46 Geo. 3. c. 75. s. 8. enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the receiver-general of the excise for the time being, or of the comptroller of the cash of the excise, or the person or persons duly authorised as aforesaid, to any

draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the excise, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general, or the person or persons authorised as aforesaid, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every person so offending, shall be guilty of felony without benefit of clergy. — 6. The statute of 46 Geo. 3. c. 76. s. 9. enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the receiver-general of the stamp duties for the time being, or of his clerk, or of either of the commissioners of stamps, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the stamp duties, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general or his clerk, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every person so offending shall be guilty of felony without benefit of clergy. — 7. A provision of a similar kind is contained in the statute 46 Geo. 3. c. 150. s. 10. with respect to the forging the name or handwriting of the receiver-general of the customs, or the supervisor of his receipts, &c. It enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting, the name or handwriting of the receiver-general of the customs for the time being, or of the supervisor of the receiver-general's receipts and payments, or the person or persons duly authorised as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the customs, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by such receiver-general, or the person or persons authorised as aforesaid, or shall utter and publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever:" every such person so offending shall be guilty of felony without benefit of clergy. — 8. The forging or counterfeiting of exchequer bills has been usually made a capital felony by the several statutes passed to authorize the issuing of those securities. The 48 Geo. 3. c. 1. s. 9. enacts, "that if any person or persons shall forge or counterfeit any exchequer bill, or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his majesty, his heirs, &c. or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate, or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate;" every person so offending shall be adjudged a felon, without benefit of clergy. This statute has generally been extended to subsequent acts, authorising a further issue of exchequer bills; as in the 51 Geo. 3. c. 15., the first section of which authorises the issue in the same manner, form, &c. as enacted and prescribed in the 48 Geo. 3. c. 1.: and the second section enacts, "that all and every the clauses, provisoes, powers, privileges, advantages, penalties, forfeitures and disabilities, contained in the said last-mentioned act, shall be applied and extended to the exchequer bills to be made in pursuance of this act, as fully and effectually to all intents and purposes, as if the said several clauses or provisoes had been particularly repeated and re-enacted in the body of this act." — 9. The statutes authorising issues of exchequer bills frequently also contain a clause relating to the forging, &c. of the certificates or receipts therein mentioned. Thus by the 51 G. 3. c. 15. s. 71. "if any person or persons shall forge, counterfeit or alter, or cause or procure to be forged, counterfeited or altered, or knowingly or willingly act or assist in the forging, counterfeiting

feiting or altering any certificate or certificates of the said commissioners by this act appointed as aforesaid, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Bank of England, in pursuance of this act; or shall wilfully deliver to the auditor of the receipt of his majesty's exchequer for the time being, or to any officer appointed by him, or to the said commissioners by this act appointed or any of them, or to any officer or officers appointed by them or any of them in the execution of the powers of this act; or shall utter any such forged, counterfeited or altered certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited or altered, with intent to defraud his majesty, his heirs, &c. or any body or bodies politic or corporate, or any person whomsoever;" in every such case, every person so offending shall be adjudged guilty of felony, without benefit of clergy.—

10. The statutes also occasionally passed in order to grant annuities for the discharge of certain exchequer bills, make the forging of the certificates, &c. therein mentioned capital offences: as the 50 G. 3. c. 23. s. 11., 53 G. 3. c. 41. s. 26., and the late statute 58 G. 3. c. 23. s. 38.— 11. The statute 24 G. 3. sess. 2. c. 37. s. 9. made the forging of franks a felony punishable by transportation for seven years; and a clause precisely similar is contained in the later statute 42 G. 3. c. 63. s. 14. which enacts, "that if any person whatsoever shall forge or counterfeit the handwriting of any person whatsoever in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, or shall forge, counterfeit, or alter, or shall procure to be forged, counterfeited, or altered, the date upon the superscription of any such letter or packet, or shall write and send by the post, or cause to be written and sent by the post, any letter or packet, the superscription or cover whereof shall be forged or counterfeited, or the date upon such superscription or cover altered, in order to avoid the payment of the duty of postage, knowing the same to be forged, counterfeited, or altered;" every person so offending shall be deemed guilty of felony, and shall be transported for seven years.— 12. The forging of the post-office mark, for the purpose of avoiding the payment of the postage, is punishable as a misdemeanor. The statute 54 G. 3. c. 169. s. 14. enacts, "that if any person shall forge or counterfeit, or cause to be forged or counterfeited any stamp, mark of postage or designation upon any letter hereby authorised to be so stamped, marked or designated, with intent to avoid the payment of the rate of postage hereby imposed," each and every person and persons so offending shall be deemed to be guilty of a misdemeanor, to be punished by fine and imprisonment, and that such offence, if committed within Great Britain, shall be enquired of, tried, &c. either within the city of London, or where the offence shall be committed. The statute 55 G. 3. c. 103. which was passed for the purpose of regulating the postage of ship-letters to and from Ireland, contains a similar enactment as to letters thereby authorised to be marked, except as to the provision for the place in which the misdemeanor is to be tried.— 13. The forging the name or handwriting of the receiver-general of the post-office, or his clerk, or persons duly authorised by him, to any draft, instrument, &c. has been made the subject of especial legislative enactment. The 46 G. 3. c. 83. s. 9. enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the receiver-general of the post-office for the time being, or his clerk, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the post-office, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general or his deputy, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever, or any corporation;" every such person so offending shall be guilty of felony, without benefit of clergy. The 47 G. 3. sess. 2. c. 59 after reciting the former act, and providing that any person duly authorised by the receiver-general, and approved of by the postmaster-general, may receive any monies, make any payments, sign any drafts, instruments, &c. enacts, (s. 3.) "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any person or persons duly authorised by the receiver-general of the post-office to draw any such drafts, instruments, or writings as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the post-office, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully aid or assist in the forging or counterfeiting, any draft, instrument, or writing, in form

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of a draft, made by any such person, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever, or any corporation;" every such person so offending shall be adjudged to be guilty of felony, without benefit of clergy. — 14. The statute 1 G. 1. stat. 2. c. 25. s. 6. enacts, "that every person or persons who shall counterfeit the hands of the treasurer, comptroller, surveyor, clerk of the acts, or of the commissioners of the navy, or any of them, or the hand or hands of the signing or vouching officers of his majesty's navy, ships or yards, or the hand or hands of any one or more of them, to any bill, ticket or other papers, by virtue whereof his majesty's naval treasure is or may be paid or disposed of, or shall knowingly produce any such counterfeit ticket, bill or other paper;" every such person so offending shall be committed to prison by the said officers or commissioners, or any one of them, until he shall find surety to appear at the next general assises, or quarter sessions of the peace, for the county, &c. where such offender shall be so committed to prison, to be there proceeded against according to law. — 15. The making or giving a false certificate, &c. upon the sale or disposal of naval stores, is subjected to a pecuniary fine of 200*l.* by the statute 39 & 40 G. 3. c. 89. s. 26. — 16. The statute 53 G. 3. c. 151. s. 12. relates to the forging, &c. the name or hand of the registrar of the court of admiralty, or of appeals for prizes, or of the cashiers of the bank, &c. to any certificate or writing, for the purpose of obtaining any of the money or effects of the suitors in those courts. It enacts "that if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting, the name or hand of the said registrar for the time being of the high court of admiralty or high court of appeals for prizes, or his deputy, or any of the cashiers of the said governor and company of the Bank of England, to any certificate, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing whatever, for or in order to the receiving or obtaining any of the money or effects of any of the suitors of the said courts or either of them, or shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in forging or counterfeiting any certificate, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, made by such registrar or his deputy, or any of the cashiers of the said governor and company of the Bank of England, or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever, then every such person and persons so offending (being thereof lawfully convicted) shall be and is hereby declared and adjudged to be guilty of felony." — 17. By the statute 46 G. 3. c. 45. s. 9. the forging the hand of the treasurer of the ordnance, &c. was made a capital offence. It enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or hand of the treasurer of the ordnance for the time being, or his deputy, or the person or persons duly authorised as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the treasurer of the ordnance; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such treasurer of the ordnance or his deputy, or the person or persons authorised as aforesaid, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever," every such person so offending shall be adjudged to be guilty of felony without benefit of clergy. — 18. The statute 54 G. 3. c. 151. s. 16. makes the forging, &c. the name or hand of the agent-general for volunteers and local militia an offence liable to capital punishment. It enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in forging or counterfeiting the name or hand of the agent-general for the time being, or his deputy, or the person or persons duly authorised as aforesaid, to any bill of exchange, acceptance, draft, or instrument in writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the said agent-general; and shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any bill of exchange, acceptance, draft, instrument, or writing in form of a draft, made by such agent-general or his deputy, or the person or persons authorised as aforesaid; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every such person so offending shall be adjudged guilty of felony without benefit of clergy. — 19. Forgery and false personation for the purpose of obtaining prize-money, pay, &c. of persons in the naval or  
marine



marine services, have, from time to time been made capital offences by a variety of statutes. The recent statute 57 G. 3. c. 127. s. 4. enacts, "that, in order to bring into one act the several provisions made for the prevention and punishment of the crimes of personation and forgery for the purpose of obtaining prize-money; if any person or persons shall willingly or knowingly personate or falsely assume, or cause or procure any other person to personate or falsely assume the name or character of any commissioned officer, warrant or petty officer, or seaman, or any commissioned or non-commissioned officer of marines or marine, or any other person entitled or supposed to be entitled to any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money for or in respect of services performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c. or the wife, widow, executor, or administrator, relation, or creditor of any such officer, seaman, or other person as aforesaid, in order to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c. or shall falsely make, forge, counterfeit or alter, or cause or procure to be falsely made, forged, counterfeited or altered, or willingly act or assist in the false making, forging, counterfeiting or altering any letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will, or other power or authority whatsoever in order to receive or to enable any other person to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c. with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall utter or publish as true, or shall aid or assist in uttering or publishing as true, any false, forged, counterfeited, or altered letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will or other power or authority whatsoever, in order to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c. with intention to defraud any person or persons, body or bodies politic or corporate whatsoever, knowing the same to be false, forged, counterfeited or altered; or shall willingly and knowingly take a false oath to obtain the probate of any will or wills, or to obtain letters of administration, in order to receive or to enable any other person to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his majesty, his heirs, &c.; or shall demand or receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board any of his majesty's ships or vessels, upon or by virtue of any probate of any will or letters of administration, knowing the will on which such probate shall have been obtained to be false, forged, and counterfeited, or knowing the probate of such will, or such letters of administration as last aforesaid, to have been obtained by means of any such false oath as aforesaid, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever," every such person so offending shall be deemed guilty of felony without benefit of clergy. — 20. As the false personating of seamen must, within the statutes, be done in order to receive the wages, &c. of some seamen, &c. entitled or supposed to be entitled thereto, there must be some evidence of the existence of such seaman, &c. — 21. As to variance in the name in an indictment on 57 G. 3. c. 127. s. 4., see Tannet's case 2 Russell, 1596. — 22. The 49 G. 3. c. 35. entitled "an act for the more convenient payment of pensions to widows of officers of the navy," enacts, (s. 9.) "that if any person shall wilfully and knowingly personate or falsely assume the name or character of, or procure any other person to personate or falsely assume the name or character of any widow entitled, or supposed to be entitled to any such pension aforesaid, in order to receive the same, or any part thereof, every such person so offending, and being lawfully convicted thereof, shall be deemed guilty of felony, and may be transported for such period, not exceeding fourteen years, as the court shall adjudge." — 23. The tenth section enacts, "that if any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in forging or counterfeiting, the name or handwriting of any widow entitled



entitled to any such pension, or of any person or persons required by any rules or regulations made under and by virtue of this act to sign any remittance bill, certificate, voucher, or receipt, in relation to the payment of any such pension, for and in order to the receiving or obtaining any money on any such pension, or shall utter as true any false, forged or counterfeited remittance bill, certificate, voucher, or receipt, knowing the same to be forged or counterfeited, with an intention to defraud any person whatsoever," every such person so offending shall be guilty of felony, and may be transported for such period, not exceeding fourteen years, as the said court shall adjudge. — 24. The st. 49 G. 3. c. 45. entitled, "an act for more conveniently paying of allowances on the compassionate list of the navy and of half-pay to officers of the royal marines" after reciting that it would greatly tend to the comfort and accommodation of persons receiving any sums of money or allowances in consequence of their names being inserted in the compassionate list of the navy, and also of the officers of the royal marines, entitled to half-pay, if such allowances and half-pay were paid to the persons respectively entitled thereto, at or near the places of their respective residences; and providing that persons entitled to such allowances and half-pay may on application for that purpose, receive payments from the receiver-general of the land tax, or collector of the customs and excise, &c., enacts, (s. 10.) "that if any person shall wilfully and knowingly personate, or falsely assume the name or character of, or procure any other person to personate, or falsely to assume the name or character of any person entitled, or supposed to be entitled, to any such allowance aforesaid, or of any officer of the royal marines on half-pay as aforesaid, in order to receive such allowance or half-pay, or any part thereof," every such person so offending shall be deemed guilty of felony, and may be transported for such period not exceeding fourteen years, as the court shall adjudge. The eleventh section enacts, "that if any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging and counterfeiting, the name or handwriting of any person or officer entitled to any such allowance, or to such half-pay, or of any person or persons required by any rules or regulations made under and by virtue of this act, to sign any remittance bill, certificate, voucher, or receipt, in relation to the payment of any such allowance or half-pay, for and in order to the receiving or obtaining any money on any such allowance or half-pay; or shall utter as true any false, forged, or counterfeited remittance bill, certificate, voucher, or receipt, knowing the same to be forged or counterfeited, with an intention to defraud any person whatsoever;" every such person so offending shall be adjudged to be guilty of felony, and may be transported for such period, not exceeding fourteen years, as the said court shall adjudge. — 25. The stat. 3 G. 3. c. 16. s. 6. related to the false personating the name, &c. of an out-pensioner at Greenwich hospital. And the more recent statute 54 G. 3. c. 110. s. 6. enacts "that whosoever willingly or knowingly shall personate or falsely assume the name or character of, or procure any other to personate or falsely to assume the name or character of any person to whom any such certificate as aforesaid shall have been granted, in order to receive the money mentioned in such certificate, or shall willingly and knowingly personate or falsely assume the name or character of, or procure any other to personate or falsely to assume the name or character of any person, in order to receive any money due or supposed to be due for or on account of any out-pension granted by the said hospital; or shall forge or counterfeit, or procure to be forged or counterfeited, any bill, certificate, letter of attorney, ticket, certificate, assignment, last will or any other power or authority, or other document whatsoever, in order to receive any such money; or shall willingly and knowingly take a false oath, or procure any other person to take a false oath, in order to receive payment of any money due or supposed to be due for or on account of any out-pension granted by the said hospital; or shall utter or publish as true any false, forged or counterfeited letter of attorney, bill, ticket, certificate, assignment, last will or any other power or authority, in order to receive payment of any money due, or supposed to be due, for or on account of any out-pension;" shall be deemed guilty of felony, without benefit of clergy. — 26. The stat. 55 G. 3. c. 60. s. 30. enacts "that if any person shall sign or subscribe any petition or application to the treasurer, or paymaster of his majesty's navy for the time being, falsely and wilfully representing herself or himself to be the widow, or the nearest or one of the nearest of kindred of any deceased petty officer or seamen, non-commissioned officer of marines or marine, who shall have belonged to or served on board any of his majesty's ships or vessels, or utter or publish any such petition or application so signed or subscribed as aforesaid, containing such false and wilful representation as aforesaid, in order to obtain a certificate from the inspector of seamen's wills and powers to procure letters of administration to the effects of any such petty officer or seamen, non-commissioned officer of marines or marine, or to procure payment of any wages,

wages, pay, prize money, bounty money or other allowances of money under twenty pounds, for or in respect of services on board any ship, or vessel of his majesty, his heirs or successors; or if any person or persons shall demand or receive any wages, pay, prize, money, bounty money or other allowance of money due or supposed to be due for or in respect of the services of any such petty officer or seamen, non-commissioned officer of marines or marine, upon or by virtue of any certificate from the said inspector of seamen's wills, knowing such certificate to have been obtained by false representations or pretences," every such person shall be transported beyond the seas for the term of seven years, in like manner as persons convicted of felony are directed to be transported by the laws and statutes of this realm. — 27. And the same statute (s. 31.) enacts, "that if any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act and assist in the false making, forging or counterfeiting the signature of any minister or householder of any parish, to any certificate annexed or subjoined to or contained in any check or petition for a certificate, as required, described and mentioned in this act, to enable any person or persons to obtain probate of any will or letters of administration to any such petty officer or seamen, non-commissioned officer of marines or marine; or shall utter or publish as true any such certificate annexed or subjoined to or contained in any such check or petition, with any false, forged or counterfeited signature of any such minister, or householder of any parish subscribed thereto, knowing the same signature to be false, forged or counterfeited, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever," then every such person so offending shall be deemed guilty of felony, and be transported as a felon for the term of life, or fourteen years, or seven years, as the court before which such offender shall be tried, shall adjudge. — 28. The stat. 56 G. 3. c. 101. reciting that it would tend to the convenience and advantage of the commissioned and warrant officers in his majesty's navy on half-pay, and of persons receiving pensions on the ordinary estimate of the navy, if they were enabled to draw for such half-pay and pensions by bills of exchange on the commissioners of the navy, instead of being paid the same by remittance bills, provides a method for effecting such purpose; and then enacts, (s. 4.) "that if any person or persons shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act or assist in the false making, forging or counterfeiting of any such authority or certificate, or bill of exchange, or assignment as aforesaid, or shall utter or publish as true any such false, forged or counterfeited authority or certificate, bill of exchange or assignment, knowing the same to be false, forged or counterfeited, with intent to defraud any person or persons body or bodies politic or corporate," every such person so offending shall be deemed guilty of felony without benefit of clergy. — 29. Upon which statute, forging a power of attorney to receive prize-money, has been holden to be a capital offence, though not in the form prescribed by 45 G. 3. c. 72. s. 92. — 30. The 39 Eliz. c. 17. s. 3. enacts, that every idle and wandering soldier or mariner, who, coming from his captain from the seas, or from beyond the seas, shall not have a testimonial under the hand of a justice of peace, of or near the place where he landed, setting down the place and time when and where he landed, (and other particulars therein mentioned,) and also, "as well every such idle and wandering soldier or mariner, as every other idle person wandering as soldier or mariner, which shall at any time hereafter forge or counterfeit any such testimonial, or have with him or them any such testimonial forged or counterfeited as aforesaid, knowing the same to be counterfeited or forged, in all these cases every such act or acts to be felony, and the offenders to suffer as aforesaid, without any benefit of clergy." — 31. The statute 4 Geo. II. c. 18. s. 1. having reference to the treaties between this kingdom and the Barbary powers; by which, on producing a pass in a certain form, those powers agreed to let British vessels go free, enacted, "that if any person or persons shall within Great Britain or Ireland, or any other his majesty's dominions, or without, falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or wittingly or knowingly act or assist in the false making, forging or counterfeiting any pass or passes for any ship or ships whatsoever, commonly called a Mediterranean pass or Mediterranean passes, or shall counterfeit the seal of the said office, or the hand or hands of the lord high-admiral of Great Britain and Ireland for the time being, or of any commissioner or commissioners for executing the said office for the time being, to any such pass or passes, or shall alter or erase any true and authentic pass or passes issued or made out by the lord high-admiral of Great Britain and Ireland, or the commissioners for executing the said office for the time being, or shall utter or publish as true any such false, forged, counterfeited, altered or erased pass or passes, knowing the same to be false, forged, counterfeited, altered or erased, all and every such person and persons, being in due form of law convicted of any of the offences

offences aforesaid in any proper court of Great Britain, Ireland, or any of his majesty's plantations beyond the seas, where such offence shall be committed respectively, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." By the second section it is provided, that such offences committed in any country or place out of Great Britain, either within or without his majesty's dominions, may be inquired of, &c. in any county of Great Britain, by virtue of the king's commission of oyer and terminer and goal delivery, or before any court of judicature in Scotland, &c. — 32. The statute 47 Geo. III. sess. 1. c. 36. entitled, "An act for the abolition of the slave trade," enacts, (s. 12.) "that if any person shall wilfully and fraudulently forge or counterfeit any such certificate, copy of sentence of condemnation, or receipt as aforesaid, or any part thereof, or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his majesty, his heirs and successors, or any other person or persons whatever;" the party so offending shall suffer death as in cases of felony, without benefit of clergy. — 33. The statute 46 Geo. III. c. 98. entitled, "An act for making additional and further provisions for the effectual performance of quarantine in Great Britain," enacts, (s. 8.) "that if any person shall knowingly and wilfully forge or counterfeit, interline, erase, or alter, or procure to be forged or counterfeited, interlined, erased, or altered, any certificate directed or required to be granted by any order of his majesty, his heirs, &c. in council now in force, or hereafter to be made touching quarantine, and the prevention of infection, or shall publish as true any such forged or counterfeited, interlined, erased, or altered certificate, knowing the same to be forged or counterfeited, interlined, erased, or altered, or shall knowingly and wilfully utter and publish any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false;" he or she shall be adjudged guilty of felony, without benefit of clergy. — 34. The statute 47 Geo. III. sess. 2. c. 66. was passed for the purpose of making more effectual provision for the prevention of smuggling; and, after authorising certain persons therein mentioned to grant licences for navigating, &c. it enacts, (s. 26.) "that if any person or persons shall counterfeit, erase, alter, or falsify, or cause to be counterfeited, erased, altered, or falsified, any licence which has been granted by the lord high-admiral of Great Britain, or by the commissioners of the admiralty for the time being, or by any person authorised by them to grant such licence, or which shall, in pursuance of this act, be granted by the commissioners of his majesty's customs in England, Scotland, or Ireland, respectively, or any three of them for the time being, or shall knowingly or wilfully make use of any licence so counterfeited, erased, altered, or falsified, such person or persons shall for every such offence forfeit the sum of five hundred pounds." — 35. By the 12 Geo. I. c. 32., which was passed for the better securing the monies and effects of the suitors of the court of chancery, it is enacted, (s. 9.) "that if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting the name or hand of the said accountant-general, the said register, the said clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, to any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing whatsoever, for or in order to the receiving or obtaining any the money or effects of any of the suitors of the said court of chancery, or shall forge or counterfeit, or procure to be forged or counterfeited, or wilfully act or assist in forging or counterfeiting any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing in form of a certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, made by such accountant-general, register, clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever;" then every such person so offending shall be adjudged to be guilty of felony, without benefit of clergy. — 36. And forging a writing purporting to be an office copy of a report of the accountant-general of money being paid into the bank; and also an office copy of a certificate of one of the cashiers of the bank is within the 12 G. 1. 1 Leach, 61. 2 East, P. C. c. 19. s. 22. p. 889. — 37. The making a false entry in a parish register, of any matter relating to a marriage, the forging, &c. a marriage licence, and destroying a register-book of marriages, were made capital offences by the statute, (commonly called the marriage act,) 26 Geo. II. c. 33. The sixteenth section of that statute enacts, "that if any person shall, with intent to elude the force of this act, knowingly and wilfully insert or cause to be inserted in the register-book of such parish or chapelry as aforesaid, any false entry of any matter or thing relating to any marriage; or falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or act or assist in falsely making, altering, forging or counterfeiting any such en-  
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ity in such register; or falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered forged, or counterfeited, or assist in falsely making, altering, forging or counterfeiting any such licence of marriage as aforesaid; or utter or publish as true any such false, altered, forged or counterfeited register as aforesaid, or a copy thereof; or any such false, altered, forged or counterfeited licence of marriage, knowing such register or licence of marriage respectively to be false, altered, forged or counterfeited; or if any person shall wilfully destroy, or cause or procure to be destroyed, any register-book of marriages, or any part of such register-book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act;" every person so offending shall be adjudged to be guilty of felony, without benefit of clergy. — 58. The late statute 52 Geo. III. c. 146., which was passed for the better regulating and preserving parish and other registers of births, baptisms, marriages, and burials, after providing as to the register-books to be kept, and copies, &c. to be transmitted, &c. enacts, (s. 14.) "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted in any such register-book of such baptisms, burials or marriages as aforesaid, or in any such copy of any such register so directed to be transmitted to the registrars as aforesaid, or in any such lists or declarations also directed to be transmitted to such registrars as aforesaid, any false entry of any matter or thing relating to any baptism, burial or marriage, or shall falsely make, alter, forge or counterfeit, or cause or procure, or wilfully permit to be falsely made, altered, forged or counterfeited, any part of any such register, list or declaration, or of any such copy of any such register; or shall wilfully destroy, deface or injure, or cause or procure, or permit to be destroyed, defaced or injured, any such register-book, or any part thereof; or shall knowingly and wilfully sign, or certify any copy of any such register hereby required to be transmitted as aforesaid, which shall be false in any part thereof, knowing the same to be false;" every person so offending shall be adjudged to be guilty of felony, and shall be transported for the term of fourteen years. The twentieth section contains a proviso that nothing in this act contained shall extend to repeal any provision contained in the 26 Geo. II. c. 33. — 39. The 48 Geo. 3. c. 142. s. 27. enacts, "that if any person or persons shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any register or registers of the birth or baptism of any person or persons to be appointed a nominee or nominees under the provisions of this act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this act, or the certificate of any judge, baron of the exchequer, justice of the peace, or magistrate, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister or consul, or chief magistrate of any province, town or place, or other person authorised by this act to grant any certificate of the life or death of any nominee, or any certificate or certificates of the officer to be appointed by the said commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in the forging or counterfeiting the name or names of any person or persons in or to any transfer of bank-annuities for the purchase, of any life-annuity or in or to any transfer or acceptance of any life-annuity in the books of the governor and company of the Bank of England, or any receipt or discharge for any life-annuity, or for any payment or payments due or to become due thereon, or to any letter of attorney, or other authority or instrument, to transfer or accept any bank-annuities or life-annuities under the provisions of this act, or to receive any life-annuities, or any payment or payments due or to become due thereon, or shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully deliver or produce to any person or persons acting under the authority of this act, or shall utter any such forged register, certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud his majesty, his heirs, &c. or any other person or persons whomsoever;" then, and in every such case, all and every person or persons so offending, shall be adjudged guilty of felony, without benefit of clergy. The 49 G. 3. c. 64. was passed to amend the 48 G. 3. c. 142.; and, (by s. 3.) it enacts, "that if any person or persons shall wilfully, falsely, and deceitfully, personate any true and real nominee or nominees, or shall wilfully, falsely, and deceitfully represent any other person or persons than the true and real nominee or nominees to be such true or real nominee or nominees, or shall forge, counterfeit, or alter, or act, or assist in forging, counterfeiting, or altering any certificate or certificates to be granted by the said officer in pursuance of this act, or shall utter any such forged certificate knowing the same to be forged, counterfeited or altered, with intent to defraud his majesty, his heirs, &c.

or



or any other person or persons whomsoever;" then, and in every such case, every such person so offending shall be adjudged guilty of felony, without benefit of clergy.— 40. By the statute 2 & 3 Ann. c. 4. which was passed for the public registering of all deeds, conveyances, and wills of any honors, manors, lands, tenements, or hereditaments, within the West Riding of the county of York, it is directed that a memorial of such deeds, &c. be registered in a certain manner at Wakefield, and that the registrar shall indorse a certificate of such registry on every such deed, &c.: and the nineteenth section enacts, "that if any person or persons shall at any time forge or counterfeit any such memorial or certificate as are hereinbefore mentioned and directed, and be thereof lawfully convicted, such person or persons shall incur and be liable to such pains and penalties, as in and by the 5 Eliz. c. 14. are imposed upon persons for forging or publishing of false deeds, charters or writings sealed, court rolls or wills, whereby the freehold or inheritance of any person or persons of, in or to any lands, tenements or hereditaments, shall or may be molested, troubled or charged." The 5 & 6 Ann. c. 18. after directing that all bargains and sales of any manors, lands, &c. within the West Riding of the county of York, shall be registered at Wakefield, and indorsed by the registrar; that the enrolment of every such deed shall be deemed a memorial pursuant to the former statute 2 & 3 Ann. c. 4.; and that no judgment, statute, &c. shall bind any manors, lands, &c. but only from the time a memorial thereof shall be registered in the office; enacts, (s. 8.) "that if any person or persons shall at any time forge or counterfeit any entry of the acknowledgment of any bargainer in any such bargain and sale as aforesaid, or any such memorial, certificate or indorsement as are herein mentioned or directed, and be thereof lawfully convicted," such person or persons shall incur the pains and penalties of the same statute 5 Eliz. c. 14. The provisions of these statutes of 2 & 3 Ann. and 5 & 6 Ann. are extended by the statute 8 Geo. II. c. 6. s. 31. to the North Riding of the county of York. And the statute 7 Ann. c. 20. which was passed for the public registering of deeds, conveyances, wills, and other incumbrances, affecting any honors, manors, lands, &c. within the county of Middlesex, after directing as to the memorials, certificates, &c. enacts, (s. 15.) "that if any person or persons shall at any time forge or counterfeit any entry of the acknowledgment of any such memorial, certificate or indorsement, as is herein mentioned or directed, and be thereof lawfully convicted," such person or persons shall incur the pains and penalties of the same statute 5 Eliz. c. 14.— 41. The statute 54 G. 3. c. 133. intituled "an act for better enabling the commissioners of stamps to make allowances for spoiled stamps on policies of insurance in Great Britain, and for preventing frauds relating thereto," enacts, (by s. 10.) "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, or willingly aid or assist in the forging or counterfeiting of the name or handwriting of any underwriter on any policy of insurance, to any declaration of any return of the premium on such policy, or any part thereof, or shall fraudulently alter, or cause or procure to be altered, or aid or assist in altering any such declaration, after the same shall have been signed by any underwriter, or shall utter or make use of any such declaration, knowing the same to have been fraudulently altered, or the name or handwriting of any underwriter to have been forged or counterfeited thereon, for the purpose of obtaining any such allowance as aforesaid, and with intent to defraud his majesty, his heirs, &c. every person so offending shall, for the first offence, forfeit the sum of five hundred pounds, to be paid to his majesty, his heirs or successors, and to be recovered in the same manner as other penalties imposed by any of the laws now in force relating to stamp duties; and for the second and every other offence shall be adjudged guilty of felony, and shall be transported for seven years to parts beyond the seas." All the powers, provisions, pains, penalties, &c. of this act are extended by a statute passed in the same session, 54 Geo. 3. c. 144. s. 11. to the contracts of insurance, and to the allowance of stamp duty in the cases therein specified.— 42. The lottery acts usually contain clauses, making the forging, &c. any ticket, certificate, &c. subject to capital punishment. By the 49 G. 3. c. 94. s. 11. "if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting, any ticket or tickets, certificate or certificates, order or orders, made forth by virtue of this present act, or alter any number, figure, word or letter therein, or knowingly utter, vend, barter, or dispose of, any such false, altered, forged, or counterfeited ticket or tickets, certificate or certificates, order or orders, or shall bring any such forged or counterfeited ticket, certificate or order, or any such ticket, certificate or order, the number whereof, or any figure, word, or letter therein, shall have been altered, (knowing the same to be forged, counterfeited or altered,) to the said managers and directors or any of them, or to the cashier or cashiers, or accomptant-general of the Bank of England for the time being, or to any other person or persons whatsoever, with a fraudulent intention; or shall



shall willingly aid, abet, assist, hire or command, any person or persons to commit any such offence or offences as aforesaid," then, and in every such case, every such person shall be adjudged a felon, without benefit of clergy. And the statute further proceeds to empower the said managers and directors, or any two or more of them, to cause any person bringing or uttering such forged or counterfeited ticket, &c. as aforesaid, or aiding, &c. therein, to be apprehended, and to commit such person to Newgate, or to the common gaol of the county or place where such person shall be so apprehended, to be proceeded against for the said felony according to law. — 43. The statute 46 G. 3. c. 142. which was passed for the better regulation of the office of surveyor-general of the woods and forests, enacts, (s. 14.) "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the surveyor-general of the woods and forests for the time being, or his deputy, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the surveyor-general of the woods and forests, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such surveyor-general or his deputy, or the person or persons authorised as aforesaid, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intent to defraud any person whomsoever," every such offender shall be adjudged guilty of felony without benefit of clergy. — 44. By 50 G. 3. c. 41. s. 18. forging, &c. any hawkers licence is liable to 300*l.* forfeiture. — 45. And by 17 G. 2. c. 5. counterfeiting certificates under the vagrant act, is liable to 50*l.* forfeiture.

VII. *Private Papers, Securities, and Documents.*

1. The 2 G. 2. c. 25. s. 1. enacts "that if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt, either for money or goods, with intention to defraud any person whatsoever, or shall utter or publish as true any false, forged, or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of any bill of exchange or promissory note for payment of money, acquittance or receipt, either for money or goods, with intention to defraud any person, knowing the same to be false, forged or counterfeited;" then every such person shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy. — 2. The statute 31 G. 2. c. 22. s. 78. reciting that doubts might arise whether the punishment, under the former statute, extended to forgeries with intent to defraud any corporation, supplies the supposed defect. — 3. The statute 7 G. 2. c. 22. enacts, "that if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intention to defraud any person whatsoever, or shall utter or publish as true, any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited;" then every such person shall be deemed guilty of felony without benefit of clergy. — 4. The 18 G. 3. c. 18. contains similar provisions as to such forgeries committed with intent to defraud any corporation. — 5. The statute 43 G. 3. c. 139. was passed for the prevention of the forging of foreign bills of exchange, promissory notes, &c. and enacts, "that if any person shall, within any part of the united kingdom of Great Britain and Ireland, falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in the false making, forging, or counterfeiting, any bill of exchange, or any promissory note, undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order for the payment of money, of any foreign prince, state, or country whatsoever, or of any minister or officer entrusted by or employed in the service of any foreign prince, state, or country, or of any person, or company of persons resident in any foreign state or country, or of any body corporate and politic, and body in the nature of a body corporate and politic

politic, created or constituted by any foreign prince or state, with intent to deceive or defraud his majesty, his heirs, &c. or any such foreign prince, state, or country, or with intent to deceive or defraud any person or company of persons whatsoever, or any body corporate and politic, or body in the nature of a body corporate and politic whatsoever, whether the same be respectively resident, carrying on business, constituted or being in any part of the united kingdom, or in any foreign state or country, and whether such bill of exchange, promissory note, or order, be in the English language, or in any foreign language or languages, or partly in one and partly in the other; or if any person shall, within any part of the said united kingdom, tender in payment or in exchange, or otherwise utter or publish as true, any such false, forged, or counterfeited bill of exchange, promissory note, undertaking, or order, knowing the same to be false, forged, or counterfeited, with intent to deceive or defraud his majesty, his heirs, &c. or any foreign prince, state, or country, or any person or company of persons, or any body corporate and politic, or body in the nature of a body politic and corporate as aforesaid, then every person so offending shall be deemed and taken to be guilty of felony, and being thereof lawfully convicted, shall be transported for any term of years not exceeding fourteen years."—6. The statute 43 G. 3. c. 89. reciting, that by the 2 G. 2. c. 25. the 7 G. 2. c. 22. and other acts, certain provisions were made for the preventing and punishing the forgery of notes, bills, instruments, &c. in those acts respectively mentioned; and that it was expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein as were thereby made, enacts, "that if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered; or willingly act or assist in the false making, forging, counterfeiting, or altering any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt, either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant, or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away, any false, forged, counterfeited, or altered deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, acquittance, or receipt, either for money or goods, accountable receipt for any note, bill, or other security for payment of money, warrant or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited or altered," then every person or persons so offending shall be deemed guilty of felony without benefit of clergy.—7. Questions have arisen upon these statutes, respecting what instruments shall be considered as bills of exchange, promissory notes, indorsements, &c.; receipts, or as warrants or orders for the payment of money or delivery of goods.—8. A promissory note for the payment of one guinea in cash or Bank of England note, is not within the 2 G. 2. c. 25. Wilcock's case, 2 Russell, 1623.—9. A bill drawn upon the commissioners of the navy, is a bill of exchange within the 2 G. 2. c. 25. Chisholm's case, 2 Russell, 1624.—10. As to the question, whether a false assertion in an indorsement, that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation, will make such an indorsement a forgery within the statute, see Maddock's case, 2 Russell, 1626.—11. A promissory note may be a valid note within the st. 2 G. 2. c. 25. and the subject of forgery though not negotiable. 6 Taunt. 325.—12. "Received the contents above, by me, W. V.," is a sufficient statement of the receipt in the indictment, without setting forth the list of items to which it referred. 2 East, P. C. c. 19. s. 56. p. 925.—13. A forged receipt for bank notes is not a receipt for money or goods within the st. 2 G. 2. c. 25. But an entry of the receipt of money or notes, made by a cashier of the Bank of England, in the bank book of a creditor, is an accountable receipt for the payment of money within the st. 2 G. 2. c. 25. 1 Leach, 180. 2 East, P. C. c. 19. s. 56. p. 926. 2 Russell, 1632. n.—14. The mere signing certain names to an assignment for payment of a sum in a navy bill, does not, unless connected with other facts, purport on the face of the writing to be a receipt; and it should therefore be averred, that the navy bill, &c. together with the signature, did purport to be and was a receipt. 2 Leach, 184. 2 East, P. C. c. 19. s. 56. p. 926.—15. The indictment for forging the word "settled," at the bottom of a bill, must show, by proper averments, that it is a receipt. 2 Leach, 180.—16. A scrip receipt not filled up with the subscriber's name is not a receipt

overt for money within the statute, 2 Leach, 597. 2 East, P. C. c. 19. s. 36. p. 933.—17. Where a person who was employed by the executors of a contractor with the navy board to settle the account of the testator with government, produced forged acquittances and receipts, which were in fact fabricated vouchers, in order to exonerate the estates of the testator from an extent; it was held to be a forging and uttering within the statute, 2 G. 3. c. 25. 2 Leach, 877. 2 East, P. C. c. 19. s. 36. p. 934.—18. As to the right of the prisoner to put the prosecutor to his election on an indictment stating various forgeries, see 2 Leach, 882.—19. The statute relating to warrants or orders for the payment of money or delivery of goods, is not confined to commercial transactions, 2 East, P. C. c. 19. s. 37. p. 945.; s. 32. p. 942.—20. Bills of exchange, &c. may be laid as warrants or orders for the payment of money, 1 Leach, 94. 2 East, P. C. c. 19. s. 38. p. 940.; s. 40. p. 944. 1 Leach, 226. 2 East, P. C. c. 19. s. 40. p. 944.; s. 39. p. 942.—21. The warrant or order must purport to have been made by one having authority to command payment, 2 East, P. C. c. 19. s. 37. p. 936.—22. A note to a shop-keeper in the name of an overseer of the poor was holden not to be within the statute, Post. 119. 2 East, P. C. c. 19. s. 37. p. 936.—23. A note to a tradesman requesting him to let the bearer have certain goods, is not within the statute, 1 Leach, 114. 2 East, P. C. c. 19. s. 37. p. 937.—24. A forged order for the purpose of obtaining a reward for the apprehension of a vagrant, was holden not within the statute; it being deficient in the requisites prescribed by the statute which authorises it to be made, Rushworth's case, 2 Russell, 1642.—25. It was held, that it ought to have appeared in the indictment, that the person whose name was subscribed to the order had no authority to make it, 2 East, P. C. c. 19. s. 37. p. 938. 2 Leach, 54.—26. The order must be directed to the holder or person interested in or having possession of the goods, Ibid.—27. But if the order purport to be one which the party has a right to make, it will be within the act, 2 East, P. C. c. 19. s. 38. p. 940.—28. A forged order on a banker was holden to be within the statute, though made in a fictitious name, as it purported to be made by a person who kept cash with such banker, 1 Leach, 94. 2 East, P. C. c. 19. s. 38. p. 940, 941.—29. As to the specification of the goods in the order, see for an order in the following form, 'please to deliver my goods to the bearer,' 1 Leach, 53. 2 East, P. C. c. 19. s. 39. p. 941.—30. An order not available by reason of some collateral objection, may yet be the subject of forgery, 2 East, P. C. c. 19. s. 39. p. 942. 2 Leach, 883.—31. Besides the foregoing statutes there are two others; the one 41 G. 3. c. 57. which enacts, "that if any person, or persons in any part of the united kingdom of Great Britain and Ireland, shall make or cause or procure to be made, or knowingly aid or assist in the making or using of, any frame, mould, or part of any frame or mould, for the making of paper, with the name or firm appearing visible in the substance of the paper, of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, without an authority in writing for that purpose from such person or persons, body corporate, or other banking company or partnership, or from some person, or persons duly authorized to give such authority; or shall manufacture, make, vend, expose to sale, publish or dispose of, or cause or procure to be manufactured, made, vend, or exposed to sale, published or disposed of, any paper having the name or firm appearing visible in the substance of the paper of any person or persons, body corporate, or other banking company or partnership whatsoever, carrying on the business of bankers; or if any person or persons, without such authority, shall, by any act, means, mystery, or contrivance, cause or procure, or shall knowingly aid or assist in causing or procuring the name or firm of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, to appear visible in the substance of the paper, whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law, shall, for the first offence, be imprisoned for any time not exceeding two years, nor less than six months; and for the second offence be transported to any of his majesty's colonies or plantations for the term of seven years." The second section of this statute enacts, "that if any person, or persons, in any part of the united kingdom of Great Britain and Ireland, shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, promissory note, or other note for the payment of money, or part of any bill of exchange, promissory note, or other note for the payment of money, purporting to be the bill of exchange, promissory note, or other note for the payment of money, of any person or persons, body corporate, banking company or partnership, carrying on the business of bankers, without an authority in writing for that

that purpose, from such person or persons, body corporate, banking company or partnership, or some person or persons duly authorised to give such authority; or shall use any such plate so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other device for the making or printing any such bill of exchange, promissory note, or other note for the payment of money, without such authority in writing as aforesaid; or if any person or persons shall, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate or device, or shall, without such authority as aforesaid, knowingly and wilfully publish, dispose of, or put away any such bill of exchange, promissory note, or other note for the payment of money, or part of such bill of exchange, promissory note, or other note for the payment of money; every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall, for the first offence, be imprisoned for any time not exceeding two years nor less than six months; and for the second offence be transported to any of his majesty's colonies or plantations for the term of seven years." The third section of the statute enacts, "that if any person or persons in any part of the united kingdom of Great Britain and Ireland, shall engrave, cut, or etch, or by any other means or contrivance trace with a hair-stroke or other mode of delineation, on any plate whatsoever, any of the subscriptions subjoined to any bill of exchange, promissory note or other note for the payment of money, of any person or persons, body corporate, or other banking company or partnership carrying on the business of bankers, to be payable to bearer on demand, or shall have in his, her, or their possession any plate with the hair-strokes or other delineation of any subscription traced thereon, subjoined to any bill of exchange, promissory note, or other note for the payment of money, purporting to be the bill of exchange and promissory note, or other note for the payment of money, of any person or persons, body corporate, or other banking company or partnership carrying on the business of bankers, and to be payable to the bearer on demand, and shall not be able to prove that such plate came into his, her, or their possession without his, her, or their knowledge or consent, every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall, for the first offence be imprisoned for any time not exceeding three years nor less than twelve months, and for the second offence be transported to any of his majesty's colonies or plantations for the term of seven years." The other, 43 G. 3. c. 139. which enacts, "that no person shall, within any part of the united kingdom of Great Britain and Ireland, engrave, cut, etch, scrape, or by any other means or device, make or knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, or any promissory note or undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order of any foreign prince, state, or country, or of any minister or officer entrusted by or employed in the service of any foreign prince, state or country, or of any person or company of persons, resident or being in any foreign state or country, or of any body corporate and politic, or body in the nature of a body corporate and politic, or constituted by any foreign prince or state, or any part of any such bill of exchange, promissory note, undertaking, or order, without an authority in writing for that purpose from such foreign prince, state, or country, minister or officer, person, company of persons, or body corporate and politic, or body in the nature of a body corporate and politic, or from some person duly authorised to give such authority, or shall within any part of the said united kingdom, without such authority, as aforesaid, by means of any such plate, or by any other device or means, make or print any such foreign bill of exchange, promissory note, undertaking, or order for the payment of money, or any part thereof, or knowingly, wilfully, and without lawful excuse, (the proof whereof shall lie upon the party accused), have in his or her custody any such plate or device, or any impression taken from the same; and if any person shall offend in any of the cases aforesaid, he shall be deemed and taken to be guilty of a misdemeanor and breach of the peace; and, being thereof convicted according to law, shall be liable for the first offence to be imprisoned for any time not exceeding six months, or to be fined, or to be publicly or privately whipped, or to suffer one or more of the said punishments, and for the second offence to be transported to any of his majesty's colonies or plantations for the term of fourteen years." It then provides that nothing contained in the act shall extend in any manner whatsoever to repeal or alter any law or statute at that time in force for the prevention or punishment of the crime of forgery within any part of the united kingdom.



## (B) Remedy for Forgery.

### (B 1.) By action.

An action for deceit lies by the common law against a forger of false deeds: as, if he forges a statute, obligation, or other specialty in the name of B. F. N. B. 96. B. (p) Vide Action upon the Case for Deceit, (A 2.)

Or the grant of a presentation by an abbot under the seal of his convent. F. N. B. 96. C.

Or letters of resignation, by a parson, of his benefice. F. N. B. 99 K.

So, by the st. 5 El. 14., the party grieved may sue his action of forger of false deeds on that statute by original, or by bill in B. R., or in the exchequer.

And in such action of forger, &c. shall have the same process as in trespass.

But in such action, the plaintiff's release shall discharge only his costs and damages, and the court may proceed to judgment and execution for the other penalties.

Vide Pleader, (2 S. 26.)

### (B 2.) By indictment.

So he may be indicted (q) for forgery by the common law. (r) Vide Indictment, (D — G 3. 5.)

And by the st. 5 El. 14. The justices of oyer and terminer, and justices of assise, in their general sessions, &c. may hear and determine the said offences, and award process, &c. as they may against any indicted before them of trespass.

But justices of the peace have no jurisdiction of forgery upon the st. 5 El. 14. Crompt. Just. 56. b. R. Cro. El. 87. (s)

Nor, of felony for the second offence; for they have not the record of the first conviction before them. Crompt. J. 56. b.

(p) Vide margin. Ibid.

(q) 1. The trial of forgery must be had in the county where the offence is committed, as the indictment can only be preferred in that county. And as it seldom happens that direct proof can be given of the very act of forgery, difficulties have sometimes occurred, in cases where there has been no offence of uttering by the prisoner, as to what shall be deemed sufficient evidence of the fact of forging within the county laid. 2 Russell, 1498.—2. The bare fact of a forged note being uttered in a particular county by one prisoner, is no evidence of the forgery having been committed in that county by another prisoner; though an accomplice of the utterer. 2 Leach, 775. 2 East, P. C. c. 19. s. 49. p. 963.; s. 61. p. 992.—3. And the finding a forged note in the custody of a person, is not evidence that it was forged in the county where it was found; especially in a case where from the circumstances there is a presumption that it was forged in another county. 2 Leach, 988. 2 N. R. 87.

(r) It is in the election of the party in the case of forging deeds, to lay the indictment either at common law, or upon the st. 5 Eliz. c. 14.

(s) 1. Cro. Eliz. 601. 697.—2. Lord Kenyon, in speaking of the general jurisdiction of the quarter sessions, after deciding, that the offence of soliciting a servant to steal his master's goods, is cognizable by that jurisdiction, as falling within that class of offences, which, being violations of the law of the land, having a tendency, as it is said, to a breach of the peace, proceeds thus: 'to this general rule there are indeed two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law.' 2 East, 18.





statute, though it be improper Latin: as, if it says, *quod super caput suum proprium fabricavit*; for it is pursuant to the words of the statute.

R. 2 Lev. 221. (u)

So, if it alleged, that A. seized of Jaywick, B. *con intentione ad molestand* falso fabricavit factum per quod B. conveyavit Jaywick-Park, &c. for though there be a variance in the name of the lands, yet the intent to disturb A. is the fact, which the jury ought to find, and is sufficiently alleged. R. Fg. 57. 261.

But if an indictment says, that such a one *contrafecit scriptum contra-natura scriptum obligatorium*, it will be bad; for it is repugnant, (x) and impossible. R. 3 Mod. 104. (y)

## FORM.

Vide AMENDMENT, (D 5.—L 1.—W—X.)

were passed to obviate the objection, that the word "person" in the st. 2 G. 2. c. 25. and 2 G. 2. c. 28. (relating to the forgery of deeds, wills, bonds, bills, &c.) did not extend to the aggregate members of a corporation. 1 Leach, 180. 2 East, P. C. c. 19. s. 58. p. 988. 3 Russell, 1495.

(u) 1. Where the indictment is upon a statute, the offence must be described as in the words of the statute. 2 East, P. C. c. 19. s. 58. p. 985.—2. But an indictment for forging a stamp on foreign muslins, which stated 'and in respect of,' foreign muslin, was holden good in the clause imposing the duty were, 'for and others 'on;' and in others 'upon.' 2 East, P. C. 3. An indictment on the st. 2 G. 2. c. 25., which enjoiningly alter and cause to be altered a certain bill or ing, and adding, a cypher Q to the letter and though the words of the statute are, 'if any person counterfeit, and the word 'alter' is not used in s. 58; p. 986. 988.

(x) 1. It is said, that a superfluous description is not necessary. 2 East, P. C. c. 19. s. 58. p. 985.—2. And as to the statute, 2 G. 2. c. 25. for forging 'a bond,' it is objected, that as the statute uses the term 'bond' the indictment ought to have described the forgery of the one or the other; that it should have been as a *writing obligatory*, as it had neither a *seal* nor *person* attached to it, and that although a bond were a writing obligatory, yet the converse did not hold; and by the opinion of the judges the indictment was holden good. 2 East, P. C. c. 19. s. 58. p. 985.—3. With respect to the inference from this case, that a superfluous description does not appear to be objectionable, a learned writer says, that he is by no means satisfied that the term 'bond' is not properly applicable to an obligation without a condition, although, for the sake of distinction, it is more usually called a single bill, 6 Bv. Col. St. pt. 5. cl. xii. p. 581. referring to 2 Blk. Com. 340. 3 Russell, 1496.

(y) In a case where the prisoner was indicted for forging a will; and on his arraignment he pleaded *autrefois acquit*; upon which the plea was taken *ore tenus*, and recorded by the clerk of the arraigns, who replied to it, on the part of the crown, *not record*; in order to prove the plea, the record of a former acquittal of the prisoner was produced; but on comparing it with the present indictment, it appeared that the prisoner had been acquitted of uttering a forged will, beginning, 'James Gibson do hereby,' &c.; and the question therefore was, whether this record was legal evidence of the prisoner's having been acquitted of the same offence; after arguments by the prisoner's counsel, the court rejected the proof as insufficient. 1 Leach, 448. 3 Russell, 1497.

## FORMA PAUPERIS.

## (A) Suit in forma pauperis.

By the st. (a) 11 H. 7. 12. Every poor person having cause of action, or suit, shall have by the chancellor a writ original, or *subpoena*, without paying for sealing or writing the same. And the chancellor shall assign clerks to write, and counsel and attorney for the same, without reward taking.

So shall the justices of B. R., C. B., barons of exchequer, and all other justices in courts of record, where such suit shall be.

And therefore, in chancery, and every court of record, the plaintiff (b) having cause of suit, upon affidavit, (c) that he has not 5*l.* (d) above the matter in question (e) shall be admitted to sue *in forma pauperis*.

And by Ord. Cla. No counsel, attorney, &c. assigned, shall take fee, or agree for recompence, &c. on pain of censure by the court: nor refuse to prosecute or defend for such pauper. Vide Rules and Orders of Chancery. (f)

And by order 18th Nov. 20 Car. 2. No pauper writs shall pay fees for sealing. (g)

(a) 1. The doctrines contained in the greater part of the notes subsequent to the present, relate to suits *at law*; the present relates to suits *in equity*: and first, paupers are allowed to prosecute and defend their rights in chancery, without incurring the same measure of costs which falls upon suitors in general; and who are entitled to this privilege, not from any legislative provision, but from the humanity of the court itself. Newl. 206.—2. And, in the eye of this court, a pauper is a person who will swear that he is not worth 5*l.* after all his debts are paid, his wearing apparel, and the matter in question, if he is not in possession of it, only excepted. *Ibid.*—3. Which affidavit must be made by the pauper himself. 1 Dick. 136. 2 B. C. C. 272.—4. But if the party is in possession of the subject matter in dispute, and which is worth more than 5*l.* he cannot except it in his affidavit, and therefore will not be regarded as a pauper. 11 Ves. 49.—5. To sue or defend *in forma pauperis*, the course is to petition the master of the rolls, annexing the necessary affidavit, supported, if the petitioner is plaintiff, by counsel's certificate, that he has a just cause of suit. Harr. Ch. Pr. 390.—6. Whereupon he may obtain an order admitting him to sue or defend *in forma pauperis*, and assigning him counsel and a six clerk; which order the plaintiff may procure before or after bill filed; and, in the latter case, it is said, no certificate is necessary. Wy. Prac. Reg. 319. Newl. 207. Vide Harr. Ch. Prac. 390.—7. One ordered to be examined *pro interesse suo*, may prosecute and make out his right in this character. 2 Dick. 788.—8. But one cannot appeal *in forma pauperis*. 2 Dick. 504.—9. Nor can executor or administrator sue as such. 1 Dick. 156.—10. Nor can a next friend. 1 Ves. J. 410.

(b) The defendant, in a civil action, is never allowed to defend as a pauper. *Ibid.* Costs, 220. Barnes, 328.

(c) A party convicted of perjury, is competent to make affidavit to enable him to sue as a pauper. 1 B. & B. 562.

(d) In 1 Litt. P. R. 633, the sum is said to be ten pounds; but this seems to be a mistake.

(e) After all his debts are paid, except his wearing apparel. R. H. 3 & 4 Jac. 2. Reg. 1. a. K. B. Hul. Costs, 212. Tidd, 90.

(f) 1. 124, 125.—2. This privilege does not exempt the pauper from paying the clerk for the labour of writing. Harr. Ch. Pr. 391. Ord. Ch. 124, 125.—3. Nor does a person, by getting himself admitted to sue as a pauper, discharge himself of costs which he has already incurred. Mos. 68. 2 B. C. C. 272.

(g) If he obtain a verdict for more than 5*l.* the officers shall be paid their court fees, and for passing the record, &c. Tidd, 91.

So

So a woman, indicted by her husband for a misdemeanor, shall be admitted to defend *in formā pauperis*. Mod. Ca. 88.

So, by the st. 5 & 6 W. & M. 21. and 9 & 10 W. 3. 25. He shall be excused stamp-duties who is admitted to sue or defend *in formā pauperis*. (h)

So, by the st. 2 Geo. 2. 28. A person arrested on a *capias*, or information, relating to the customs, making affidavit before a judge, or a commissioner to take affidavits, that he is not worth 5*l.* beside his wearing apparel, if he petition to defend *in formā pauperis*, the judge in discretion may admit him so to do; and assign counsel, attorney, or clerk, who shall take no fee, or reward. (i)

But by the st. 23 H. 8. 15. A plaintiff admitted as pauper, if (k) nonsuit, &c. instead of paying costs, shall suffer such other punishment, as the justices of the court where the suit depends shall think reasonable.

So, if he be admitted, though he was dispaupered before nonsuit. R. 1 Rol. 88.

And a pauper, being nonsuited, may have corporal punishment. 1 Rol. 88. (l)

And the usual course is, that costs are taxed, and if he does not pay, he shall be whipped; except where the court in discretion, (as it may,) directs that he shall be excused from both. 1 Sid. 261. Sal. 506. (l)

By Rule in the Exchequer 47, a petitioner to be admitted *in formā pauperis* shall bring a certificate under counsel's hand, that he hath probable cause of suit, and take the usual oath, &c. Vide Rules and Orders in Exchequer.

So, by a rule in B. R. H. 3 & 4 Jac. 2. *Nullus admittatur in formā pauperis extra curiam*. (m)

So, by order in the exchequer, 1717, no pauper is to be admitted but by consent of the clerk and counsel assigned to be standing counsel;

(A) Vide etiam 44 G. 3. c. 98. 1. 19. 48 G. 3. c. 149. Sched. Part II. s. V.

(i) 1. Though a pauper be not liable to pay costs, yet he is entitled to receive them from his adversary. 1 B. & P. 59.—2. And, in regard to equity, there are cases where the court has ordered his costs to be taxed as the costs of a suitor not in *formā pauperis*. Wallop v. Walburton, Newl. 209.—3. As where a plea or demurrer to a bill by a pauper is over ruled. 1 Eq. Ca. Abr. 125.—4. However in another and subsequent case, where the pauper, being plaintiff, succeeded, the court would not allow him to receive more than he and his solicitor were out of pocket. Pre. Ch. 219, 220. 2 Eq. Ca. Abr. 633.—5. And in another case, where the defendant being a pauper, the bill was dismissed, for want of prosecution, with costs, the court adhered to the same rule.—6. In a late case Lord Eldon, after considering the different authorities, appears to have been of opinion, that there is no general rule upon this subject, but that the court has a discretion in each case; and he decided, that it was fit, that where an answer to a pauper's bill was reported impertinent, the costs of expunging the impertinence should be taxed as *dioc* costs, but when taxed, to be paid into court to wait the event. 16 Ves. 160. 232. Newl. 210.—7. He may have a trial at bar. 2 Salk. 651. 6 Mod. 125. Sed vide 2 Lil. Pr. Reg. 608.

(k) A pauper is liable to be committed for filing an improper bill. 4 Ves. 630.

(l) 1. 1 Sid. 261. 2 Salk. 506. 7 Mod. 114.—2. But this punishment does not appear to have been ever inflicted. Ibid.

(m) 1. But now if a plaintiff will make affidavit that he is not worth five pounds, &c. he may, upon petition to the chief justice, supported in K. B., by counsel's opinion of his cause of action, be admitted out of court. Tidd, 90. R. H. 3 & 4 Jac. 2 Reg. 1. 2. K. B.—2. Which admission may be either at the commencement of the suit, or afterwards *pendente lite*. Say, Costs, 90. 3 Wils. 24.

and

and if admitted after commencement of the suit, the pauper to give security to pay the costs before admittance. (n)

So, if a pauper contracts for the benefit of the suit, he shall be dismissed, and never afterwards retained. Per Ord. Cla. Vide Rules and Orders of Chancery. (o)

So, if he gives, or agrees to give a fee or recompence; he shall be dispaupered, and never afterwards admitted. Ord. Cla. Vide Rules and Orders of Chancery. (p)

So, if he gives notice of trial, and does not proceed. (q) Sal 506. (r)

So, if he has an estate in possession, though it be mortgaged above the value. Per Holt, 2 J. cont. Sal. 507. (s)

So, by Ord. Cla. process of contempt at a pauper's suit shall not be sent to the great seal, till signed by the six clerk, who shall take care that it be not vexatious. Vide Rules and Orders of Chancery. (t)

## FORMEDON.

Vide PLEADER, (3 E. 1., &c.)

## FOWLING.

Vide JUSTICES of PEACE, (B 45, 46.)

## FOWLS.

Vide DISMES, (H 9.)

(n) 1. Supra, citing Mos. 68. 2 B.C.C. 272.—2. If a pauper is guilty of scandal in his bill or answer, he shall pay the costs of having the same expunged. Toth. 237. 16 Ves. 262.—3. Nor can he dismiss his bill without payment of costs. 3 B.C.C. 87. Wy. Pr. Reg. 321.

(o) 1. 124.

(p) Ibid.

(q) In C.B. a pauper must pay costs for not proceeding to trial pursuant to notice. Pr. Reg. 405. Ca. Pr. C.P. 47.

(r) 1. Or be otherwise guilty of improper conduct. 2 Lil. P.R. 633. 2 Salk. 506. 1 Str. 420. 2 Str. 963. 1122. 3 Wils. 24. 1 B. & P. 40. 6 East, 505. 2 Smith, 676.—2. But until this be done, they will not make any rule about costs. 2 Str. 878. 963. 3 Wils. 24. 1 B. & P. 40. 6 East, 505. 2 Smith, 676. Vide Ca. Pr. C. P. 47. Pr. Reg. 405. 1 Str. 420.—3. And unless the pauper's conduct appear to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one for the same cause. 2 Str. 878. 1121. 3 Wils. 24. Hutton v. Colboys. Tidd, 92. Vide 2 T.R. 511.—4. Nor, if the pauper should succeed in the second action, will they deduct the costs of the first out of those recovered in the second. 2 Str. 878.

(s) 1. So where he is in possession, and receives the rents of the lands in question, although the defendant has a verdict at law, and may, thereupon, take a writ of possession. Harr. Ch. Pr. 290.—2. So where he comes to proceed to trial pursuant to notice. 16 Ves. 408.—3. But a charitable subscription raised for him, to enable him to carry on the suit, is not a ground for dispaupering him. 16 Ves. 407.—4. Nor improper and vexatious conduct by him, in a former suit against the same party. 16 Ves. 410. 1 B. & P. 564.—5. The court, however, are tender upon the subject of dispaupering. 10 Ves. 511.

(t) Notice of motion by a party in *forma pauperis*, must be signed by the clerk in court. 17 Ves. 387.

FRAN-



and it admitted after common law security to pay the costs of the writ of vires.

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**(C) Allowed in exec. p. [320.]**

**(D) County Palatine.**

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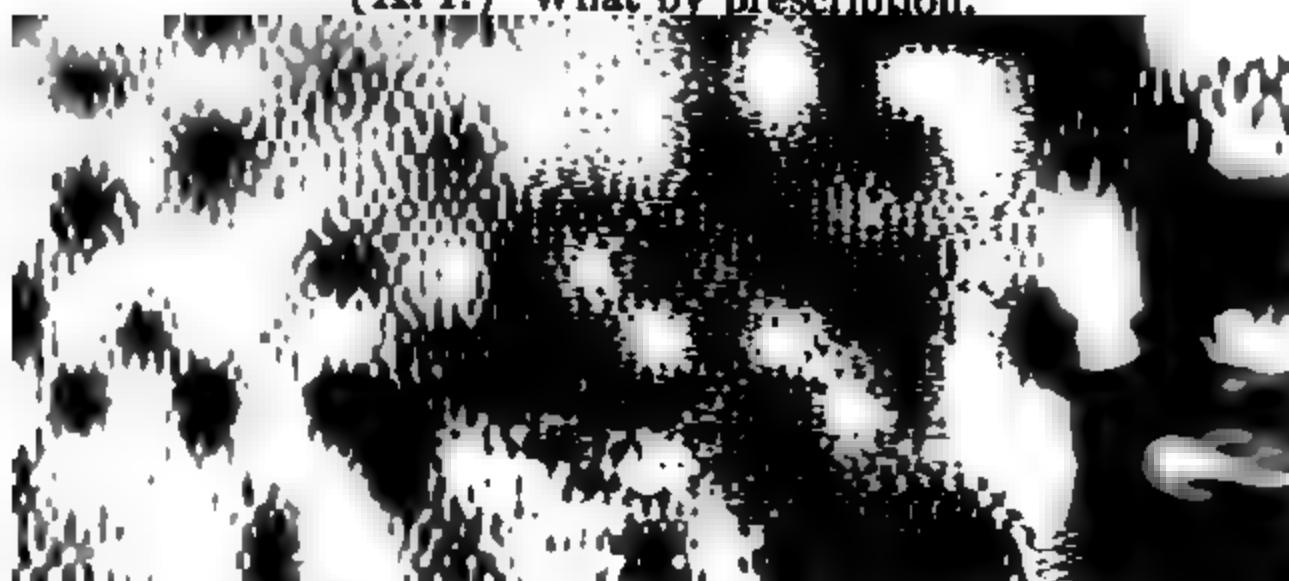
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tion of the corporation. p. [376.]

### (A) How they may be claimed.

- (A. 1.) What by prescription.



(c) Any thing which may arise by grant, and have, at the same time, a perpetual dura-  
tion, may be claimed by prescription.

Any

Any thing which may be claimed without matter of record, may be claimed by prescription. Co. L. 114.

As, a privilege to be a corporation. Co. L. 114. Vide post, (F. 4.)

Tenere placita. Co. L. 114. b. 2 Rol. 270. l. 52. Vide Courts, (P 1.)

To have treasure-trove. Co. L. 114. b. Vide Waife, (G.) (d).

Waifes (e), and estrays (f). 5 Co. 109. b. Co. L. 114. b. Vide Waife, (A. 1, 2. — F.)

Wreck of the sea. Co. L. 114. b. Vide Wreck. (g)

A court

(d) 1. Treasure trove is where any money is found hid in the earth, and no one knows to whom it belongs; in which case it becomes the property of the lord of the manor, having this franchise. But if the owner may any ways be known, it belongs to him. As, to the place, where the finding is; it seems not material, whether it be hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or elsewhere. 3 Inst. 577. 3 Inst. 132. 3 Cruise, 270. — 2. Nothing is said to be treasure trove but gold and silver; and it is the duty of every person who finds any treasure of this kind, to make it known to the coroners of the county, for the concealing of it is punishable by fine and imprisonment. Ibid. 3 Hawk. 67.

(e) 1. Which are goods that have been stolen, and waived, or left by the felon on his being pursued, for fear of apprehension. 3 Cruise, 266. 3 Rep. 109. — 2. Thus, if a felon, who is pursued, waives the goods, or, thinking that he is pursued, flies away, and leaves the goods behind him; the king's officer, or the bailiff of the lord of the manor who has the franchise of waifs, may seize the goods to the king's or the lord's use, and keep them; unless the owner make a fresh pursuit after the felon, and sue an appeal of robbery, within a year and a day, or give evidence against him, whereby he is attainted; in which case the owner shall have restitution of his goods so stolen and waived. Ibid. — 3. The reason that waifs are forfeited, and that the person from whom they were stolen shall lose his property in them, is on account of his default in not making fresh suit to apprehend the felon; for which the law has imposed this penalty upon the owner. Ibid. — 4. Though waif is generally spoken of goods stolen, yet if a person had pursued with hue and cry as a felon, and he flies and leaves his own goods, these will be forfeited the same as goods stolen. But they are properly fugitive's goods, and not forfeited till it be found before the coroner, or otherwise by record, that he fled for the felony. 3 Cruise, 267. 3 Hawk. P. C. 480. — 5. If the thief had not the goods in his possession when he fled, there is no forfeiture; for if a felon steals goods, hides them, and afterwards flies, there is no forfeiture. So where he leaves stolen goods any where, with an intent to fetch them at another time, they are not waived. And in these cases, the owner may take his goods where he finds them. 3 Rep. 109. Cro. Eliz. 694.

(f) 1. An estray is a beast that is tame, found within a manor, owned by no one; in which case, if it be proclaimed according to law, at the two next market towns, on two market days, and is not claimed by the owner within a year and a day, it becomes the property of the lord of the manor, if entitled to this species of franchise. 3 Cruise, 262. — 2. If the beast strays into another manor, within the year after it has been an estray, the first lord cannot retake it; for till the claimations made, he has not acquired a property in it, of the second lord is good against him. Bro. Abr. 3 Cruise, 262. — 3. If the beast be not regularly proclaimed any time. And where a beast is proclaimed as the law within the year and day, he shall have it again, upon 372. — 4. If the beasts of an infant, *feme covert*, or *pe* stray, and are proclaimed according to law; If none claim, they shall be all bound, and become the property 3. If any animal belonging to the king strays into the he liable to forfeiture; for the grant of the king cannot then his prerogative, which is, to take the cattle of a *or* — 5. A beast estray is not to be used in any manner, as milk a cow. Cro. Jac. 148.

(g) 1. Wreck signifies such goods as, after a ship has been lost, are cast upon the land;

A court (letti (4) and other courts. Co. L. 114. b. Royal

land; for they are not wrecks as long as they remain at sea, within the jurisdiction of the admiralty. 5 Cruise, 267. 5 Rep. 106. — 2. And by the st. of Westminster the first, 3 Edw. 1. c. 4. it is enacted, that when a man, or any living creature, escapes alive out of a ship that is cast away, whereby the owner of the goods may be known, the ship or goods shall not be a wreck. — 3. If a ship be pursued by an enemy, and the mariners come ashore, leaving the ship empty, and she comes to land without any person in her; yet she is not a wreck, but shall be restored to the owners. 2 Inst. 167. — 4. By the common law, all wrecks belong to the king, in consequence of the dominion which he has over the seas; for being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of merchants. This is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who in shipwrecks approach the shore, by removing the temptations to inhumanity. Ibid. 3 Cruise, 268. — 5. This right, however, may, and often does, belong to lords of manors, having the franchise of wreck by grant from the crown, or by prescription. Cases and Opinions, 2 vol. 452. 5 Cruise, 268. — 6. The right to wreck is assigned by the statute of Westminster the first, which enacts, that where the ship or goods are deemed a wreck, they shall belong to the king, and be seized by the sheriff, coroner, or bailiff; and shall be delivered to them of the town, who shall answer before the justices of the wreck belonging to the king; and where wrecks belong to another than the king, he shall have it in like manner. 2 Inst. 166. — 7. By s. 2. of 33 G. 3. c. 87. no lord of any manor, or other person who may be entitled to, or claim to, be entitled to, wreck of the sea, or to any goods found jetsam, flotsam, or ligan, shall be entitled to appropriate such wreck or goods to his own use, or otherwise to dispose thereof, until he shall have caused a report thereof, in writing, to be given to the deputy vice-admiral of that part of the coast where the same shall be stranded, wrecked, or found, or to his agent, or if there shall be no such deputy vice-admiral, or agent, residing within fifty miles, then to the corporation of the Trinity-House, Deptford Strand, which report shall contain an accurate description of such wreck, &c., and of the place or places, and time or times of finding the same, and of any marks that may be thereon, and of such other particulars as may the better enable the owners thereof to recover the same, and also of the place or places where the same are deposited, and may be examined by any person claiming right thereto; nor until the expiration of a year and a day after the delivery of such notice; and the deputy vice-admiral or agent shall, within forty-eight hours after receiving such report, transmit a copy thereof to the secretary of said corporation, upon pain of forfeiting, for any neglect to transmit such account, 50*l.* to any person who will sue for the same; and the said secretary shall cause such account to be placed in some conspicuous situation, for the inspection of all persons. — 8. By s. 3. when any goods which shall be found or taken possession of by any lord of any manor, or person claiming to be entitled to wreck of the sea, &c. or his agent or servant, or by any vice-admiral, or his deputy or agent, or by any officer or other person acting under the authority of the 16 G. 3. c. 120. or 49 G. 3. c. 122, shall be of so perishable a nature, as to much damaged, that the same cannot be kept, then such goods shall and may, at the request of any of the persons concerned therein, or in the saving or preserving thereof, with the consent of some justice of the peace not interested in the same or in the saving thereof, and in the presence of such justice, be sold by public auction or private contract, as such justice may direct by writing under his hand, which writing shall contain an accurate account of the goods and any marks thereon, or other particulars belonging thereto, and of the times and places of the finding and intended sale thereof, and the money raised by such sale, after defraying the reasonable expenses of such sale, to be settled by such justice, shall be deposited with the lord of the manor or other person, or deputy vice-admiral, who would have received the custody of the goods, to abide the claim of all persons, in like manner as such goods would be subject if remaining unsold: provided that all persons required to transmit reports to the deputy vice-admiral of the finding of any goods, shall, in case of any such sale, (like-wise transmit to him an account of such sale and the proceeds thereof, and the said deputy vice-admiral shall forward such reports to the secretary of the Trinity-House, &c. within the like period, and subject to the like penalties for neglect therein, as in cases of any goods found and required to be reported under the said recited act and this act.

(4) Which is a court of record, having the same jurisdiction, within some particular precinct, which the sheriff's torn has in the county. It is not necessarily incident to a manor,

Royal fishes; as whales, sturgeons, &c. Co. L. 114. b. (1) A  
fairs, markets, &c. Co. L. 114. b.

Frank-foldage. Co. L. 114. b.

The custody of a gaol. Co. L. 114. b.

So a man (n) may take title to land by prescription. Co. L. 114. b. (A)

(A 2.) What not.

But franchises and liberties, which cannot be seized before the cause  
of forfeiture appears upon record, cannot be claimed by prescription.

Co. L. 114. 2 Rol. 270. l. 20. 5 Co. 109. b.

As, *bona et catalla proditorum, felonum, felonum de se, fugitivorum, et  
atlagatorum, vel in exigenda positorum, &c.* Co. L. 114. a. R. 5 Co. 109.

R. 9 Co. 24. b. Vide Waife, (B—C—D.)

Consuance of Pleas. Co. L. 114. a. Vide Courts, (P 2. &c.)

Deodands (m) Co. L. 114. a. Vide Waife, (E 1. 2.)

Privilege to have a sanctuary. Co. L. 114. a. (n)

To make a corporation, Co. L. 114. a. Vide post, (F 1. &c.)

To make a coroner, or conservator of the peace. Co. L. 114.

To have fines *pro licentia concordandi.* Jon. 271.

But a man may claim these privileges indirectly by prescription (o);  
for he may claim a county palatine by prescription, to which *jure regali*  
belong. Co. L. 114. b. Vide post, (D 1. &c.)

## (B) Confirmed.

Upon prayer of the commons 21 Ed. 3. to the king to restrain the  
granting of franchises, it was answered, that they shall be granted by  
good advice. 2 Rol. 203. l. 30. (p)

a shambly like a court baron; but is derived from the sheriff's tourn, being a grant from  
the crown to certain lords of manors, for the ease of their tenants, that they might  
administer justice to them at home. 2 Cruise, 268. 5 Barr. 1889.

(a) 1. When either thrown on shore, or caught near the coast. — 2. This right is  
declared by the st. 17 Edw. 2. c. 11, *de prerogative regis.*

(k) 1. A franchise may be vested in either natural persons, or bodies politic; in one  
man, or in many. 2 Blk. Com. 47. — 2. But the same identical franchise that has  
before been granted to one, cannot be bestowed upon another, for that would prejudice  
the former grant. Ibid. 2 Rol. Abr. 191. Keilw. 196.

(l) It should seem, that land cannot be claimed by prescription, that is to say, the  
owner cannot entitle himself to it by pleading, that himself and his ancestors have im-  
memorially exercised a dominion over such a close by continual actupancy, because this  
is no other than asserting an absolute ownership therein, in which case the law de-  
signates his right a seisin in fee, and by that title must it be claimed.

(m) 1. By which are to be understood, either animals, or inanimate things, which  
occasion the death of a human being; and these are forfeited to the king. 2 Chit.  
Piering. 155. — 2. The superstitions of former times designed them to be used as an  
expiation for the soul of the deceased, and in later times they were to be applied by  
his majesty's almoner to pious uses. 3 Inst. 57. 5 Rep. 120. b. 1 Com. 299. 4 Chit.  
Piering. 155. — 3. And the original of deodand is to be traced to that animal-sent-  
ence which nature, for the wisest purposes, exacts without stint every infringement of  
the security of our fellow-creatures.

(n) The immunity of these privileged places was very much abridged by st. 27 H. 8.  
c. 12. and now, by st. 21 Jac. 1. c. 28, all privilege of sanctuary and  
abjuration is taken away and abolished. 4 Com. 333.

(o) Twenty years uninterrupted enjoyment of a franchise is presumptive evidence in  
favour of the claimant. 1 Chit. G. L. 22. cites 6 East, 215. up to East, 129. 3 East, 488.  
2 Inst. 156. a.

(p) Supra, (A 1.) in nota.

But



But by the st. *Magna Charta* 9 H. 3. 9 & 37. *Civitas Londinensis, et omnes alie civitates, burgi, et villæ habeant omnes libertates et liberas consuetudines suas.*

By the st. 34 Ed. 1. 4. *De Tallagio non concedendo, habeant ita libere, sicut aliquo tempore habuerint.*

And all liberties were afterwards confirmed by the st. 1 Ed. 3. 9. 14 Ed. 3. 1., the st. 1 H. 4. 1. 2 H. 4. 1. 7 H. 4. 1. 9 H. 4. 1. 13 H. 4. 1. the st. 3 H. 5., st. 2 Ch. 1., the st. 2 H. 6. 1.

### (C) Allowed in eyre.

Franchises, which do not lie in prescription, but are only allowable by charter, if the grant was before time of memory, viz. before the time of king R. 1., may be claimed by charter of confirmation, or allowance in eyre, B. R. C. B. or exchequer, without shewing the original grant. 2 Inst. 281. 9 Co. 28. a. 2 Rol. 201. l. 5. 10.

And without such confirmation, or allowance, they cannot be claimed. 2 Rol. 200. l. 40, 45. 1 Rol. 112. Jon. 284, 289.

So a grant of discharge, or exemption, before time of memory, shall be of no effect, without a confirmation or allowance; though it has never since been charged. 2 Rol. 200. l. 50.

An allowance in eyre is peremptory to the king. 2 Rol. 201. l. 20.

Not in B. R. &c. if the grant afterwards appears to be illegal. 2 Rol. 201. l. 23. (g)

An antient charter, if the words are general, or obscure, shall be construed according to antient allowance. 2 Inst. 282. 9 Co. 28. a.

Or according to the import of the words when the charter was made, and subsequent usage. 2 Inst. 282.

If a charter of liberties pleaded before justices in eyre, or of the forest, be delayed to be allowed; a writ lies *de libertatibus allocandis*. F. N. B. 229. B.

And it may be sued by a corporation, or by a single person. F. N. B. 230.

By the st. 3 (or 3 & 4) Ed. 6. 4. and 18 El. 6. If a charter be lost, shewing an exemplification or *constat* of the roll, is sufficient. 2 Inst. 282.

But if the charter be within time of memory, there needs no confirmation, or allowance. 9 Co. 28. a.

So a thing which may be claimed by prescription needs not any confirmation or allowance. Cont. 2 Inst. 281. Acc. 9 Co. 28. a. Strata Marc. Kit. 30. b.

### (D) County Palatine.

#### (D 1.) What shall be.

The highest franchise is a county palatine.

A county palatine is so called à *palatio regis*, because the count has *jura regalia* within his county as fully as the king himself, (r) from

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(g) Allowance in eyre is not conclusive evidence against third persons; the true way of pleading it is to allege immemorial usage, and to produce also the allowance in B. R., or in eyre. 2 Wils. 25.

(r) '*Regalem potestatem in omnibus.*' Bract. l. 3. c. 8. s. 4.

whom all justice, honour, dignity, franchises, and privileges were at first derived. 4 Inst. 204. Dav. 60.

And the county is made a county palatine; not the person, a count palatine. 4 Inst. 205.

It may be by prescription, or by parliament.

So the king may create a county palatine. Dav. 61.

In England, Chester, Durham, and Lancaster, are counties palatine. (s) Dav. 61. b. Of which, Vide post, (D 3, 4, 5, 6, 7.)

In Ireland three counties palatine were created *temp.* H. 2. (1.) The province of Leinster, granted to Earl Strongbow, which afterwards descended to five daughters, who, upon partition, had each a county by itself, which was a county palatine. Dav. 61. b. (2.) The province of Meth. (3.) The province of Ulster. Dav. 61. b.

### (D 2.) The dignity.

The authority of him, who had a county palatine, was as full as the authority of the king himself, within his county palatine. 4 Inst. 205.

And consisted in a royal seignior, and royal jurisdiction. Dav. 62. a.

In a county palatine, the justices in eyre, of assize, of gaol-delivery, of the peace, &c. were made by commission under seal of the count palatine, 4 Inst. 205.; till by the st. 27 H. 8. 24. the power was resumed, and recontinued to the king.

All original and judicial writs, and all indictments there for treason, or felony, were in his name, till the st. 27 H. 8. 24. enacted, that they should be in the name of the king, and teste'd in the name of the count. 4 Inst. 205. (t)

And, till the same statute, an indictment ought to be *contra pacem* of the count, and now *contra pacem regis*. 4 Inst. 205. (u)

So, till the same statute, the count palatine might pardon treason, felony, &c. 4 Inst. 205.

So the count palatine might make a tenure *in capite*, by grand serjeanty, &c. Dav. 62. b.

And barons within the same county. 4 Inst. 211. Dav. 62. b.

### (D 3.) The county palatine of Lancaster.

The county palatine of Lancaster was erected by act of parliament, 50 Ed. 3. and granted to John Duke of Lancaster, his son, for life; *et*

(s) These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feudal kingdoms in Europe) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon enemies' countries, Wales and Scotland, in order that the owners, being encouraged by so large an authority, might be the more watchful in its defence; and that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemies' incursions. And upon this account also, there were formerly two other counties palatine, Pembrokehire and Hexhamshire, the latter now united with Northumberland; but these were abolished by parliament, the former in 27 H. 8. the latter in 14 Eliz. 1 Com. 117, 118:

(t) All forfeitures for treason by the common law accrue to them. 4 Inst. 205.

(u) And indeed, by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried; in a court leet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the sheriff's court or tourn, *contra pacem vicescomitis*. Seld. in Hengham, Magn. C. 2. 1 Com. 117.

*quod habeat cancellariam suam, ac brevia sua sub sigillo suo, deputando justiciarios suos tam ad placita coronæ, quam alia placita quæcunque ad communem legem; ac cognitionem, et executionem, &c. per brevia et ministros suos faciend'*; et quæcunque al' libertates ac jura regalia ad comitatum palatinum pertinent', adeo libere sicut comes Cestrie, &c. 4 Inst. 204. Dav. 62. 1 Vent. 157. (x)

And, therefore, the King shall have the same prerogative, where he is seised in right of the duchy of Lancaster, as where he is seised in right of the crown. Cro. EL 240.

But King H. 4. by charter in parliament directed, that all possessions of the duchy should remain as before. Pl. Com. 214.

And by the st. 1 Ed. 4. all possessions, which King H. 6. had the 3d of March preceding, are vested in and annexed to the crown, as forfeited for high treason, and by the same act are created to be the dutchy of Lancaster, and the county of Lancaster is made a county palatine, and parcel of the said dutchy; and the King shall have a seal, chancellor, and other officers for the county palatine, and others for the dutchy, and they shall be managed separately from other possessions of the King. Pl. Com. 219.

By the st. 27 H. 8. 11. S. 6. all leases of the king's manors, lands, &c. in the county palatine of Lancaster, or of the dutchy of Lancaster out of the county palatine, &c. shall pass under the seals of the dutchy of Lancaster, or of the county palatine, as heretofore used. Vide Patent, (C 4.) (y)

So, by the St. 27 H. 8. 24. S. 5. justices of assize, gaol-delivery, and peace, made by the king in the county palatine of Lancaster, shall be by commission under the king's usual seal of Lancaster.

By the st. 37 H. 8. 19. fines of lands in the county palatine of Lancaster, before justices of assize at Lancaster, shall be of equal force as fines in C. B.

And fines and recoveries ought to be levied there, of lands within the county palatine, and not at Westminster. 4 Inst. 205.

And therefore, justices of assize, gaol-delivery, and the peace, are always assigned by the king for the county palatine of Lancaster, by commission under the seal of the county palatine. 4 Inst. 205.

So the king has a court of equity, for matters of equity arising within the county palatine of Lancaster. 2 Lev. 24. And this was allowed by the st. 50 Ed. 3.

So the dutchy court at Westminster (z) may examine matters of equity, arising

(x) 1. Plowd. 215.—2. It does not appear, however, that this county palatine was erected by any statute in this reign: Edward, son of Henry III., was Duke of Lancaster; and it is said to have been a county palatine time out of mind. Crompt. Juris. 137. 2 Bac. Abr. 514.

(y) The certificate of the auditor of the duchy of Lancaster, is sufficient evidence of the enrolment of a duchy lease. Dougl. 56.

(z) 1. The proceedings of this court are as in a court of chancery for lands, &c. within the survey of the court by English bill, &c. and decree, and the process the same as in chancery; but it is not a mixed court as the chancery of England is, partly of the common law, and partly of equity. 4 Inst. 206. 2 Bac. Abr. 514.—2. It was granted by patent, that this court might make ordinances for the hospital of W. how they

arising out of the county palatine of Lancaster, within the dutchy of Lancaster. 2 Lev. 24. (a)

So, by usage, since the time of H. 5. for matters of equity in the county palatine of Lancaster. Semb. 2 Lev. 24.

The process in the (b) dutchy-court, shall be by privy-seal, attachment, &c. as in chancery. 4 Inst. 206.

The officers there are the chancellor, attorney, receiver-general, clerk, auditors, surveyors, messenger. 4 Inst. 206. (c)

And four council assistants and council to the court. 4 Inst. 206.

But lands held of the dutchy are not, without more, within the county palatine. Semb. Skin. 43.

#### (D 4.) The county palatine of Chester.

The county palatine of Chester is by prescription. 4 Inst. 211. Dav. 62. 1 Vent. 157.

Hugh Lupus had the county of Chester granted to him by William the Conqueror, *tenendum sibi et hæredibus ita libere ad gladium, sicut ipse rex tenebat Angliam ad coronam*. 4 Inst. 211.

By this general grant, he had *jura regalia*, and a county palatine. 4 Inst. 211.

And the city of Chester, though a county of itself, is part of the county palatine. 4 Inst. 212.

But the bishoprick of Chester was held of the king, and the possessions not within the grant. 4 Inst. 211.

#### (D 5.) The chamberlain.

In the county palatine of Chester, the chamberlain of Chester has a

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they *se gererent, conversarentur et eligerent*, and this patent was confirmed by the st. 14 Eliz.; yet it was resolved, that the court hereby hath no power to determine the right of the possessions; and the hospital having exhibited a bill in this court, to avoid a lease by them made, of lands lying out of the duchy, a prohibition was granted. Rol. Rep. 42.—3. The duchy court cannot try the validity of letters patent, or other matter properly triable at law. Rol. Rep. 42. 252. 3 Bulst. 119. 12 Rep. 114.—4. By the st. of 16 C. 1. c. 10. reciting, that the proceedings, censures, and decrees of the court of star-chamber, were found an intolerable burthen to the subject, &c. it is enacted, that the court of star-chamber, and all its power, jurisdiction, and authority, shall be dissolved, and the like jurisdiction then used and exercised in the court of the duchy of Lancaster, &c. is repealed, revoked, and made void.—5. And whatever belongs to the jurisdiction of the duchy, may be determined in the exchequer. Hard. 171.—6. Or in the court of chancery. 1 Ch. Rep. 55.

(a) An appeal lies to the duchy court from a decree in the court of equity at Lancaster. 1 Vern. 442. 5 Ves. 722.

(b) 1. By st. 22 G. 2. c. 46. mesne process in any suit in court of (session of Chester) or common pleas of Lancaster, bearing teste in the preceding sessions, may be made returnable on the first Wednesday of any month in each of the two vacations, betwixt the sessions, or on the first day of sessions, and on those returnable in vacation in bailable actions, defendant shall put in special bail in eight days after the return, or sheriff shall assign bail bond; and on service of copy, defendant shall appear in eight days after return, or plaintiff may enter appearance, and proceed; and all such writs may be proceeded on as if they had been returnable at the preceding sessions.—2. *Testatum capias* is the process to be served on defendant, and not the chancellor's mandate. Barnes, 406.

(c) By st. 17 G. 2. c. 7. the chancellor of the duchy may appoint commissioners to take affidavits, to be used in the courts of the county palatine.

court of equity held at the exchequer there; and he is in the nature of a chancellor. 4 Inst. 211, 212.

Also he shall be a judge of matters at common law in the same county, as in the chancery at Westminster. 4 Inst. 211.

And he has a deputy, called the vice-chamberlain. 4 Inst. 211.

And all process to the county palatine shall be directed to the chamberlain, commanding him, that he command the sheriff to execute it. 2 Lev. 111. (d)

If an information be for a fact in the county of the city, there shall be a *mittimus* to the chamberlain, commanding that he send it to the mayor, and after trial, take it back, and remit it to the court. 2 Mod. Ca. 328.

#### (D 6.) The chief justice.

So within the county palatine of Chester, the chief justice of Chester has jurisdiction of all pleas of the crown, and common pleas. 4 Inst. 211.

So, before him, fines and recoveries may be suffered. 4 Inst. 211.

And by the st. 2 & 3 Ed. 6. 28. a fine before him, being proclaimed three several days, at three several sessions, shall be of the same effect as a fine at Westminster.

If error be of a fine in Chester, it shall be directed to the chief justice, *vel ejus locum tenenti*, and not to the chamberlain. Dy. 320. b.

So records of the courts of Westminster, for trial there, shall be transmitted to the justices of assize, not to the chamberlain. R. 2 Lev. 111.

So error to reverse judgments in Chester, shall be in a special manner. Dy. 345. b. 4 Inst. 214.

But this does not extend to error in fact. Dy. 345. b. 4 Inst. 214.

Nor to error upon a fine. 4 Inst. 214.

Or to reverse an outlawry. R. Sal. 500.

By the st. 1 H. 4. 18. if a person of the county of Chester commit felony, battery, or other trespass out of that county, and then flee into Chester, process shall go to the *exigend*, in the county where the offence was done, and then the outlawry shall be certified to the officers of the county of Chester, and the offender, and his lands there seized for the lord of Chester, saving to the king, year, day, and wast; and his lands elsewhere shall remain in the king.

So, by the st. 43 El. 15. a fine of lands in the county of the city of Chester, may be levied before the mayor of Chester, in the same manner as before the high justice of Chester; but error thereon lies before the chief justice of Chester.

And by the same stat. he may issue a *dedimus potestatem* to take fines, or to make attornies in a common recovery.

#### (D 7.) The county palatine of Durham.

So the county of Durham, being parcel of the bishoprick of Durham, is a county palatine by prescription. 4 Inst. 216. Dav. 62. b.

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(d) Vide supra, (D 5.) in notis.



And has its chancery, and justices. (e) Dav. 62. b. 1 Bul. 160. (f)

By the st. 27 H. 8. 24. s. 21. the bishop of Durham, and his chancellor, shall be justices of peace in the county palatine of Durham.

So he (g) has *jura regalia* by prescription, in all places between Tine and Teese. 1 Rol. 399. (h)

And he shall have the escheat of his tenant for treason, if the estate be not entailed, where there is a forfeiture by the st. H. 8. 1 Rol. 400.

And he shall prescribe for the goods of felons, or of felons of themselves. R. in a Quo W. 1 Rol. 390, 400. 2 Bul. 226.

And before the st. 27 H. 8. 24. he might pardon all treasons and felonies within his county. 1 Bul. 160.

And a recovery in C. B. for lands in the county of Durham shall be void. 1 Bul. 160.

So it is sufficient to prescribe for franchises not granted, by saying, that it is a county palatine, and has *jura regalia, et ratione inde* he claims such franchises. R. 2 Bul. 226, 227.

### (D 8.) Ely, &c.

Ely is called a county palatine by the st. 33 H. 8. 10. and the st. 5 El. 23.

The king 10 H. 1. erected the cathedral of Ely out of the monas-

(e) By st. 4 G. 3. c. 21., the chancellor and justices of the court of pleas may appoint commissioners to take affidavits.

(f) In the county palatine of Durham there is a court of chancery, which is a mixed court both of law and equity, the same as the chancery at Westminster. 4 Inst. 218.

(g) 1. Of the counties palatine, the county of Durham is now the only one remaining in the hands of a subject. 1 Com. 118. — 2. For the earldom of Chester, as Camden testifies, was united to the crown by Henry 3., and has ever since given title to the king's eldest son. Ibid. — 3. And the county palatine or duchy of Lancaster, was the property of Henry of Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from Richard 2., and assumed the title of Henry 4. But he was too prudent to suffer this to be united to the crown, lest if he lost one, he should lose the other also. For, as Plowden and Sir Edward Coke observe, 'he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured; for that, after the decease of Richard 2., the right of the crown was in the heir of Lionel Duke of Clarence, second son of Edward 3. John of Gaunt, father to this Henry 4., being but the fourth son.' And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the royal dignity, and thus they descended to his son and grandson Henry 5. and Henry 6., many new territories and privileges being annexed to the duchy by the former. Henry 6. being attainted in 1 Edward 4., this duchy was declared in parliament to have become forfeited to the crown, and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine, (which might otherwise have determined by the attainder,) and to make the same parcel of the duchy; and farther, to vest the whole in King Edward 4. and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. 7. another act was made, to resume such part of the duchy lands as had been dismembered from it in the reigns of Edw. 4. and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henries and Edward 4. or any of them had and held the same. 1 Com. 118, 119.

(h) 1. Rol. Abr. 546. 3 Bulst. 156. — 2. His jurisdiction extends as well to the manors of other men, as to the demesnes of the bishop. Rol. Rep. 397. 3 Bulst. 156.

tery there, and the bishoprick out of the abbey; and granted the county of Cambridge, before within the diocese of Lincoln, for his diocese. 4 Inst. 220.

To the bishop and his successors the king (i) granted *jura regalia* within the isle of Ely; by which grant, and by prescription founded thereon, the bishop has a royal jurisdiction before his justice *de placitis coronæ, et de communibus placitis*. 4 Inst. 220. (k)

But Ely is only a royal franchise, and not a county palatine. Carth. 109. (l)

And therefore, if there be an action in a court of Westminster, for a matter arising there (m); the defendant cannot plead to the jurisdiction of the court: but the bishop may demand conusance of the plea. R. Carth. 109. (n)

And an action there for lands in Ely is not void, as it would be in a county palatine. Carth. 109. (o)

So the county of Pembroke in Wales was a county palatine; but the jurisdiction is ousted by the st. 27 H. 8. 26. 4 Inst. 221.

So Hexham was claimed by the Archbishop of York as a county palatine; but 14 El. it was determined to be part, and within the same jurisdiction as the other part, of the county of Northumberland. 4 Inst. 222.

#### (D 9.) The jurisdiction of a county palatine.

A county palatine has jurisdiction of all pleas of lands and tenements lying within the county palatine, which ought to be determined there, and not elsewhere. R. 4 Inst. 212.

(i) The franchise is of much earlier date than the time of Henry 1. The bishoprick was founded by that prince in the tenth year of his reign, A. D. 1109., and immediately after the grant here alluded to was made. But the franchise itself may be traced back to the seventh century, and Henry's charter refers to preceding grants, and declares that the church of Ely shall *continue* to have the same privileges and liberties as it had *die quâ Edwardus vivus et mortuus fuit*. See Bentham's Ely, 46. Appendix 23. 2 Bac. Abr. 515.

(k) 1. The court of Ely is a court of superior jurisdiction, and hath cognizance of all transitory actions, though not arising within the jurisdiction. 1 Lev. 298. — 2. The justices of this court sit, as do those of Lancaster and Durham, under commissions of oyer and terminer, gaol-delivery, and the peace, under the great seal, but the patent to hold pleas at Ely is granted by the bishop to his chief justice, of whom the courts at Westminster take notice as the king's justice; the writ of error to remove a record out of this court, being directed *justiciario nostro*. Godb. 380. 2 Bac. Abr. 516. — 3. But the bishop not having a palatinate jurisdiction within the isle, though exercising *jura regalia* there, process out of the courts of Westminster into the isle must go in the first instance to the sheriff of Cambridgeshire, who thereupon issues his mandate to the bailiff of the franchise. If it go in the first instance to the bailiff it is error, and the bailiff is a trespasser if he execute it. 3 East, 128. 14 East, 289.

(l) 3 East, 128.

(m) 1. If one be bailiff of lands in A. and B., and B. be within the franchise of Ely, and A. not, the bailiffs cannot be charged in a joint action, for this would oust the franchise of its jurisdiction. 4 Inst. 221. — 2. But if an action that in its nature is joint, arise partly within and partly without the franchise, the franchise cannot claim conusance. 4 Inst. 220.

(n) 1. Salk. 183. — 2. Of the manner of demanding conusance, vide Sid. 283. Keb. 946. 948.

(o) The bishop of Ely exercises a jurisdiction over all causes, as well criminal as civil. 4 Inst. 220. 1 Com. 119.

So,

So, of contracts, and all matters and causes which arise within the county palatine. 4 Inst. 212. (p)

And therefore, if real actions for land within a county palatine, are brought in the courts at Westminster, it may be pleaded to the jurisdiction of the court; except in error, foreign plea, or voucher. 4 Inst. 212. Vide Abatement, (D 2.)

So, in personal actions, if the matter be alleged within a county palatine. 4 Inst. 213.

In debt upon a bond, &c. which appears by the date to be made in a county palatine. Sav. 35. (q)

So an inhabitant of a county palatine cannot be summoned out of it, except in case of treason, or error, by any writ or process. 4 Inst. 412.

So (r) process or writ used there ought to be under the seal of the county palatine. 4 Inst. 212. (s)

So an office, found upon a writ or commission for land there, if it be not out of the exchequer there, shall be void. 4 Inst. 213.

If there be judgment in a real action for land which lies in a county palatine, it is void, though there was no plea to the jurisdiction; for the court takes notice of every county, and county palatine. 2 Inst. 557.

But a county palatine shall not have jurisdiction, where the judge himself is a party. 4 Inst. 213. R. 12 Co. 114. 1 Rol. 246. (t)

So a transitory action may be alleged out of a county palatine, and may be brought in a court of Westminster, though the cause of action arose within the county palatine. 4 Inst. 213. R. 12 Co. 114. R. 1 Sid. 309. Sav. 35.

Though the party also resides in the county palatine. R. 1 Sid. 103. R. 2 Rol. 318. l. 15.

So, if the party lives (u) out of the county palatine, he may be sued for

(p) The courts palatinate are general courts for all the subjects of the palatinate, and not merely for causes arising within the palatinate; and therefore if a debtor goes from a foreign into a palatinate jurisdiction, his obligations go along with him as much as if he removed from one kingdom into another; and he may be sued there, though the cause of action arose not within such palatinate jurisdiction. Gilb. C.P. 189.

(q) B.R. will expect a return to a *latitat* into Durham, and will not determine as to jurisdiction on motion, but on claim of conusance or plea to the jurisdiction. Str. 1089. Andr. 191.

(r) The judges of assize who sit in counties palatine, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of England. 3 Com. 79.

(s) If a *latitat* issue out of the court of king's bench into a county palatine, the officer there must make out a mandate for its execution, else he will be attached. Andr. 191. 2 Str. 1089.

(t) Hence a man cannot sue in the chancery of Chester for a thing which in interest concerns the chancellor there, because he cannot be his own judge; he therefore may sue in the chancery of England, as otherwise there would be a failure of justice. Rol. Abr. 374. Rol. Rep. 246. 3 Bulst. 117. 12 Rep. 113. 4 Inst. 213.

(u) 1. If a murder is committed at Sandwich, and an appeal brought by original in B. R., directed to the sheriff of the county of Kent, and he brings in the defendant, who pleads that Sandwich is part of the Cinque-Ports, *ubi breve domini regis non currit*, &c. and demands judgment of the writ, this is a bad plea; for the defendant having done the murder within the Cinque Ports, and after flying out, if this pleading should be allowed, there would be a failure of justice; for the Cinque Ports cannot award pro-

for land or goods within it, at a court at Westminster. 4 Inst. 213. R. 12 Co. 114. (x)

So an ejectment may be in B. R. for lands there, when the defendant is *custod. mar'*. Dub. 1 Sid. 168. Ray. 81. Carth. 12.

So, if the action alleges the fact in a county palatine, after a plea in bar, the defendant shall not have advantage of it. R. Carth. 11.

Nor, if the defendant demurs to the declaration. R. Carth. 355. (y)

So (z) error lies in B. R. upon a judgment given in a county palatine. 4 Inst. 212. (a) Vide Pleader, (3 B. 3.) (b)

So, if a suit be against A. who lives in a county palatine, by the executors of B. upon an obligation, in C. B., upon which A. sues in the exchequer, which is a court of equity, in Chester, where one executor dwells, the other in London; he cannot serve process upon him in London. R. Hut. 59.

So a *feri facias* lies to a county palatine, upon a judgment in B. R. against him who dwells there. R. 1 Lev. 256.

So a suit in equity, in the duchy of Lancaster, ought to shew the lands in question to be within the jurisdiction. Eq. Ca. 95. (c)

(E) The

cess of outlawry, since that ought to be proclaimed in open county. Yelv. 12, 13. Cro. Eliz. 910. — 2. But if the defendant by his plea shews, that at the time of the murder supposed, and at all times after, he had been an inhabitant and commorant within the Cinque Ports, and so had given jurisdiction to the judges there, and shewed that they might have proceeded, &c. the plea had been good. Yelv. 13.

(x) It is stated, that upon view of precedents the jurisdiction of the counties palatine is allowable between parties dwelling in the same county, and for lands there, and for matters local. 1 Ch. Ca. 41.

(y) Outlawry in a county palatine cannot be pleaded in any of the courts at Westminster, for the party outlawed is only ousted of his law within that jurisdiction, and it shall not extend to disable a man in another county where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing the privileges of the law within that jurisdiction can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there. But it seems that outlawry in the county palatine of Lancaster, may be pleaded in the courts of Westminster, because that county was erected by act of parliament in Edward the Third's time, but Durham and Chester are by prescription. Fitz. Coron. 233. 12 Edw. 4. 16. Vent. 157. 2 Sid. 146. 2 Bac. Abr. 513.

(z) A *certiorari* from B. R. lies to remove proceedings from a county palatine in a civil action. But such a writ does not issue as of course; a special ground for it must be laid before the court. Dougl. 749. 751.

(a) 1. If an erroneous judgment be given, either in the chancery of Durham upon a judgment there, according to the common law, or before the justices of the bishop, a writ of error shall be brought before the bishop himself; and if he give an erroneous judgment thereupon, a writ of error shall be sued returnable in the king's bench. 4 Inst. 218. — 2. If a man be surety for another to keep the peace, and after he break the peace, and the surety have lands in the county palatine of Durham, the king shall command the bishop of Durham, or his chancellor, to do execution; and so it is in the other counties palatine, and in the same manner it is of a statute staple, &c. recognizances, &c. 2 Inst. 219, 220.

(b) 1. No appeal lies in chancery from a decree in a county palatine; but if any appeal lies, it must be to the king himself. 1 Vern. 177. 184. Mitf. Eq. Pl. 123. 2 Bac. Abr. 512. — 2. To a bill of appeal and review of a decree in the court of a county palatine, a demurrer has been allowed, it being apparent on the face of the bill that the court of chancery had no jurisdiction. Ibid. — 3. But though chancery assumes no appellate jurisdiction in these cases, yet it will in some cases remove a suit before the decision into its own court by writ of *certiorari*. Ibid.

(c) 1. 2d Part, 2 Mod. Ca. — 2. If lands, parcel of the duchy, lie within the county palatine,

## (E) The Cinque-Ports.

### (E 1.) What privileges they have.

The franchise of the Cinque-Ports (*d*) is claimed, in part by prescription, in part by act of parliament, and charter, and has been time out of mind, &c. 4 Inst. 223. (*e*)

In the time of Edward the Confessor there were but three ports, Dover, Sandwich, and Romney; but in the time of William the Conqueror, Hastings, and Hithe were added; and 1<sup>o</sup> John, Winchelsea, and Rye: yet (*f*) they are called the Cinque-Ports. 4 Inst. 222. 2 Inst. 556.

So the king, by patent, may make any town a member of the Cinque-Ports. Hard. 56.

The Cinque-Ports are part of the county of Kent, and though they have not *jura regalia*, yet they have many privileges, which were confirmed (*g*) by the st. M. Ch. 9. 4 Inst. 223. (*h*)

And therefore, have all jurisdiction in all actions real, mixt, and personal, which arise within the Cinque-Ports. 4 Inst. 224. (*i*)

If

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palatine, a suit in equity may be for them in the duchy court. Vent. 157. Vide 9 Mod. 95. Ro. Abr. 539. — 3. But if a man enters into an obligation concerning lands lying in the county palatine, and he is sued upon this at common law, he cannot sue in equity in the duchy court to be relieved against this bond, for the jurisdiction being local, it cannot be extended to this collateral matter. Ro. Abr. 530. Hob. 77. — 4. And a prohibition was awarded, because the duchy has no jurisdiction in respect of the person, as because the suitors dwell within the county palatine, nor upon the lands of the subject any where but upon the king's own land, and his own revenue, and perhaps upon bonds and assurances given for his revenue of the duchy. Ibid. — 5. It has however since been holden, that a bill may be exhibited in the duchy court, to be relieved against the forfeiture of a mortgage of lands lying within the county of Lancaster. Vent. 155. 2 Lev. 24. 2 Keb. 826. — 6. By 4 G. 3. c. 16., infants in counties palatine are enabled to convey by order of the respective courts belonging to the counties palatine.

(*d*) Or five most important havens, as they formerly were esteemed, in the kingdom. 5 Com. 79.

(*e*) The Cinque Ports held *per baronium*, and were represented in parliament by the lord warden or keeper of the Cinque Ports; but they did not hold by the tenure of knight service, only by sending ships to sea, &c., and as they were instituted for the defence and safety of the kingdom, they had several liberties and privileges granted to them, in respect of the necessary attendance in those ports. Bract. lib. 3. f. 118. 4 Inst. 222. 2 Bac. Abr. 535.

(*f*) 'Though seven in number.'

(*g*) 1. In these words: '*Barones de quinque portibus et omnes alii portus habeant omnes libertates et liberas consuetudines suas.*' 2 Inst. 20. — 2. But this confirmation does not extend to pleas of the crown, with which they intermeddle as justices of the peace. Cro. Car. 253.

(*h*) By st. W. & M. sess. 1. c. 7. reciting that the election of members to serve in parliament ought to be free; and that the late lord warden of the cinque ports had pretended unto and claimed, as of right, a power of nominating and recommending to each of the said Cinque-Ports, the two antient towns, and their respective members, one person whom they ought to elect to serve as a baron or member of parliament for such respective port, ancient towns, or members, contrary to the antient usage, right and freedom of elections; it is declared and enacted, that all such nominations or recommendations are contrary to the laws and constitutions of this realm, and for the future shall be so deemed and construed, and hereby are declared to have been and are void to all intents and purposes whatsoever; any pretence to the contrary notwithstanding.

(*i*) 1. The jurisdiction of the cinque ports is general, as well in personal as real and mixed



If an action be brought in B.R. &c. for a matter which arises there, it may be pleaded generally in abatement. Vide Abatement, (D 3.) (k)

And error does not lie in B.R. or C.B. on a judgment given there. 2 Inst. 557. (l)

But a judgment in B.R. or other court of the king, is good, if the privilege of the Cinque-Ports be not pleaded. 4 Inst. 223. 2 Inst. 557.

And such judgment does not destroy their privilege afterwards, 2 Inst. 557. 4 Inst. 223.

And B.R. cannot take notice judicially, what towns are within the Cinque-Ports. 2 Inst. 557.

So prerogative-writs, (m) as *habeas corpus*, (n) *mandamus*, &c. run to the Cinque-Ports. R. 2 Cro. 543. (o)

So an appeal lies in B.R. for a murder in the Cinque-Ports. R. Yelv. 13. Cro. Car. 247. (p)

So a *certiorari* lies to remove an indictment for felony in the Cinque-Ports. R. Cro. Car. 253. 264. 291. (q)

mixed actions. 4 Inst. 224 — 2. Otherwise in debt or trespass transitory. Cro. Eliz. 910. — 3. Where a stranger comes within the Cinque-Ports, and does a transitory trespass, and after goes out of their jurisdiction, he to whom the trespass was done may have an action at common law, else he would be without remedy; for they can call none in who are out of their jurisdiction, and the privileges were granted for the ease and benefit, and not the prejudice of the inhabitants. Yelv. 12. 2 Inst. 557. — 4. They hold plea of freehold by plaint. Sid. 166. — 5. But a judgment in B.R. for lands there shall bind for ever, though such judgment for lands in Wales, or a county palatine, is merely void. 2 Inst. 557. 4 Inst. 223. Bro. Cinque Ports, 24. 2 Bac. Abr. 536. n. adds *quære*.

(k) If an ejectment on a feigned lease be brought of lands within the Cinque-Ports, the courts of Westminster will not allow the tenant of the lands, on his prayer, to be made defendant to plead to the jurisdiction of these courts, but will tie him strictly to the rules of confessing lease, entry and ouster, and pleading not guilty. This is not like the case of antient demesne, where a recovery in the courts above makes the lands frank-free for ever. 2 Bac. Abr. 536. n.

(l) 1. A writ of error lies from the mayor and jurats of each port to the lord warden of the Cinque-Ports, in his court of Shepway; and from the court of Shepway to the king's bench. Jenk. 71. *Diversite des Courts*, tit. *Bank le Roy*. 1 Sid. 356. 3 Com. 80. — 2. And so too a writ of error lies from all the other jurisdictions to the same supreme court of judicature, as an ensign of superiority reserved to the crown at the original creation of the franchises. Bro. Abr. tit. Error, 74. 101. Davis, 62. 4 Inst. 38. 214. 218. 3 Com. 80. — 3. And all prerogative writs (as those of *habeas corpus*, prohibition, *certiorari* and *mandamus*) may issue for the same reason to all these exempt jurisdictions: because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. 1 Sid. 92. Cro. Jac. 545. 3 Com. 80.

(m) Though there is no doubt that the principal position is correct, yet it has been said that it had scarce ever been known, that a *prohibition*, or *habeas corpus*, went to the Cinque-Ports. Sid. 166.

(n) *Ad faciendum et recipiendum*; but if *ad respondendum* a private person, *quære*, see Mod. 20. 8 Mod. 22. 12 Mod. 666.

(o) 1 Palm. 55. 96. Sid. 355. 4 Inst. 223. 2 Lev. 86. 3 Keb. 598. Hardr. 475.

(p) 1. 2 Inst. 557. Cro. Eliz. 694. — 2. And the reason given is, because the king in a manner is concerned; for if the plaintiff is nonsuit, the defendant shall be arraigned at his suit. Yelv. 13. Cro. Eliz. 911. — 3. However, Popham has said, that if the defendant at all times after continued within the Cinque-Ports, so that he might be proceeded against there, no appeal would lie elsewhere. Yelv. 13. — 4. If the defendant is in *custodiâ marescalli*, the appeal may be against him by bill. 2 Inst. 557. Cro. Eliz. 695. 778.

(q) 1. Vide Roll. Abr. 395. — 2. A *quo minus* lies also. Hard. 475.

(E 2.) What Courts.

Within the Cinque-Ports there are several courts : a court before the mayor and jurats of each port ; a court before the constable of the castle of Dover ; and a court of the Cinque-Ports *apud* Shepway. 4 Inst. 223. (q)

The court before the mayor and jurats is a court of record. 2 Inst. 557.

The court before the constable of the castle of Dover holds plea by bill, according to the course of the common law, of things which concern the guard of the castle. 2 Inst. 557. F.N.B. 240. B.

But by the *st. Art. super Chart.* 7. (r) No foreign plea of the county shall be pleaded, which does not touch the guard of the castle.

Nor shall the people of the Cinque-Ports be distrained to plead elsewhere, or in other manner than they ought, according to the antient charters or franchises affirmed by the great charter. 2 Inst. 556.

The court of the Cinque-Ports *apud* Shepway was created by letters patent *temp.* Ed. 1. 4 Inst. 224. But must have been confirmed by parliament. 2 Inst. 557. (s)

And an erroneous judgment before the mayor and jurats in any port, shall be redressed there. 4 Inst. 224. 2 Inst. 557. R. Dy. 376. a. (t)

And that, by bill in the nature of a writ of error, without any writ. 2 Inst. 557.

And upon reversal, the mayor and jurats shall be fined, and the mayor removed from his office. 2 Inst. 557. Dy. 376. a.

(E 3.) How a writ to the Cinque-Ports is directed.

A writ to the Cinque-Ports to remove a record of a judgment there, shall be directed to the constable of Dover, who is the immediate officer to B. R. and he shall write to the barons to certify to him, and shall then send it to the court. 30 H. 6. 6. Vide *infra*. (u)

But if an indictment be before them as justices of peace, or of oyer and terminer, a *certiorari* to remove it need not be to the warden of the Cinque-Ports ; but to the mayor and jurats before whom it was taken. R. Cro. Car. 252. 264.

The warden of the Cinque-Ports is an officer, who has been appointed, time out of mind, &c. for the custody of the ports. 4 Inst. 223.

And he has the jurisdiction of admiral within the Cinque-Ports (x),

(q) 1. There is a court of chancery in the Cinque-Ports, but no original writs issue thence ; it serves only to decide matters of equity. Sid. 166.—2. The great use of their chancery is, it is said, to relieve against errors in proceedings at law, which they used to indorse upon the bill. Sid. 356.

(r) 28 Edw. 1. c. 7.

(s) It is said by Twisden, that nobody knows where this court is. Sid. 166.

(t) 1. That is, that upon their judgment no writ of error lies in B. R., yet they are examinable by bill in nature of a writ of error, *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*. 2 Inst. 557. Dyer, 376. 4 Inst. 224.—2. Secus upon the judgments of the court of Shepway. Sid. 356.—3. And so are the books which speak of a writ of error to the Cinque-Ports to be intended.

(u) 1. 2 Inst. 557. 4 Inst. 223.—2. But writs of appeal must be directed to the sheriff, because the king in a manner is concerned. Cro. Eliz. 604. Yelv. 13. Cro. Eliz. 911. 2 Inst. 557. Vide *supra*, (E 1.)

(x) To hold plea by bill concerning the guard of the castle, &c. according to the course of the common law. 2 Inst. 556.

exempt from the admiralty of England. 4 Inst. 223. 2 Inst. 556. 2 Jon. 67. Sir L. Jenk. 1 vol. 85. (y)

So he shall be constable of the castle of Dover. 4 Inst. 223. 2 Inst. 556. (z)

The constable of Dover and warden of the Cinque-Ports is the immediate officer to the king's courts, for all matters within the Cinque-Ports; and therefore, a writ shall be directed to him to certify a record there. 4 Inst. 223. (a)

Though it be in another port; for he shall send for it to the barons of the Cinque-Ports, and transmit it to the king's court. 4 Inst. 223. Vide supra.

So, if a defendant, against whom judgment is in B. R. &c. has no land but in the Cinque-Ports, there shall be a writ to the constable of Dover, to make execution. 4 Inst. 223. R. 1. And. 28. 3 Leo. 3. (b)

If surety of the peace be demanded in chancery, against any within the Cinque-Ports, there shall be a writ to him to take it. 4 Inst. 223.

## (F) Corporation.

### (F 1.) What shall be.

A corporation (c) is a franchise (d) created by the king.

A corporation is a body constituted by policy, with a capacity to take, or to do. Co. L. 250. a. (e)

For

(y) Which jurisdiction is saved to him in several acts of parliament, as 2 H. 5. st. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. et vide 2 Jon. 66, 67. Ch. Ca. 305.

(z) By 28 Edw. 1. c. 7. the constable of the castle of Dover shall not hold any foreign plea of the county at the castle gate, except it touch the keeping of the castle; nor shall the said constable distrain the inhabitants of the cinque ports to plead any other-where nor otherwise than they ought after the form of charters obtained of kings of their old franchises, confirmed by *Magna Carta*.

(a) The writs directed to him are, *Rex, &c. constabulario castri sui de Dover, et custodi quinque portuum, &c.* 2 Inst. 556. 4 Inst. 223.

(b) The record must be certified into chancery, and from thence by *mittimus* to the lord warden to make execution. And. 28. 3 Leon. 3. W. Bendl. 46.

(c) The words *corporation*, and *incorporation*, are frequently confounded, particularly in the old books. The distinction between them is this; a *corporation* is a political institution; *incorporation* is the act by which that institution is created. 1 Kyd, 13.

(d) 1. The propriety of this appellation depends upon the more or less extensive meaning in which the word "franchise" is used; in its most extensive sense it expresses every political right which can be enjoyed or exercised by a freeman; in this sense, the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; and in this sense the right of acting as a corporation, may be called a franchise, existing collectively in all the individuals of whom the corporation is composed; in this sense, and in this sense alone, the franchise of being a corporation, can have any precise meaning. 1 Kyd, 14. — 2. In a less general and more appropriate sense, the word "franchise" means a royal privilege in the hands of a subject, by which he either receives some profit, or has the exclusive exercise of some right; of the first kind are the goods of felons, waifs, estrays, wrecks, or the like; of the second are courts, gaols, return of writs, fairs, markets, and many others. They are estates and inheritances, which may be granted and conveyed from one to another, as other estates, which is not the case with a corporation; in this sense a corporation cannot be called a franchise; the latter is a privilege or liberty, which can have no existence without reference to some person to whom it may belong; the former is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise, as the substance to its attribute; it is something to which many attributes belong; but is itself something distinct from those attributes. 1 Kyd, 15.

(e) A corporation, or a body politic, or body incorporate, is a collection of many individuals

For by incorporation it acquires *jus personæ*, and becomes *persona politica*, and is capable of all (*f*) civil rights, *habendi et agendi*. Per Att. Gen. Quo. W. 3. 8.

A corporation is ecclesiastical (*g*), or lay (*h*); and both are sole (*i*), or aggregate. Co. L. 250. a. (*k*)

An

individuals united in one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested by the policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued; of enjoying privileges and immunities in *common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence. 1 Kyd, 13.

(*f*) There are some corporations which have a corporate capacity only to some particular purpose; as churchwardens.

(*g*) 1. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual; such are bishops; some deans and prebendaries; all archdeacons, parsons and vicars; and formerly chauntry priests; which are sole corporations: deans and chapters at present, and formerly prior and convent, abbot and monks, which are corporations aggregate. 1 Kyd, 22.—2. It is not the description of the persons who are the members of a corporation, but the purpose of its institution which characterises it to be a lay or a spiritual foundation; and for this reason, though the greater part of the members of the colleges in the universities be clerical, yet they are, in general, to be considered as lay corporations. 1 Kyd, 23. Carth. 93. Vide L. Raym. 6.—3. The knights of St. John of Jerusalem, though religious, were not ecclesiastical, but lay corporations. Godb. 393.

(*h*) 1. Lay corporations are subdivided into eleemosynary and civil.—2. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons; and colleges for the promotion of learning and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. 1 Kyd, 26. 1 Com. 471.—3. Civil corporations are established for a variety of temporal purposes. Thus a corporate capacity is given to the king, to prevent, in general, the possibility of an interregnum or vacancy of the throne, and to preserve entire the possessions of the crown; so that immediately on the demise of one king, his successor is in full possession of the regal rights and dignity. Other civil corporations are established for the purpose of local governments, such as the corporations of cities and towns, under the names of mayor and commonalty, bailiffs and burgesses, and other similar denominations; and to this class seem properly to belong the general corporate bodies of the two universities, which whatever may have been the notion of former times with respect to them, are now universally considered as lay corporations with temporal rights, not as eleemosynary foundations, as particular colleges are; though stipends are annexed to particular magistrates and professors; for these are rewards *pro opere et labore*, in the same manner as the standing salaries of particular officers in other corporations which are confessedly not eleemosynary but civil. Other corporations are established for the maintenance and regulation of some particular object of public policy; such as the corporation of the Trinity House for regulating navigation, the Bank, and the different insurance companies in London; others for the regulation of trade, manufactures, and commerce, such as the East India company, the Guinea company, and the companies of trades in London and other towns; others for the advancement of science in general, or some particular branches of it; such are the College of Physicians and the company of Surgeons in London for the improvement of the medical science; the Royal Society for the advancement of natural knowledge; the Society of Antiquarians for promoting the study of Antiquities; and the Royal Academy of Arts for cultivating painting and sculpture. 1 Kyd, 28, 29. 1 Com. 470, 471. 3 Burr. 1652, 1656. Sawyer's Arg. Quo Warr. 9.

(*i*) From their having perpetual succession, and the capacity of suing and being sued in their political character, single persons have, uniformly, in the books of English law, been called corporations. 1 Kyd, 20.

(*k*) 1. Corporations aggregate consist of many persons united together into one society,

An ecclesiastical corporation sole is (*l*) regular (*m*); as, an abbot, prior, &c. Co. L. 250. a.

Or secular (*n*); as a bishop, dean, &c. Co. L. 250. a.

An ecclesiastical corporation aggregate consists of an head and body, who are all persons capable; as, a dean and chapter: or the head only is capable, and the others incapable in law; as, an abbot and his convent, &c. (*o*)

So a lay-corporation is sole;

society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had; and in this sense the king is a sole corporation, so is a bishop, so are some deans and prebendaries, distinct from their several chapters, and so is every parson and vicar. — 2. Corporations aggregate are of two kinds; the one created for public government; the other for private charity. Public corporations being for the good of the community, are governed by the laws of the land, so that the validity of their private constitutions is examinable by the king's courts. Private corporations are subject to the laws made, or empowered to be made, by those who create them. 2 T. R. 352.

(*l*) 1. Sole corporations are divided into two kinds: those where the person so denominated has a corporate capacity for his own benefit; and those where he acts only as trustee for the benefit of others. — 2. Of the first kind, those best known, and most commonly enumerated, are the king, archbishops, bishops, certain deans, and prebendaries, all archdeacons, parsons, and vicars; and of the same kind were chauntry priests, in the times of popish superstition. Vide 10 Rep. 27. a. b. 28. a. 4 Rep. 65. Cro. Eliz. 464. 1 Kyd, 20. — 3. Of the second kind the most familiar instance is the chamberlain of London, who may take a recognizance to himself and successors, in his politic capacity, in trust for the orphans. Vide 1 Rol. Abr. 515. 4 Rep. 65. Cro. Eliz. 464. 1 Kyd, 20.

(*m*) The regular corporations were composed of those ecclesiastical persons who lived under some rule, had a common dormitory and refectory, and were obliged to observe the statutes of their order; of this class were the monasteries, priories, and some canonries. 1 Kyd, 23. Burn's Ecc. L. Monast. s. 3.

(*n*) The secular were so called because they conversed in *seculo*, performed spiritual offices to the laity, and took upon them the cure of souls; such are, at this day, all the ecclesiastical corporations known to the law, and such were formerly some canons. 1 Kyd, 23. Burn's Ecc. L. Monast. s. 3.

(*o*) 1. Before the dissolution of monasteries, corporations aggregate were divided into the two classes of corporations aggregate of many persons capable, and corporations aggregate of one person capable, and the rest incapable or dead in law. Co. L. 2. a. — 2. A master and fellows, or a master and scholars of a college, and a dean and chapter, are examples of the former kind; an abbot and monks, and a prior and monks, were examples of the latter. 1 Kyd, 21. — 3. Those of the former must sue and be sued by their aggregate name; but the abbot alone, or the prior alone, might sue and be sued alone in right of his house: thus when an abbot and convent were seized of land, and were afterwards disseised of it, the abbot might have an assize in his own name without naming the convent, and a *præcipe quod reddat* was, in like manner, to be sued against the abbot alone; for as to civil purposes a monk was totally incapacitated to act in his own right, and if he received a personal injury, or did an injury to another, he could not sue or be sued alone, but the sovereign of the house must, in both cases, have been joined with him; but he had a capacity to fill a spiritual office, as to be a vicar, or to be the abbot of another place than that of which he had been a subordinate monk, or he might act in the right of another, as executor. And the abbot, as well as the subordinate monks, was, as a natural person, considered as dead in law; but he had a politic capacity as sovereign of the house, by which he might sue and be sued, infeoff, give, demise, and lease to others, and purchase and take from others, and which was admitted by the policy of the law, that those, who had a right against the house, might know how they were to sue, and that the rights of the house itself might be recovered in the name of the abbot. 11 Ass. pl. 19. Bro. Corpor. 81. 3 H. 6. 23. Bro. Corpor. 78. Moigne, 1. 22 H. 6. 4. Co. L. 346. b. 347. a. 1 Kyd, 22.

Or



Or aggregate; as, a mayor and commonalty. 10 Co. 29. b. (p)

(F 2.) How created: — By the common law.

A corporation is by the common law, by act of parliament, by prescription, or by charter. Co. L. 250. a.

By the common law; as, the king. 10 Co. 29. b. (q)

(F 3.) By parliament.

So a corporation may be created by act of parliament. 10 Co. 29. b. (r)

(F 4.) By prescription.

So an ancient city or borough may claim to be a corporation by prescription. 10 Co. 29. b. (s)

A corporation by prescription may prescribe by several names. Per Hale, Hard. 504.

(F 5.) By charter; who may make it.

To a corporation by charter (t) there are requisite, 1. An authority to make it. (u) 2. Suffieient words. 3. Persons to be incorporated. 4. A name. 5. A place. R. 10 Co. 29. b.

The

(p) There cannot exist in the same place two independent corporations with general powers of government. 2 T.R. 567.

(q) 1. Corporations by common law are those to which several corporate capacities have been annexed, in virtue of their political character, by the universal assent of the community, from the most remote period to which their existence can be traced. 1 Kyd, 39. — 2. Of this description are the king, all bishops, parsons, vicars, deans, archdeacons, prebendaries, or canons of some cathedrals, churchwardens, and deans and chapters, and such were all chauntry priests, abbot and convent, or prior and convent. 1 Kyd, 40.

(r) 1. When it is intended that a corporation should be established, vested with powers or privileges which, by the principles of the common law, cannot be granted by the king's charter, then recourse must be had to the aid of an act of parliament; as, if it be intended to grant the power of imprisonment, as in the case of the college of physicians; or to confer an exclusive right of trading, as in the case of the East India company; or when a court is erected, with a power, to proceed in a manner different from the common law, which is the case of the vice-chancellor's court in the two universities. 1 Kyd, 61. Cro. Car. 73. 87, 88. Jenk. 97. 117. — 2. But most of those statutes which are usually cited as having created corporations, either confirm such as have been previously created by the king; or they permit the king to erect a corporation *in futuro*, with such and such powers, so that the immediate creative act is usually performed by the king alone, in virtue of his royal prerogative. 1 Com. 473.

(s) A corporation by prescription is a corporation which has existed from time immemorial, and of which it is impossible to shew the commencement by any particular charter or act of parliament, the law presuming that such charter or act of parliament, once existed, but that it has been lost by such accidents as length of time may produce. 1 Kyd, 41. 21 Edw. 4. 56. et seq. Bro. Corpor. 65.

(t) A corporation by the king's charter is such a one as exists by virtue of such charter alone. 1 Kyd, 40.

(u) 1. As the *intention* of a grant of incorporation is to confer some on the grantees, which, however, may be counterbalanced by some conditions, with which it is accompanied, it has become an established rule, that the grant must be accepted by the voluntary consent of a majority of those whom it is intended to incorporate; otherwise the grant will be void. 1 Rol. Rep. 226. Brownl. and Goulds. 2d pt. 100. — 2. And it must be accepted as it is offered; they are not at liberty to act under part of its provisions and reject the rest; but if a *new* charter be given to a corporation already in being, and acting either under a former charter or prescriptive usage, such corporation already existing, is not obliged to accept the new charter in the whole, and to receive either all or no part of it; it may act partly under that, and partly under its old charter or prescription.

The king alone has authority to make a corporation by his charter. 10 Co. 33. b. 1 Rol. 512. l. 27. Per Att. Gen. Quo W. 8. (x)

And therefore, a prescription by a subject, or a corporation, to make another corporation, is void. Bro. Corporation, 45. 1 Rol. 512. l. 35.

So, if the king grants power to another to make a corporation, it is void, except when it may commence upon the charter, or grant of the king, and not by the power conferred upon the other by such grant. 49 Ass. 8. Dub. Bro. Corporation, 45. Th. D. lib. 1. c. 22. S. 26. Acc. 10 Co. 33. b. (y)

So the pope, though he usurped very great authority, never could make a corporation. Jon. 184. Bro. Corporation, 34. (z)

prescription. 3 Burr. 1647. 1656. 1661.—3. But though the king cannot take away liberties, before granted by him or his predecessors, yet if a corporation accept a charter which abridges or alters any of their liberties, this is good; and when a corporation takes a new charter concerning their liberties, they may make use of it as a grant, or as a confirmation. 4 Mod. 269. 1 Salk. 167. L. Raym. 29. 32.

(x) 1. It is certain, that during the latter part of the Saxon period, and for some time after the Conquest, the great nobles claimed and exercised prerogatives within their own demesnes, similar to those which the king exercised within the demesnes of the crown; and of these it is certain, that the power of conferring corporate privileges on their towns, was one. There are many instances of towns within the demesnes of the feudal barons, which had enjoyed such privileges by charters from their immediate lords, and, having come to the crown by escheat, have had those privileges confirmed, and others added to them by subsequent charters from the king. 1 Kyd, 42. Millar on Eng. Govern. 149. Stewart's Dissert. Eng. Cons. pt. 3. s. 3. Lutw. 1336.—2. That the king, however, was very soon after the Conquest, understood to possess the exclusive prerogative of creating guilds, or incorporate companies, appears from this circumstance, that many such companies were suppressed about that period, as *adulterine* guilds; that is, guilds set up without the king's warrant or authority. 1 Kyd, 44. Firma Burgi, 26.—3. In the time of Bracton, who lived in the reigns of Henry 3. and Edward 1.; the king's prerogative, as to the exclusive right of granting liberties and franchises in general, seems to have been fully established. Brac. l. 2. c. 24. f. 55, 56.—4. And the absolute necessity of his assent to the erection of any corporation was held, in the reign of Edward 3., to have been long settled as clear law. 49 Edw. 3. 3, 4. 49 Ass. 8. Bro. Corpor. 15. Prescrip. 15. 10 Rep. 33. 1 Rol. 512.

(y) 1. It was formerly asserted, that the act of incorporation must be the immediate act of the king himself, and that he could not grant a licence to another to erect a corporation. 2 H. 7. 13. 10 Rep. 27.—2. But the law has long been settled otherwise; and he may not only grant a licence to a subject to erect a *particular* corporation, but give a *general* power by charter to erect corporations indefinitely. The chancellor of the university of Oxford has by charter such a power, and has actually often exerted it in the erection of several matriculated companies, now subsisting, of tradesmen, subservient to the students. 1 Kyd, 50. 1 Com. 474.—3. This power is most frequently exercised in the case of eleemosynary or charitable corporations, when a licence is granted to a subject to erect such a corporation, and to endow it with possessions or revenues; in which case the donor is called the founder. 1 Kyd, 50.

(z) 1. At the time of the Reformation, in consequence of the statute of 1 Edw. 6. c. 14. which gave the colleges, therein described, to the king, it generally became a question, whether the house claimed was a *lawful* college; the determination of which depended on the authority by which it was established. 1 Kyd, 44.—2. In the case of Greystock college, it appeared that Pope Urban, at the request of Ralph, baron of Greystock, founded a college of a master and six priests, resident at Greystock, and assigned to each of the priests five marks *per annum*, beside their bed and chamber, and to the master 40*l.* *per annum*; and it was certified into the book of first-fruits and tenths, that this college was in being within five years before the making of the statute; and it was resolved by the justices, that this *reputative* college was not given to the king, by that statute, because it wanted a *lawful* beginning, and the countenance also of a *lawful* commencement; for that the Pope could not found or incorporate a college within this realm; nor assign; nor licence others to assign; temporal livings to it; But

So the corporation of London, though its privileges are confirmed by parliament, cannot make another corporation. 1 Sal. 192.

But a subject may chuse the persons, invent the name, &c. for the King. 1 Rol. 512. l. 30.

So a corporation may make a fraternity, (a) or company, within themselves. 1 Sal. 192. (b)

So the king, by charter to the East India company, &c. may enable them to constitute such persons, who shall be incorporated.

### (F 6.) By what words.

There need not any precise words to make a corporation. R. 10 Co. 30. b.

And therefore, if the words, *fundo, erigo, stabilio, &c.* be wanting, it is not material. 10 Co. 28. a. 1 Rol. 513. l. 7.

Anciently if the king had granted to a vill *gildam mercatoriam*, it was, by such grant, incorporated. 1 Rol. 513. l. 10. 10 Co. 30. a. Sutton's Hosp. (c)

So,

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but that it ought to be done by the king himself, and by no other. Dyer, 81. pl. 64. 4 Rep. 107. b. — 3. But, during the times of popery, even long after the king's consent was thought necessary to the erection of a corporation, it was held, that that consent was not sufficient, without the concurrence of the pope, to found an abbey or convent. 14 H. 8. 2. 29. Bro. Corpor. 34. Jenk. 205.

(a) 1. The court thus distinguishes between a corporation and a fraternity, that a corporation is properly an investing of the people of the place with the local government thereof, and therefore their laws shall bind strangers; but that a fraternity is some people of a place united together in respect of a mystery and business, into a company; and their laws and ordinances cannot bind strangers, because they have not a local power or government. — 2. Upon which distinction, it has been observed, that it is certainly made in very inaccurate terms. It seems to imply, that the name of corporation, and the powers belonging to such a body, can be enjoyed only by a corporation invested with the local government of a place, and that all the companies of trades within towns and cities, are only voluntary associations, and can exercise no corporate powers, which is certainly not true; for when such companies are incorporated by the king's charter, they are as much corporations, as the general corporate body of the town or city in which they are. But the true distinction seems to be this, that a company incorporated by the king's charter, can act as a corporation by its own intrinsic powers, without the assistance or protection of the corporation of the town; but that a company established by the authority of the mayor and commonalty of London, though allowed to be a legal institution, cannot act of itself as a corporation, but its members must assert their claim of privileges under the prescriptive right of the mayor and commonalty, to establish such a company. 1 Kyd, 48. Comb. 372. 1 Str. 462.

(b) 1. In the more ancient books, we find several instances of private companies of trades within a corporate town, claiming to act as corporations, erected by the authority of the general corporation of the town, in which they claim to act; but it is on all such occasions uniformly decided, that no commonalty or corporation, either by usage or prescription, or by any other means than by the authority of the king's charter, empowering them to do so, by express words. 1 Kyd, 47. 49 Ass. p. 8. 49 Edw. 3. 3, 4. Bro. Corpor. 15. 45. Prescrip. 15. 10 Rep. 33. 1 Rol. 512. 1 Sid. 291. 2 Keb. 55. — 2. But it is admitted, that the mayor and commonalty of London may make a fraternity or company within the city, which, however, will be no more than a voluntary association, from which each of the members may retire whenever he pleases. *Ibid.* Salk. 195.

(c) 1. The grant of a *gilda mercatoria* does not seem to have invested the grantees with the local government of the place; for a *gilda mercatoria* established in a town, may be distinct from the general corporation of the town. 1 Salk. 203. Ld. Raym. 1129. 1134. 1 Kyd, 64. — 2. And in most of the royal boroughs in Scotland, there are

So, if the king grants to a vill to be quit of toll, it is incorporated for this purpose. 1 Rol. 513. l. 22. (d)

Or, if he grants lands to them, they have thereby a corporate capacity to take, if a rent be reserved. 1 Rol. 513. l. 40. Adm. Cro. El. 35.

Or, if he gives licence to grant lands to them. 1 Rol. 513. l. 13.

Yet a grant of land to a vill, does not give capacity to take, if a rent be not reserved; for the grant shall be void. 1 Rol. 513. l. 20.

And a grant of land, rendering rent, does not give a capacity to alien the same land. R. Cro. El. 35.

### (F 7.) What persons.

A corporation may be constituted of persons natural, or political. 10 Co. 29. b.

It may be composed out of another corporation. 1 Rol. 512. C. (e)  
If the other be a corporation by prescription. 1 Sid. 291. (f)

So

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several incorporated companies of trades, and a gildry, which is also an incorporated company, but distinct from the others; and the magistracy of the town is composed of members partly taken from the gildry, and partly from the trades. 1 Kyd, 65.

(d) 1. In former times, a gift of land from the king to the burgesses, citizens, or commonalty of such a place, was conceived to be sufficient to incorporate them under such collective name. 7 Edw. 4. 14. Bro. Corpor. 54.—2. So if the king granted to the men of Dale, that they might elect a mayor every year, and that they should plead and be impleaded by the name of mayor and commonalty; this seems to have been sufficient to incorporate them. 21 Edw. 4. 56. Bro. Corpor. 65. Sed vide 21 Edw. 4. 57.—3. And there are many instances of grants by charter, to the inhabitants of a town, 'that their town shall be a free borough,' and that they shall enjoy various privileges and exemptions, without any direct clause of incorporation; and yet by virtue of such charter, such towns have been uniformly considered as incorporated. Firm. Burg. c. 11. Madox, Hist. Exch. 402. 1 Kyd, 63.—4. Nor is it necessary that the charter should expressly confer those powers, without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are in general expressly given. 10 Rep. 29.—5. A grant of incorporation to the citizens or burgesses of such a city or borough, especially an old grant, is good, without the words 'their successors.' Brownl. and Goulds. 2d pt. 292.

(e) Thus by a charter of Edward 6., the mayor, citizens, and commonalty of London, are appointed governors of Christ's hospital, of Bridewell, and incorporated by the name of the governors of the possessions, revenues, and goods of the hospital of Edward 6., king of England, of Christ, Bridewell. 10 Rep. 31. b.

(f) 1. So a man, who forms a component part of a corporation aggregate, may have, to some purposes, a distinct corporate capacity; thus a dean and chapter form one corporation aggregate; but in many cases both dean and prebendaries have distinct rights as corporations sole; each may have peculiar revenues, appropriated to him and his successors, in his political capacity; and the prebendaries alone, without the dean, may also form one aggregate corporation, distinct from that of dean and chapter. 9 E. 3. 18. b. 14 H. 4. 10. b. 20 E. 4. 2. 10 Rep. 31. b. 1 Kyd, 33.—2. So, also, several distinct and independent corporations may form the component parts of one general corporate body; thus there are in Shrewsbury several distinct independent companies of carpenters, brickmakers, bricklayers, tylers, and plasterers, and these all united form one great corporation, under the name of the company of carpenters, brickmakers, bricklayers, tylers, and plasterers of Shrewsbury. Dougl. 374. 1 Kyd, 35.—

3. There are some towns in which there are several incorporated companies of trade, which have so far a connection with the general corporation of the town, that no man can be a freeman of the town at large, and consequently a member of the general corporation, without being previously a freeman of some one of these companies, of which description is the corporation of the city of London, and of many other cities and towns. And the general corporate bodies of the universities are constituted nearly in the same manner; for every member of the general corporation must be a member of some

So a corporation aggregate may be made without a head. Bro. Corporation, 43. R. 10 Co. 30. b. (g)

## (F 8.) Place.

A corporation ought to be constituted of some place. 10 Co. 123.

And though the place be not in reality in England, it ought to be mentioned as in England; as, the corporation of St. John of Jerusalem in England. (k) 10 Co. 32. b. 1 Rol. 512. D.

So, if it be named of any place, it is sufficient, though it has not any lands or possessions there. Jon. 168.

## (F 9.) Name.

A corporation ought to have a name; (i) which is in the nature

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some one or other of the colleges or halls within the university. There are other incorporated towns, in which there are no incorporated companies, which have any reference to the general corporation of the town, and the freedom of the town of course refers only to that general corporation; such, it is said, are the towns of Kingston upon Hull, and Kingston upon Thames. 1 Kyd, 35.—4. There are also several corporate companies of trades, without reference to any general corporation of the town in which they are, and indeed where there is no incorporation of the town at all; such are the cutlers' company of Sheffield, and the company of shipwrights of Rotherhithe. The Bank, the East India Company, the College of Physicians, and the other scientific companies before mentioned, have no reference to the general corporation of the city of London. 1 Kyd, 36.—5. Many aggregate corporations are composed of several distinct parts, which are called integral parts, without any one of which the corporation would not be complete, although none of them be a distinct corporation; thus where a corporation consists of a mayor, aldermen, and commonalty, the mayor, the aldermen, and the commonalty are three integral parts; but neither of these has any corporate capacity distinct from the other two, and therefore the mayor cannot, in his political character of mayor, take in succession any thing as a sole corporation; nor the aldermen, as a select body, take any thing to them and their successors, as an aggregate corporation; nor, in like manner, the commonalty. 1 Kyd, 36.

(g) 1. In most aggregate corporations, there is one particular person who is called the head, and who forms one of the integral parts of the corporation; such is the mayor, in a corporation of mayor, aldermen, and commonalty; the chancellor in the general corporations of the universities; the dean, in the corporation of dean and chapter; the master, in a corporation of master and fellows, or master, fellows, and scholars, in the colleges of the universities, or in a corporation of master, wardens, and assistants, of any of the companies in London, or other cities. 1 Kyd, 37.—2. But, as laid down in the text, there may be a corporation aggregate of many persons, capable, without a head; as a chapter without a dean, or a commonalty without a mayor; thus the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries only, without a dean; and the governors of Sutton hospital, commonly called the Charterhouse, have no president or superior, but are all of equal authority; and at first the greater number of corporations were without a head. 1 Kyd, 37. 1 Com. 478. 10 Rep. 30.

(k) These names, however, may be so resolved, as to exclude the necessity of a fiction, that the places comprehended in them were in England. We have only to suppose that the saint, or the description of men, had their denomination from Jerusalem, and that afterwards a house dedicated to that saint, or belonging to those men, was established in England. Thus, there is such a description of men as the knights templars of Jerusalem; and there is a master, or a house of that order in England. 1 Kyd, 228.

(i) In the name of a corporation is generally inserted the enumeration of the component parts of its government, as mayor, aldermen, and citizens; mayor, aldermen, and commonalty. But sometimes, instead of some of these component parts, a more general description is used; thus, though the aldermen are a principal part of the government of the city of Bristol, yet by a charter of Charles II., the corporate name is mayor, burgesses, and commonalty. So though the component parts of the corporation of the city of London, are mayor, aldermen and commonalty, or citizens, yet the corporate name is mayor, commonalty, and citizens. 1 Kyd, 228.



of a name given to a natural person by baptism. (k) 10 Co. 29. b. (l) Vide Capacity, (B 5.)

But the name of an intended hospital is sufficient. 10 Co. 32. (m)

So, if the name be implied by the charter, it is sufficient, though no name be given by express words: as, if the king incorporates the inhabitants of D. with power to chuse a mayor; the name of mayor and commonalty (n) will be sufficiently expressed. Per Holt, 1 Sal. 191. (o)

So a corporation by prescription may have different names. Per Hale, Hard. 504. (p)

And in pleading, shall say, that it was known as well by the one name, as the other. Lut. 1498.

(k) Though the name of a corporation be compared to the christian name of a man, yet that comparison is not in all respects perfectly correct. A christian name consists, in general, but of a single word, as Oliver, Robert; and if there be an alteration in a letter, that may frequently make a material alteration in the name. Thus, if a man intending to sue Oliver, name him Olive, the writ must abate, because Olive is the name of a woman, and Oliver that of a man, and the two names, of course totally different in sense. But the name of a corporation frequently consists of a great number of words, and the transposition, interpolation, omission, or alteration of some of them may make no essential difference in their sense. 1 Anders. 207. 1 Kyd, 227.

(l) 21 E. 4. 56. 1 Rol. Rep. 512.

(m) It is not requisite, that there should be truth in the name of a corporation, whether it be an hospital, or any other body politic. 10 Rep. 32.

(n) Though the name given by charter to a corporation may seem to express only a definite number of persons by their names of office, yet in all legal acts, and legal proceedings, it must uniformly be understood to mean the whole corporate body. Thus, the merchant taylors of London were incorporated by the name of 'master and wardens of the merchant taylors of the brotherhood of St. John the Baptist, in the city of London, and their successors;' and it was granted to them, that they should purchase and sue by the name of master and wardens of the merchant taylors; and that the same master and wardens should make statutes and ordinances. It was held, that by this name, *the master and wardens*, should be understood, not the five individual persons who were the master, and four wardens, but the whole company in their politic capacity. Moore, 582.

(o) 3 Salk. 102.

(p) 1. A corporation may have one name, by which it may take and grant, and another by which it may plead and be impleaded; thus, a corporation may purchase and grant by the name of master, wardens, and brothers, and may be empowered to plead and be impleaded by the name of master and wardens only. 11 H. 7. 27. Bro. Corpor. 95. 1 Kyd, 229.—2. But in this respect there is a distinction between the case of a corporation by prescription, and that of a corporation by charter; the former may have several names to the same purpose, thus a writ was brought by the master of St. Lazarus of Burton, who said that he and all his predecessors, masters of the hospital aforesaid, had been from time immemorial called and known, and had impleaded and been impleaded, as well by the name of 'master of the hospital of St. Lazarus of Burton, of the order of St. Lazarus of Jerusalem in England,' as by the name of 'master of Burton of St. Lazarus of Jerusalem in England.' 9 Edw. 4. 19. Bro. Corpor. 32. 1 Kyd, 229.—3. And a *scire facias* will lie in one of the names, on a judgment obtained in a writ by the other. Thus where a writ of waste was brought by the prior of the hospital of St. John of Jerusalem, and he recovered and took execution by *elegit*; the defendant, after the money levied, brought a *scire facias* to have the land returned, and it was sued against the prior of St. John of Jerusalem; and it was held well, because he was known as well by the one name as the other. 44 Edw. 3. 16. Bro. Corpor. 10. Misnom. 15.—4. But a corporation by charter, it is said, though it may, either by charter or by act of parliament, be empowered to purchase and grant by one name, and sue and be sued by another, yet cannot have two names to the same purpose. 3 Salk. 102. Lutw. 508, 509. Hardr. 504.—5. Mr. Kyd adds, that this may be true with respect to a grant by charter; but that there seems to be no reason why an act of parliament might not empower a corporation by charter to use two names for the same purpose. 1 Kyd, 230.

So,

So, by charter, a corporation may be incorporated by one name, and afterwards by another.

And after the change of name, the last ought to be used. (q) 1 Rol. 512. l. 55. (r)

So a change of name, or new charter, does not merge the ancient privileges. R. Mo. 581, 582. R. 4 Co. 87. b. R. 1 Sand. 344. R. Ray. 439. Bro. Corporation, 38.

And therefore, it shall retain the possessions which it had before. (s) 1 Rol. 513. l. 2. (t)

Shall recover a debt, &c. due before. 3 Lev. 237.

So it shall be subject to obligations, annuities, &c. as before. Bro. Corporation, 3. 61.

But they ought to prescribe by their ancient name till such a day, and shew how it was then changed; and not by their last name. Hard. 504. Lut. 1498.

### (F 10.) What things are incident to a corporation.

A corporation being erected, it has, as incident, (u) without words in the charter, power to purchase, and alien. 10 Co. 30. 1 Rol. 513. l. 35.

To plead and be impleaded. 10 Co. 30. b. 1 Rol. 513. l. 35.

(q) In all legal proceedings, where a corporation is introduced, its true name must be used, whether it be a party to the proceedings or not. Ld. Raym. 1515. 2 Str. 787. Cowp. 26. 29.

(r) 1. Queen Elizabeth, by her charter, incorporated the inhabitants of Wells, by the name of mayor, *masters*, and burgesses. King Charles 2. granted to them, that they should be known by the name of mayor, *aldermen*, and burgesses. By this last name they entered into a bond, and the obligee sued them by their former name. They pleaded *non est factum*, on which a special verdict was found, stating the preceding facts, and the question made was, whether this was the bond of the mayor, *masters*, and burgesses; and adjudged not; on the ground, that by taking the second letters patent, the first name was entirely extinguished. Ld. Raym. 80. Lutw. 508.—2. With respect, however, to the extinction of the old name by a new charter, Holt C. J. afterwards took this distinction; that where the new charter alters the *constitution* of the corporation, and new models it, there they shall lose their old name; but that if the constitution, as to all its integral parts, remains the same, though the new charter give them a new name, the old one remains. Thus, if a mayor be added, or a mayor and *masters* be made mayor and *aldermen*, or an abbot and convent translated into a dean and chapter, there they lose their old name, because the integral parts of the corporation no longer remain the same. But if the bailiffs and burgesses, *villæ de Gippo*, accept a charter, constituting them bailiffs and burgesses, *villæ Gipwici*, this is a new name only, and they may still use their former name, because the town is the same, and the old constitution remains. 2 Ld. Raym. 1259. Salk. 435.

(s) 2 H. 6. 9. 14 H. 6. 12. 21 E. 4. 56. 4 Rep. 87. Jenk. 99. Moore, 581.

(t) Thus the people of York, prescribed as mayor, bailiffs, and citizens, to take and seize as forfeited, all goods, foreign bought and foreign sold, till the time of Richard 2., when they were incorporated by the name of mayor, sheriffs, and citizens, after which they claimed the same privilege as mayor, sheriffs, and citizens, and the claim was allowed. Dyer, 279. Moore, 582.

(u) 1. Though many things may be *incident* to a corporation, yet to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: 1. To have perpetual succession under a *special* denomination, and under an *artificial* form; 2. To take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. 1 Kyd, 70.—2. These alone are sufficient to the *essence* of a corporation; neither the actual possession of property, nor the actual enjoyment of franchises, is necessary. Skin. 311. 10 Rep. 31. 3 Rep. 75.

To make a common seal. (x) 10 Co. 30. b. (y)

To chuse members in the place of others dead, or removed. R. 1 Rol. 514. l. 5. D. Ca. Parl. 45.

To take a resignation of any member. Cont. 12. Jac. R. acc. 15 Jac. 2 Rol. 456. l. 10. Per Hale, 1 Sid. 14. Acc. 11 W. 3. in B. R. Sal. 493. upon a return of a mandamus to the mayor of Rippon.

So it has a power as incident, to make bye-laws. 10 Co. 31. a. Per Holt, T. 11 W. 3. (y)

(F 11.) What it may do.

A corporation may purchase, and take in succession. Ca. L. 2. 250. a. Vide post, (F. 15, 16, 17.)

Or make an alienation, under the common seal, in fee, for life, or for years. 1 Sid. 162. Vide post, (F 18.)

So an act by the major part (z), corporately assembled (b), is the act of

(x) 1. A corporation aggregate, being considered as an invisible body, cannot manifest its intentions by any personal act, or oral discourse; and though the particular members may express their private consent to any act by words, or by signing their names, this does not bind the corporation; the law, therefore, has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. This is by fixing the common seal; which therefore it is incident to every corporation to have, without any clause in the charter of incorporation expressly empowering them to use one; for when they are incorporated, they may make or use what seal they will. Dav. 44. 48. 10 Rep. 30. 1 Kyd, 268.—2. In every case therefore where they must act by deed, there they must use their common seal.—3. When, however, the common seal is affixed to a deed, that is sufficient without delivery. 1 Vent. 257. 1 Lev. 46. 1 Sid. 8. Cart. 160. 1 Salk. 255. 3 Keb. 307. 2 Leon. 98. contra. 1 Kyd, 268.—4. And it is said, that when the common seal appears to be affixed to a deed, it is not necessary that the party producing the deed should prove by witness the fact of its having been regularly affixed, or that the major part of the corporation agreed; but that if it be alleged to have been affixed by the hand of a stranger, that shall be proved by the party who alleges it. Skin. 2.

(y) 1. The power of having a common seal, and of making bye-laws or private statutes for the better government of the corporation, it is admitted, are very unnecessary to a corporation *sole*, though they may be exercised. 1 Com. 475, 476.—2. And the power of making bye-laws is not so inseparably incident to a corporation aggregate, that it cannot subsist without it; for there are some aggregate corporations to which rules and ordinances may be prescribed, and which they are bound to obey. Id. 477.

(z) 1. If a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. Latw. 619. 1 Kyd, 312.—2. Infamy in the mayor, bailiff, or other head of a corporation, shall not avoid the deeds or grants of the corporation, because he acts in his corporate, and not in his natural capacity. 5 Rep. 27. 1 Kyd, 312.—3. So it would seem that nonsane memory, outlawry, or excommunication of the head, ought not to avoid the acts of the corporation. 21 Edw. 4. 7. 12. 27. 67. Bro. Corpor. 63. 1 Kyd, 312.—4. But an act done by the members of a corporation in the *absence* of the head, shall not bind them. Thus, in the vacancy of the mayoralty, an obligation given by the commonalty is not binding. And on this principle, if a bond be extorted from a mayor and commonalty, by the imprisonment of the mayor, they may plead that imprisonment in avoidance of the bond, because during the imprisonment of the mayor the corporation may be considered as without a head. Ibid. Cowp. 222. 224, 225.—5. If a contract be made with the head of a corporation, for something which is to be applied to the benefit of the corporation, and which is afterwards actually so applied, this shall bind the corporation; but the plaintiff, in his declaration on that contract, must shew that the

the corporation had the benefit. 39 H. 6. 21, 22. 7 Rep. 10. Long. Quinto, 70, 71. 73. — 6. But an act of the head of a corporation, by which any claim of the corporation is discharged, does not bind the corporation; thus an acquittance by the mayor alone of any sum due to the mayor and commonalty, does not bind them. 2 R. 3, 7. Bro. Corp. 87.; not in strictness of law, says Jenkins, but because an hundred precedents were shewn of the allowance of such an acquittance, it was allowed by all the judges of England. Jenk. 162. — 7. If a prior, with the consent of his convent, had made a lease for years, rendering rent, and had without the convent, by deed expressly released the rent and died, the successor should have recovered the arrears; but if the prior had ousted the lessee and died, this being a discharge in law, would have discharged the rent accrued during the continuance of the ouster, against the successor. 34 H. 6, 21. 10 Rep. 67. 1 Kyd, 314.

(b) 1. There are three different kinds of assemblies in corporations, all of which are frequently called courts, legislative, electoral, and administrative; Legislative, which possess the power of making laws for the government of those who are within the jurisdiction of the respective corporations; such are the court of common council in London, the legislative courts of the different companies within that city; the *comitia majora* of the college of physicians; the convocation in the university of Oxford; the congregation or senate in that of Cambridge; the court of proprietors of the Bank, East India, and South Sea stocks: Electoral, which possess the privilege of elections; such are the livery in London for the election of members of parliament, and wardmotes for those of aldermen; the convocation and congregation in the university of Oxford, and the congregation of that of Cambridge; the *comitia majora* of the college of physicians, and the proprietors of the stock companies: Administrative, who have the management of particular affairs; such are the court of aldermen in London; the *comitia minora* of the college of physicians; the convocation and congregation in that of Cambridge; the courts of assistants in the city companies; the court of directors of the Bank and other stock companies. 1 Kyd, 400. — 2. Where no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not. 1 Kyd, 400. — 3. So, though a particular constitution require the presence of a majority of the whole number, yet the concurrence and consent of a majority of the whole is not necessary; it is sufficient that a majority of the number present concur. 2 Burr. 1019. — 4. So, where a number less than the majority of the whole, or by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole; thus, by the constitution of the city of London, forty are sufficient to form a court of common council, though the number of common-council men greatly exceeds the double of that number, and a majority of that forty, if no more be present, bind the whole corporation. 1 Kyd, 401. — 5. So, where it appeared that King Edward VI., by charter incorporated twelve persons by name, to elect a chaplain for the church of Kirton, in Lincolnshire; and by a distinct clause, three of the twelve were to choose a chaplain to officiate in the church of Sandford, within the parish of Kirton, with the consent and approbation of the major part of the inhabitants of Sandford: on a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of Sandford; the third dissented; the question, whether this was a valid election, coming before Lord Chancellor Hardwicke, he is reported to have expressed himself thus: "It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so, if all be summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part. Thus the common construction of charters, and I am of opinion, that the three are a corporation for the purpose for which they are appointed, and that the major part of them may do any corporate act; this was a corporate act, and the choice too was confirmed, and consequently it was not necessary that all the three should join." 2 Atk. 212. 1 Kyd. 402. — 6. When a clause, expressly empowering a major part to act, is inserted in a charter, the operation of it depends on the context, and on the position of the words. 1 Kyd, 402. — 7. With respect to the body at large, the cases on this point may be distributed into three classes. First, where the number of those out of whom the corporate assembly is to be formed is definite, and the clause is, "they or the major part of them," without the addition of the words, "for the time being." Secondly, when the numbers is indefinite, and the clause is also without this addition; and, Thirdly, when, either in the case of a definite or indefinite number, the words, "for the time being," are added. 1 Kyd, 402. — 8. With respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable and many



of the whole corporation. Per Att. Gen. Quo W. 32. R. Dav. 47, 48. Ca. Parl. 29. (c)

If assembled in a convenient place; though not in the chapter-house, &c. R. Dav. 48.

By the st. 33, H. 8. 27. by the common law, all assents, elections, grants, and leases by the dean, &c. or other governor of a cathedral, hospital, college, or corporation, with the assent of the greater part of the chapter, fellows, &c. are as good as if all had agreed (*d*): and all orders, statutes, &c. by the founder, &c. that such assent, election, &c. should be hindered by one, or more, being the lesser number of such corporation, made, or to be made; and oath for the observance, &c. shall be void. (*e*)

So

many incapable, and a corporation aggregate of many persons capable; that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head besides, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part, in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting voice. 7 Mod. 12. 12 Mod. 232. 1 Kyd, 425.—9. Where the head office of a corporation is filled by more than one person, as in the case of two bailiffs, and any corporate act is directed to be done by the two bailiffs and the other members of the corporation, or the major part of them; in such a case, though it be not necessary that the bailiffs, or either of them, should make part of the majority concurring in the act, yet the presence of both is absolutely necessary; because both fill but one office. 1 Kyd, 428.—10. Where the provisions of a charter direct that the new mayor shall be sworn before his predecessor, the presence of the latter is not sufficient; there must also be his assent; at least nothing must appear from whence his dissent is manifest. Str. 994. 1 Kyd, 429.

(*c*) 1. This rule is to be understood as confined to a majority of those, who, by the constitution of the corporation, have a voice in the corporate deliberations; for it frequently happens, that the power of action does not extend to the corporation at large, but is confined to a select body; and then the act of the majority of that select body binds not only the whole of the select body, but the whole corporation. 1 Kyd, 308.—2. In different corporations, too, the manner in which the majority shall be reckoned varies according to the provisions of the constitution; sometimes the act that is to bind the corporation must be sanctioned by the assent of an absolute majority of the whole body empowered to act; sometimes, it is sufficient if a majority of the whole body be assembled, and the majority of those assembled agree to the act; and sometimes a majority of those assembled, whether those assembled be a majority of the whole or not, may bind the whole corporate body. 1 Kyd, 309.

(*d*) Notwithstanding this rule of the common law with respect to the majority, many founders of ecclesiastical and eleemosynary corporations, in order the better to prevent the alienation of the possessions of these bodies, had frequently rendered necessary the assent of a part greater than the absolute majority of the whole, and sometimes the assent of every individual. King Henry VIII., finding these private regulations a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations, procured this statute, to reduce *all* corporations to the rule of the common law. 1 Com. 478. 1 Kyd, 309.

(*e*) 1. By the words of the preamble to this statute, it does not appear to have been the intention of the legislature that it should extend to any negative or necessary voice given by the founder to the head of any corporation; and in fact, in many cases which have occurred since the statute, in which the question has been, whether, by the words of a charter, a negative has been conferred on the head of the corporation, no doubt has been entertained of the legality of such negative, if actually conferred. 1 Com. 478. Cowp. 379. 1 Kyd, 311.—2. It likewise appears from the wording, both of the preamble and of the enacting clause, that the statute was not intended to prevent a select body from binding the whole corporation, nor to affect the sense in which the word 'majority' should be construed, according to the different constitutions of different corporations. 1 Kyd, 311.



So a by-law for the public good, made by the major part, binds all. R. 5 Co. 63.

But the major part ought to give their votes *distincte*, and not by proxy. R. Dav. 47, 48.

So the statutes of a college, &c. require a licence for absence to be by the wardens, 3 bursters, 5 deans, and 5 senior fellows, the major part is not sufficient, but it ought to be by all; for it is not within the 38 H. 8. 27, which extends only to acts that concern the whole corporation. R. Dy. 247. (f)

So, where a by-law is not good without a custom, the major part does not bind, if it be not warranted by the same custom. 5 Co. 69. (g)

(F 12.) How act:—By attorney.

A corporation aggregate can do nothing but by attorney. Co. L. 66. b. It ought to appear by attorney (h); for if all appear in person, it is not sufficient. Bro. Corporation, 28. Vide post, (F. 19.) (i)

It ought to acknowledge a deed (k), or levy a fine (l), by attorney. 1 Leo. 184. Mo. 591. (m)

Any natural person may be an attorney for a corporation. Though he be a member of the same corporation. Bro. Corporation, 4. (n)

(f) 1. Where an agreement, with relation to a dean and chapter, is executed by the dean for himself and chapter, though signed by him only, it shall bind the chapter. 2 Atk. 45.—2. And if a body corporate, composed of a definite number of members, make an agreement with a person to grant him a lease, and the money be paid, though some of the members were wanting at the time of the agreement, probably a court of equity would carry it into execution. 3 Atk. 478.

(g) 1. It seems that the acts of the regular servants of a corporation, done in their official character, shall in general bind the corporation.—2. Thus where the mayor and commonalty of a town, by deed covenanted with the mayor and commonalty of another, that the burgesses of the latter should be quit of toll and other duties within the former, and the burgesses of the latter were afterwards distrained by the officers of the former, this was held to be a breach of covenant, which would support an action of covenant against the corporation. 48 E. 3. 17, 18. Bro. Corpor. 14. 74. 1 B. C. C. 469. 1 Kyd, 314.

(h) The attorney may be one of the corporation, nor is it an objection that such a one is in a manner a party, because he has an individual capacity distinct from the corporate capacity. 3 H. 6. 43.

(i) In early times a corporation, as well as a community not incorporated, might have deputed some of their members to appear on their behalf in a court of justice. In many instances some of the inhabitants of a town were summoned in the name of the whole, and these appeared and pleaded by *their* attorney; so that the attorney was not the attorney of the town or corporation, but the attorney of those who happened to be summoned or commissioned by the community. Madox, Firma Burgi, c. 7. 1 Kyd, 270.

(k) 9 E. 4. 39. Bro. Corpor. 72.

(l) 1. Or make a feoffment. Plowd. 149.—2. Or be enfeoffed. 13 H. 3. 3. (13.) 14 H. 8. 2. 29. Bro. Corpor. 34. Cro. Jac. 411.

(m) 1. If it accept rent from the assignee of a lease made by them, that must be by warrant of attorney, in order to discharge the original lessee. 2 Saund, 305. Carter, 16. 17.—2. Unless, it is said, the corporation have a particular officer, whose business it is to manage the revenues; as is the case of the city of London, whose chamberlain receives the rents of their estates; when, it is supposed, that the receipt of rent from a new tenant, with an entry of the change of tenant in the books of the office will bind the corporation. 1 Kyd, 269.

(n) 1. Supra.—2. A corporation which has appointed a general attorney in a court of record, may, by such attorney, claim liberties. 4 H. 6. 6. Bro. Corpor. 36.

A cor-

A corporation may make a lease, and seal it, and afterwards make a letter of attorney to enter, and deliver the lease. R. 2 Leo. 97. R. 1 Vent. 257. (o)

So, if there be an uncertainty of place, as, if a corporation purchases a carve in such a wast, there shall be first an election of the place, with the abuttals, and afterwards a letter of attorney for entry thereon. 1 Leo. 30.

If it makes an attorney to collect its rents, and to enter; if it would avoid a lease for non-payment afterwards, it ought to make an attorney to enter, *de novo*. Per Holt, Skin. 413.

So a corporation may acknowledge a deed before a judge, in the Chapter-house, without attorney. R. Mo. 676.

Or put the common seal to a deed. Mo. 676.

So a corporation, with its head, may give a personal command without attorney.

### (F 13.) By deed.

So a corporation aggregate can do nothing (p) but by deed under the common seal. Bro. Corp. 34.

As it cannot make a feoffment, or demise (q), or give a licence. Bro. Corp. 50, 51. 1 Vent. 48. (r)

Nor enter for a forfeiture (s), or into lands purchased. R. 1 Rol. 514. R. Bro. Corp. 50. cont. 96. 1 Leo. 30. 2 Cro. 110. 1 Vent. 48. (t)

Nor present to a benefice. Bro. Corp. 34, 83. (u)

So it cannot be a disseisor, or trespasser, without an agreement by deed. Bro. Corp. 48. 50.

Nor authorize one to appear as its bailiff in an assise. 1 Vent. 48.

But a corporation which has a head, may give a personal command,

(o) A dean and chapter made a lease for three lives, and a letter of attorney to deliver it on the land; Twisden, J. thought that the letter was void, the lease being a perfect lease by sealing, and the delivery afterwards insignificant; but Hale C. J. observed, that since he had sat in the court, it had been ruled that the latter execution was good, and that the lease on being sealed was but an error, when the letter of attorney was delivered at the same time. 3 Keb. 307.

(p) That is no act in which their real property is concerned, or by which their rights are to be asserted.

(q) 1. But though they cannot make a lease without deed, yet before the statute of frauds, it might, without deed, have been granted over by the lessee. Plowd. 150.—2. And if a lease for years be made to a corporation, and they grant it over, it is said, that the grantee may entitle himself thereto without shewing the deed. Cro. Jac. 110. Sed vide 1 Kyd, 264.

(r) Where a corporation aggregate are disseised, the entry to revest their estate must be by an authority under seal. Jenk. 131.

(s) Bro. Corpor. 54. 56. 59. Dyer, 102. pl. 83.

(t) Nor make an appointment to seize goods as forfeited to the use of the corporation. 1 Vent. 47. 1 Mod. 18. 2 Keb. 567. 3 P. Wms. 424.

(u) 1. If the mayor and commonalty of London have an estate for the life of J. S., and the reversioner grant over his reversion, the attornment by the mayor and commonalty to the grantee must be by deed. 6 Rep. 38.—2. Nor can a corporation aggregate make an express surrender without deed in writing under their common seal; but they may by act in law surrender a term without writing, as by accepting a new lease for years. 10 Rep. 67.—3. In commissions of bankruptcy, corporations usually appoint their clerk or treasurer to prove debts due to them; but he must produce his appointment under seal to the commissioners. Cooke's B. L. 175.

and

and do small acts without deed; as, it may retain a servant, a cook, butler, &c. (w) Dub. Bro. Corp. 47. acc. 49, 50. 56. 1 Vent. 47.

It may authorise another to drive cattle, kindle a fire, &c. Bro. Corp. 50. Adm. 1 Vent. 47. 2 Sand. 305.

To make a distress; for this does not vest, or divest, any interest. 1 Sal. 191. (x)

And therefore, any one may justify such an act, without shewing an authority by deed. (y)

So he may justify as their servant to remove cattle out of their land, without deed. R. Lut. 1497.

So they may do an act upon record, without their common seal; for they are estopped by the record. 1 Sal. 192. (z)

So a corporation aggregate may do small acts. 1 Sal. 191. (a)

### (F 14.) What it cannot do.

But a corporation cannot do a personal act, which requires knowledge: as homage (b), or fealty. (c) Co. L. 66. b. (d)

(w) One authority makes a distinction between the case of a corporation aggregate, consisting of many persons, one capable and the other incapable, as abbot and convent; and corporations aggregate of many persons capable, as mayor and commonalty, or dean and chapter; the former, he seems to intimate, may do many acts without deed, because the abbot is the only person capable, and the oracle of the whole, the rest being incapable of any act, because they are dead in law; but corporations of the other kind being composed of persons all of whom are capable of action, there is no individual who can be considered as the oracle of the whole, and therefore they can speak only by their deed executed in due form. Some authorities go so far as to say, not only that no servant of a corporation can be appointed without deed, but that without it no command is valid to do any particular act; others, with more reason, say, that admitting that no servant can be appointed without deed, yet when he is once appointed, he may do every thing incident to the nature of his service, not only without commandment by deed, but without any commandment at all. 4 H. 7. 6. 13. 17. 7 H. 7. 9. 1 Kyd, 260.

(x) 1. 3 Lev. 107. 72. It is even said, that it is not necessary that he should be made bailiff before he distrain; that it is sufficient if the corporation agree to it afterwards, for that his being bailiff is not traversable, and that a member of the corporation may distrain in right of the corporation, and justify as bailiff. 26 H. 8. 8. 12 H. 7. 25, 26.

(y) If a sheriff make a warrant of arrest to a corporation which has return of writs, they may make a bailiff to execute it without writing. Moore, 512.

(z) 1. 3 Salk. 103. Comb. 41, 42. The assignment of auditors by a commonalty may be without deed. 12 E. 4. 10.—2. And they may make an attorney in a court of record, without any other writing than the record itself. 13 H. 8. 12. Bro. Corpor. 85.—3. Yet in general the person who appears on behalf of a corporation in a court of justice must be authorised so to do by warrant under their common seal. Plowd. 91. 1 Skin. 154. 2 Show. 366.

(a) The bank of England, or any similar corporation, may, without deed, empower their servant to make promissory notes or bills of exchange in their name; and this is the usual practice with the bank. 1 Kyd, 261. 3 P. Wms. 419.

(b) 1. For it is incapable of a personal appearance, and homage cannot be done by attorney. Co. Litt. 66.—2. But it might have purchased land held by homage and fealty, and then it would have been considered as holding them by that tenure. 33 H. 8. Bro. Fealty, 15.

(c) For it cannot take an oath. Plowd. 213. 245 10 Rep. 32.

(d) 1. A corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established; it cannot therefore be considered as a moral agent subject to moral obligation, nor as a single person subject to personal suffering, or capable of personal action. 1 Kyd, 71.

Nor

Nor be bound in a statute, or recognizance. Per Dyer, Mo: 68. Dal. 69. (e)

Nor wage law. (f)

So it cannot commit treason or felony.

Nor shall it be excommunicated (g); for it has no conscience. (h)

(F 15.) Purchase by a corporation. — What good,

A corporation has an incident power to purchase lands or goods. Co. L. 2. a. 10 Co. 30. b. R. 1 Rol. 518. l. 35. (i)

And may take goods in succession, without a licence in mortmain. So lands and tenements, with a licence.

(F 16.) When it goes in succession.

If a feoffment, grant, &c. be made to a corporation aggregate, which consists of persons, all capable, it will give a fee to them without the word 'successors.' (k) Co. L. 9. b. 94. b. D. 27 H. 8. 15. a. (l)

So if the head only is capable; as to a prior and convent, &c. where it is given in *frankalmoign*. Co. L. 9. b. 94. b.

So a lease to a corporation aggregate, &c. as to a mayor and commonalty, though limited for life, shall be good for ever; for the words, 'for life,' shall be rejected. 27 H. 8. 15. a.

So goods and chattels granted to them go in succession. Dy. 48. a. 4 Co. 65. a.

So an obligation, &c. made to them, though it says nothing of successors. 27 H. 8. 15. a.

So, if a master of an hospital recovers the arrears of an annuity, and dies: they go to the hospital, not to the executor of the master. 1 Rol. 515. l. 10.

If the president of the college of physicians recovers in debt, for male-practice; the successor, and not his executor, shall have a *scire facias*. R. 1 Rol. 515. l. 20.

So, by special custom, a corporation sole may take goods, &c. in

(e) Nor can it levy a fine. Theo. Dig. Fine (B).

(f) See note (c) page [347].

(g) Nor summoned into the ecclesiastical courts. 10. Rep. 32.

(h) Neither can it be apprehended or arrested, and therefore cannot be *outlawed*, for outlawry always supposes a precedent right of arrest. 10 Rep. 32.

(i) By the general rule of the common law, a body corporate is capable of taking any grant of property, privileges, and franchises, in the same manner as private persons. Litt. Rep. 49. 112. 114.—2. But with respect to the capacity of taking land, there is this difference between a corporation aggregate and a corporation sole, that the former has only a corporate capacity, and therefore as a collective number of persons, the members of it cannot take lands by their corporate name to them, and their heirs, but only to them and their successors: sole corporations have two capacities, their natural and corporate, and may therefore take either to them and their heirs, or to them and their successors. 1 Kyd, 74.

(k) With respect to the force of the word 'successors,' a distinction is made between the case, where there is succession in one *with* several others, and that where there is succession in one person in *right* of several others; thus, if a man be bound in an obligation to a dean and his successors, the word 'successors' has no effect, because, as a sole corporation, he cannot take a chattel in succession; and it does not appear to be the intention of the parties that it should go to the dean in conjunction with the chapter; but it was otherwise of an obligation made to an abbot or prior, and his successors, without mentioning the convent; for this shall enure to the successors, because none of the other monks have capacity to take. 20 Edw. 4. 2. 1 Kyd, 106.

(l) Because in judgment of law they never die.

succession: as, the chamberlain of London. R. Cro. El. 464. R. 4 Co. 65. a. Fulwood.

But a feoffment, grant, &c. to a corporation sole will not give a fee in succession, unless it be limited to him and his successors. Co. L. 94. b. (m).

Nor to a corporation aggregate, where the head alone is capable; as, to an abbot and convent, &c. without the word *frankalmoign*. Co. L. 94. b. (n).

So, regularly, no chattel in possession, or action (*σ*), granted or made to a corporation sole, goes in succession, but to his executor; though it be granted, &c. to him and his successors. Dy. 48. a. R. 4 Co. 65. a. 1 Rol. 515. l. 5. 15. (p).

As, an obligation, term for years, &c. 4 Co. 65. a. Vide Biens, (C). (q)

(m) Unless to the king. Co. Litt. 9.

(n) But this opinion does not seem to be supported by the authorities, nor by the reason of the thing: not by the authorities, for there are cases in the year books which justify the contrary conclusion; not by the reason of the thing, for an abbot, as an individual, was considered as dead in law, and could take only in his corporate capacity as head of his house, and in trust for them; and therefore a gift to him and his convent must have been intended to go in succession. 11 H. 4. 84. b. 20 H. 6. 8. 9 H. 5. 9. Bro. Corpor. 20. 1 Kyd, 105.

(o) Therefore if a man be bound in a recognizance or obligation, to a sole corporation, the executor, and not the successor, shall have it; for though it has a *natural* and a *corporate* capacity, yet the latter is confined to real property.

(p) 1. Lord Coke makes a distinction between the case of a sole corporation, who is a body politic by *prescription*, and one who is a body politic by *custom*, and cites the case of the chamberlain of London as an example of the latter, who may take a recognizance to himself and his successors in trust for the orphans. But the reason does not seem to depend so much on the corporation being by prescription or by custom, as on his being a trustee or not, and taking for his own benefit, or for the benefit of another. 1 Kyd, 77. — 2. The reason given by Blackstone for this incapacity of a sole corporation is, that such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. 1 Com. 477. — 3. Perhaps the reason might be more correctly stated thus, that the law has appointed a revenue in fee to be the only source from which sole corporations are to support their official or corporate character, and that therefore their successors have no interest in any chattel given to the predecessor; for certainly a lease for years given to a corporation sole, and his successors, is as little likely to create a misunderstanding between the executor and the successor as a gift in fee. 1 Kyd, 77.

(q) 1. If the master of an hospital, or any similar corporation, recover in a writ of *quintum*, and die, the successor shall have the arrears and not his executors; but it is otherwise in the case of a parson, for there the executors are entitled and not the successor; and the reason of the difference seems to be, that the parson is entitled to the *quintum* for his own benefit as parson, and therefore the arrears incurred in his lifetime belong to his personal representatives; but the master of the hospital is entitled to the *quintum* only as trustee for the benefit of his house. 19 H. 6. 44. Bro. Corpor. 26. 1 Rol. 515. — 2. On the same principal, if a rent due to dean and chapter be in arrear, and the dean die, the rent belongs to the succeeding dean and chapter; if rent be due to the dean in his sole corporate capacity, and he die, it shall go to his executors; but rent on a lease granted by a sole corporation; accruing after the death of the predecessor, shall go to the successor, and he shall have covenant on the lease. Dyer. 48. in marg. Carter, 16. — 3. The charter granted to the college of physicians and confirmed by act of parliament, imposes on all offenders in practising physic in London, without admission by the college, a penalty of 5*l.* per month, one half to the king and the other to the president and college; if the president recover in debt against an offender and die, the successor and not the executor shall have a *scire facias* on this judgment, because the successor recovers as due to himself and the college, and not as representing his predecessor. 1 Rol. 515.



(F 17.) What not good.

But a corporation, sole or aggregate ecclesiastical, or lay, cannot (r) purchase, or take lands and tenements, (s) without licence (t) to take in mortmain. Vide Capacity, (B 2, 3.) (Vide Co. L. 2. b. 2 Inst. 75.)

So a feoffment, grant, &c. which takes effect when a corporation aggregate wants a head, as, to a mayor and commonalty, &c. in a vacation when there is no mayor, shall be void. Co. L. 264. a. 13 Ed. 4. 8. b. (u)

A devise to a college by the master is void; for it has not a head when the devise takes effect. R. 4 Leo. 223. (x)

But if there be an head when the grant takes effect, it is sufficient; though there was none when the grant was made; as, a lease to A. for life, remainder to a mayor and commonalty, made in a vacation, shall be a good remainder, if there be a mayor when A. dies. Co. L. 264. a.

So a grant of liberties, or franchises, in the time of vacation, shall be good: as, a grant to a commonalty, to be incorporated by the name of mayor and bailiffs, and to choose a mayor. 10 Co. 27. b. (y)

(r) A corporation aggregate cannot hold lands in *joint tenancy* with a natural person, because as the corporation never dies, the natural person cannot have the advantage of the incident of survivorship; but such corporation may hold lands in *common* with a natural person, because survivorship is not incident to lands so holden. Plowd. 239.

(s) The statutes of mortmain make no mention of personal property, and therefore the power of corporations aggregate, in general, to take such property, remains unlimited; but many particular corporations, established by act of parliament for some particular purpose, are limited in this respect as well as in their power to purchase lands. 1 Kyd, 104.

(t) 1. A corporation aggregate cannot, by the strict rules of the common law, be seised of lands to the use of another; for this is foreign to the purpose of its institution; the persons who compose the corporation might, in their *natural* capacities, have been seised to the use of another; it would therefore be nugatory to allow them to do that in their *corporate* capacity, which they had power to do in their *natural*, as the sole purpose of incorporating them was, to confer powers upon them which they could not otherwise have. Gilb. Uses and Trusts, 5. 170. — 2. Another reason given for this incapacity is, that the corporation aggregate could not be compelled by subpoena to execute the possession to the use, because if it disobeyed it could not be compelled by imprisonment. Ibid. Jenk. 195. Plowd. 102. 538. — 3. Notwithstanding which rule, however, it is certain that many corporations are made trustees for charitable purposes, and are compelled to perform their trusts, which may perhaps, however, be reconciled to the rule in this way; the trust is not vested in the corporation, as a corporation, but the natural persons of whom it is composed are created trustees, and their description, as constituent parts of a corporation, operates only as a more certain designation of their persons; which explanation appears the more reasonable from what is said of a sole corporation on the same subject, 'that a man who is a corporation sole cannot be seised to an use in his corporate capacity, nor by his corporate name alone without his *natural* name, and then the addition of his corporate name must be considered only as a fuller description of his person. Gilb. ibid. 2 Leon. 122. 1 Kyd, 73.

(u) 1. 18 Edw. 4. 8. Bro. Corpor. 58, 59. — 2. And the reason is, that without the head the corporation is incomplete, and the only act it can do during the vacancy is to elect another.

(x) Because the devise must take effect at the instant of the death of the deviser, and at that moment the corporation is incomplete.

(y) 1. But a grant made in remainder to a corporation, when no such corporation exists, is void, though such a corporation be created before the expiration of the particular estate. Hob. 33. — 2. A grant may be made to a corporation by the same charter by which it is created. 2 Edw. 6. Bro. Corpor. 89. 10 Rep. 74.

So

So payment of rent may be made to a chapter in a vacation. Mo. 52.

So a licence by the king to grant to a chaplain, &c. is good, though no chaplain is then *in esse*. 10 Co. 27.

So, in pleading, there is no need to alledge the life of the mayor at the time of the grant. Bro. Corp. 58. 13 Ed. 4. 8. b.

(F 18.) Alienation by a corporation.

So a (z) corporation has an incident power to make an alienation (a) of their lands or goods. Vide 1 Sid. 162.

And though they alien all their goods and possessions, yet the corporation continues. Jon. 168.

But an alienation of the head, without the body, is a *disseisin*. Co. L. 341. b.

A fine and non-claim bars a corporation, which has an absolute fee. R. Pl. Com. 537, 538. (b)

But a successor of a bishop, dean, &c. who have not an absolute estate, shall have other five years. Pl. Com. 538. (c)

(s) 'Civil.'

(a) 1. The capacity of a corporation, and of the members of which it is composed, as individuals, is totally distinct. 8 H. 6. 1. 14. Bro. Corpor. 24. 19 H. 6. 64. Bro. Corpor. 27. — 2. The corporation at large may therefore grant to any individual member; thus the dean and chapter may present any of the prebendaries to a living, or make a lease to him of the chapter lands; and a mayor and commonalty may make a grant to any ordinary member of the corporation. But the *head* of a corporation differs in this respect from any other member; a lease cannot be made by the chapter without the concurrence of the dean; therefore the chapters cannot by themselves make a lease to the dean, and he cannot take it as from dean and chapter, because, being an integral part of the corporation, he would, in such case, be both lessor and lessee; neither can they present the dean, nor can the mayor and commonalty grant to the mayor; because the corporation is complete without any particular individual member, and his concurrence is not necessary to any act of the corporation; but it is not complete without the head. 14 H. 8. 2. 29. Bro. Corpor. 34. Salk. 398. 8 Mod. 304. Ld. Raym. 778. 1 Kyd, 180. — 3. But if a lease for years be made to A., one of the commonalty of London, and afterwards he become mayor, this lease is not extinct; and so it is of a dean and chapter; for the member of the corporation in this case does not make the body corporate, nor, at the time of the lease made, was he head of the corporation. Jenk. 200. — 4. If a corporation consists of two bailiffs and burgesses, one of the bailiffs and burgesses cannot make a lease of the corporation lands in their *politic* capacity to the other bailiff in his *natural* capacity; for the bailiffs are an integral part of the corporation, and they both make but one officer; and therefore where one is severed in any corporate act, that act becomes void; for if one bailiff could do a corporate act separately this inconvenience would follow; they might act directly contrary to one another; the meaning and intent of the charter in making two bailiffs was, that they should both be present and concur in every corporate act; one, therefore, with the burgesses, cannot make a lease to any one, much less to the other; and if both concur, the one to whom the lease is made will be both lessor and lessee. 8 Mod. 304.

(b) 1. But since the st. 13 El. c. 10., it has been adjudged, that colleges are not bound by fine and nonclaim; because it would have been of no effect to have prohibited them to bar the right of their colleges by conveyances made by the master and fellows themselves, and to have left them power by their permission or sufferance, and non-claim to bar it. 11 Rep. 78. — 2. And deans and chapters being within the statute of Elizabeth, the law with respect to them, on this point, must be the same as with respect to colleges. 1 Kyd, 317.

(c) At common law, and much more since the restraining statutes, though a bishop, dean, parson, vicar, or prebendary do not make their entry or claim, nor bring their action to avoid a fine within five years, but are remiss and negligent for that time, yet their successors shall not be bound for ever, because they have no absolute estate in their possessions. Plowd. 375. 538. 10 Rep. 69. 71. 1 Kyd, 317.

(F 19.)

## (F 19.) Corporation may sue or be sued.

So a corporation has an incident power to sue or be sued. (d)

And therefore, may maintain a writ of right (e), or other real action (f), for their tenements. F. N. B. 5. C. Pl. Com. 537. (g)

A mayor and commonalty may have an action of covenant upon a grant for the benefit of their members. (h) 1 Sand. 344. (i)

(d) 1. It is laid down that a corporation aggregate cannot be summoned into the ecclesiastical courts. 13 Rep. 52. 1 Kyd, 277. — 2. It seems, however, that they may be made amenable to these courts; for it is said, that 'the court Christian cites the *members* of corporations by their proper names, with the addition of the names of their corporate capacity, though it proceeds against them in the latter character, for that court has no other way of citing them than this; that it cannot cite the body politic, and that therefore it has no mode of proceeding against them but this; that this does not resemble a *distringas* at common law, by which the lands or goods of the body politic may be taken, and where, if they have neither lands nor goods, there is no way to make them appear; but that in the court Christian they are cited by their proper names, though in their *politic* capacity; and if they stand out, they must lie by the heels in their *natural* capacity. Skin. 27, 28. 1 Kyd, 277.

(e) That is to say, all corporations aggregate, having the fee simple of their possessions, may maintain a writ of right, as any tenant in fee-simple may. And so may those sole corporations who have the fee-simple absolute in their possessions; a bishop for the possessions of his bishoprick; a dean or master of an hospital, for those possessions which they held distinct from the chapter or the hospital respectively; and so might an abbot or prior for the possessions of their monasteries. But sole corporations which have not the fee-simple in them, as a person, vicar, prebendary, and in ancient times, a chauntry priest, cannot maintain a writ of right, but the highest writ which they can have is a *juris utrum*. 1 Kyd, 185.

(f) 1. As those corporations which had not the fee-simple absolutely in them, could not have a writ of right properly so called; so neither could they have a writ of customs and services, *ne injuste veres, rationabilibus divisio, quo jure*, or such other writ as were grounded on the mere right. F. N. B. 49. L. Co. Lit. 341. — 2. But they might have a writ of waste, a writ of entry *ad communem legem*, a writ *de consimilio casu ad terminum qui præterit*, or a *quod permittat*, a writ *contra formam collationis*, or *contra formam feoffamenti*, a writ of mesne, and such other *possessory* writs as were applicable to their case. Ibid.

(g) Cro. Eliz. 282. Co. Litt. 341.

(h) 1. The mayor and commonalty of Lincoln brought an action of covenant against the mayor, bailiffs, and commonalty of Derby, and counted, that the predecessors of the defendants by their deed had granted to the predecessors of the plaintiffs, that the mayor and the commonalty of Lincoln should be quit of murage, pontage, custom and toll within the town of Derby for all their merchandizes, and averred that the officers of Derby had taken toll and custom wrongfully of some burgesses of Lincoln, contrary to the covenant. The action was held maintainable, though it was objected that the corporation ought not to have the action, but that the action should have been brought by the particular persons whose goods were taken, against the particular persons who took them. 48 E. 3. 17. — 2. If, however, such an exemption had been claimed by grant from the king, or by prescription, it should seem that the action could not have been maintained by the corporation at large, but must have been brought by the members particularly injured, because, in such an exemption, it is not the corporation in its aggregate capacity that is particularly interested, but the several members in their individual capacities. It is at least certain, that the individuals injured could have maintained the action. 1 Kyd, 191. 1 Saund. 343. — 3. The question whether the corporation at large can maintain an action for the infringement of a privilege claimed by an individual, as member of the corporation, in consequence of a grant from the king to the corporation for the benefit of its members, was agitated in 1 H. Bl. 206.

(i) 1. A great part of the revenues of corporations consists of certain duties leviable within the limits of their jurisdictions, and if payment of any of them be refused, they may recover them by action of debt or *indebitatus assumpsit*. Hard. 486. 1 Vent. 398. 2 Wils. 95. 3 Burr. 1402. Cowp. 102. 1 T. R. 616. — 2. They may likewise distrain for them. Ld. Raym. 584. 1 Salk. 248. 5 Mod. 356. Carth. 557.

And trespass for the imprisonment of the mayor. (k). Per Brian, 21 Ed. 4. 14. b. (l)

And an action upon the case for a disturbance in holding their feet, or taking the profits of liberties granted to the corporation. 45 Ed. 3. 2. b. 18 H. 6. 11. b. (m)

But the mayor and commonalty shall not have an action upon a bond, made to the mayor himself by his own proper name. Per Vavisor, 21 Ed. 4. 15. Dy. 48.

Though another be afterwards made mayor. 21 Ed. 4. 15.

So the commonalty cannot sue an action alone, if there be a mayor or a bailiff.

Otherwise, if there be no mayor or bailiff. Dub. Th. Dig. l. 1. c. 22. S. 13. 16. (n)

The process against a mayor and commonalty is distress. 45 Ed. 3. s. a. 2 Ver. 396. (o)

And in chancery, if they have not whereby they may be distrained, (p) upon a petition to the lords in parliament it may be ordered, that if they do not appear upon the issuing of process and *distringas* there, the bill shall be taken *pro confesso*. Ca. Ch. 205.

If the sheriff upon a *distringas* does not compel an appearance, the court will oblige him to return larger issues. 1 Sal. 191. (q)

But

(k) This position means, that if an injury be done to one of the members of a corporation, by which the corporation at large are put to any damage, the corporation may have an action on that account. As where the corporation are bound to elect a new mayor every year, on a particular day, under the penalty of 10*l.*, and the mayor be imprisoned unjustly, so that they cannot observe the day, by which they incur the penalty; or if they are bound to appear annually in the exchequer under a penalty, and they cannot observe the day on account of the mayor's imprisonment, by which they lose the penalty, the corporation shall have an action for the imprisonment. 21 E. 4. 7. 12. 27. 67. Bro. Corpor. 63.

(l) So trespass for trespassing upon their lands. 21 Edw. 4. 75. 1 Edw. 5. 5. 7 H. 7. 9.

(m) If a grant be made to the corporation of a town that they shall have the return of writs within the town, and that the sheriff of the county shall not intromit, they may maintain an action on the case against the sheriff, if he enter and serve process. 1 Rot. Rep. 118.

(n) Where an action is given to a common informer to sue for a penalty, by the words any 'person or persons,' a corporation aggregate cannot sue as a common informer. Str. 1241.

(o) 1. That is, if they neglect to appear on service of the writ or summons, which is to be served on the mayor or other chief officer of the corporation. Prec. Ch. 131. 1 Gh. Ca. 206. — 2. The *distringas* is to be against the corporate property; nor will an attachment lie against them in their corporate capacity. 2 Keb. 1. Raym. 152. 1 H. Bl. 209.

(p) If they have neither lands nor goods there is no way to make them appear, either in a court of law or of equity, it being a rule, that for a public concern, the sheriff cannot distrain any individual member of the corporation. Skin. 27. 1 Vent. 351. Styles, 227. contra. Cowp. 85.

(q) 1. The proceedings on the *distringas* in the courts of law against a corporation, are the same as in other cases. 1 Kyd, 276. — 2. In equity it is used to compel an appearance, to compel an answer, and to compel performance of a decree. Ibid. — 3. When it is to compel appearance or an answer, and the defendants stand out in contempt, there issues an *alias*; and if they still stand out, a *pluries*; and if on the return of the *pluries* they do not enter an appearance, or put in their answer, as the case may be, the next step is to apply for a sequestration. Harr. Prac. 265. — 4. When a *distringas* issues against them in consequence of their disobedience to a decree, a sequestration may be had against them after the return of the first writ. 2 Vern. 395. Prec. Ch. 129. — 5. And when the sequestration is once awarded, they cannot have it

But process of outlawry does not lie against a corporation aggregate. 45 Ed. 3. 2, 3.

And therefore trespass does not lie against a corporation, but against the particular persons only: (r) for a *capias* and *exigent* do not go against a corporation. (s) Bro. Corp. 43. Qu. Th. Dig. l. 4. c. 13. S. 3. 7. (t)

Nor a *subpcena*; for it has no conscience. D. 2 Bul. 233.

At the return of the process it is not sufficient, if the particular persons distrained appear. Bro. Corp. 28.

Or, if all the members of the corporation appear in person. Bro. Corp. 28.

But the corporation must appear by attorney, made under their common seal, by the name of the corporation. Bro. Corp. 28. Vide ante, (F 12.)

For the pleadings in actions by, and against a corporation, vide Pleader, (2 B 1, 2.)

(F 20.) The members of a corporation: — How chosen: —  
The election; when good.

So a corporation has an incident power to choose new (u) members;

discharged on entering their appearance with the register on the *distringas*, and submitting to answer interrogatories; because that permission granted in the case of common persons is in favour of liberty, which a corporation cannot lose; but if they can shew any irregularity in the proceedings, that may be cause to discharge the order. Ibid.

(r) 1. Individuals are not liable for erroneous acts done by them in their corporate capacity, without proof of malice. 1 East, 555. — 2. An entry by a corporation in their books animadverting on the administration of justice, exposes those who concurred in it to a criminal information. 2 T.R. 199.

(s) Which are the proper process in an action of trespass.

(t) 1. Notwithstanding this, there are several cases in the year-books, of actions of trespass brought against a mayor and commonalty, in which, though many objections appear to have been taken on other points, none appears to have been taken to the action itself. 38 G. 3. 18. 8 H. 6. 1. 9 H. 6. 36. 20 H. 6. 9. 4 H. 7. 13. 4 H. 7. 13. Bro. Corpor. 48. 45 E. 3. 23. 11 H. 6. 11. — 2. And accordingly, it has recently been decided, that a corporation may be sued by a tort done by their command. 16 East, 6. — 3. The case therefore in which it was decided, that a *replevin* cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff, seems not to be law. Brownl. 175. — 4. If a corporation has been used for time immemorial to repair a creek, that creates an obligation to keep it in repair, and an action may be maintained against the corporation for not repairing it, by any one who has sustained any damage from its not being in a state of repair. Cowp. 86. 1 Kyd, 225. — 5. It seems likewise that in such a case as this, or where a corporation is bound to keep a bridge or a highway in repair, an indictment will lie against it for not repairing. It is, indeed, reported to have been said by Lord Chief Justice Holt, (12 Mod. 559.) that 'a corporation is not indictable, but the particular members of it are;' it seems, however, that this can apply only to the case of a crime or misdemeanour, and that an indictment may lie against a corporation, in the cases mentioned, as well as against a county or parish. 1 Kyd, 226. Dogherty's Crown Circuit Assistant, 398.

(u) 1. I apprehend, says Mr. Kyd, that in the business of corporations, as well as in every other case, there can be no election at all, unless there be a candidate or candidates; and in the case of the election of a mayor or other head-officer on the charter-day, or in the case of an election of an alderman by the wardmote, as in the city of London, or where the electors are commanded by *mandamus* to elect any officer whatever of a corporation, "the electors must proceed to an election, because they cannot stop for that day, or defer it to another time." The only case to which this distinction



bers; (x) as, a mayor, or bailiffs, aldermen, &c. though no power be given by the charter. Dub. 12 Co. 121. Acc. per 2 J. 1 Rol. 514. l. 5. D. Ca. Parl. 45.

And

tion can apply, appears to me to be that of a mere voluntary election on a bye-day, to fill up a vacancy which might, at the discretion of the electors, be filled up at any time. 2 Kyd, 19. — 2. It has been remarked, "that in corporations by prescription, the time and manner of election, and the qualifications, both of the electors and of the persons capable of being elected, depend principally on custom; and in corporations by charter, on the provisions of the charter." This qualification of the proposition was introduced with a view to the inherent power which corporations have with respect to the regulation of their internal concerns; for, though it be true that all these circumstances depend principally on custom or charter; yet so far as may be consistent with the constitution of the corporation, whether by charter or prescription, these may be regulated by bye-laws. 2 Kyd, 20. — 3. With respect to the qualifications of the electors and of the eligible, it has been laid down as a general proposition, that a bye-law may limit the number of the former, but not the number of the latter; because a limitation of the number of electors tends to prevent the confusion naturally attendant on popular elections; a reason which does not in so great a degree apply to the case of the eligible; but neither branch of this proposition is to be taken in the full extent of the words in which it is expressed; for neither is every bye-law good which limits the number of electors, nor every bye-law bad which limits that of the eligible. 2 Kyd, 24. — 4. With respect to the latter, though a bye-law would be void, which should require an additional qualification beyond those required by the constitution of the corporation, or which should transfer the right of being elected from a more numerous body, to a body of a more select description; yet a bye-law, requiring the nomination of a particular number of candidates, out of the whole number of the persons eligible, and that the election should be of one of the candidates so nominated, would be good. Salk. 190. Str. 314. — 5. But where it appeared that the charter directed the election to be made out of four persons to be nominated out of the burgesses or inhabitants at large, and that a bye-law made by the mayor and aldermen directed it to be made out of four persons to be nominated out of the aldermen, or of whom one at least should be an alderman; the court of king's bench held this bye-law to be void, and on a writ of error the House of Lords affirmed the judgment. 3 Burr. 1835. — 6. With respect to the electors, though a bye-law restraining their number may be good, yet that restraint must be within certain limitations. It cannot strike off an integral part of the electors; nor transfer the right of election from the body at large to a select number independent of that body; nor impose a qualification inconsistent with the charter, or unconnected with their corporate character. 4 Rep. 78. Jenk. 275. — 7. The case in which the general proposition was established, "that the number of electors may be restrained by a bye-law; but that a bye-law cannot narrow the number of the persons out of whom the election is to be made," is cited in 3 Burr. 1833. 2 Kyd, 28. The case in which it was finally decided, that a bye-law cannot exclude an integral part of the electors, nor impose a qualification inconsistent with the charter, or unconnected with their corporate character, was in 3 Burr. 1827. 2 Kyd, 29. — 8. Where, by custom or by charter, a particular day was appointed for the election of a magistrate, by common-law the election must have been on that precise day; and in the case of a custom, if the plaintiff in a declaration for a false return to a *mandamus*, had laid the day of his election right, but at the trial had proved it to have been on a different day, he would have failed in his action, because he did not bring his election within the custom; but if he had laid a wrong day in the declaration, and proved an election on the right day, he would have maintained his action; provided the day laid in the declaration had been before the action brought, because the day laid was not material to the custom. Carth. 228. 2 Kyd, 31.

(x) 1. A person who is already in possession of one office, is not, for that reason, disqualified to be elected to another; whether the two offices be incompatible or not; if they be not incompatible, they may of course be held together; if they be incompatible, the election or appointment to the second, and acceptance by the party elected or appointed, vacates the first. 1 Kyd, 369. — 2. The rule is general. Thus, if a judge of the common pleas be appointed a judge of the king's bench, this vacates the office of judge of the common pleas; because it is part of the business of the one to correct the errors of the other; so if the king's remembrancer in the exchequer be appointed a baron in the same court, the first office is void, because a man

And therefore an affirmative authority by charter does not take away the incident power to choose: as, if a charter says, that after (*y*) death, removal, &c. they may chuse another within 8 days; if the election be not within 8 days, they may chuse afterwards. R. per 2 J. 1 Rol. 514. l. 5.

If the charter says, the mayor shall summon a court, &c. and he refuses, it may be done without him. Semb. 3 Mod. 13.

So, though the charter says, the commonalty shall chuse, which imports all the commons; yet an election by the (*a*) major part is good. R. 1 Rol. 514. l. 10. (*b*)

And by usage, a select number (*c*), called the common council,

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cannot be a judge and a minister in the same court. Poph. 28, 29. — 3. So, if a town-clerk be elected mayor, in a corporation where the mayor holds a court of record, and the town clerk is a minister of the court, if he accept the office of mayor, the place of town-clerk is *ipso facto* void. 1 Sid. 305. 2 Keb. 92. 1 Kyd, 370. — 4. And there is no distinction between the case where an inferior officer is appointed or elected to a superior office, and that where a superior officer is appointed or elected to an inferior office. — 5. Thus, if a judge of the king's bench accept of an appointment to the place of judge of the common pleas, which has sometimes been the case, this vacates the place of judge of the king's bench. — 6. The greater number of the cases that have occurred on this subject have, indeed, been of inferior officers appointed or elected to superior offices; but in the decisions no distinction has been made between the two classes. 1 Kyd, 370. — 7. Whether one office in a corporation be incompatible with another, depends entirely on the constitution of the corporation in which the question arises, whether it be a corporation by prescription or by charter; as if the king by his charter were to say there should be a mayor, twenty-four jurats, and a town-clerk, the corporation, by their own act, could not reduce the number by consolidating two of these offices, because the corporate body would then consist of twenty-six distinct members. 1 Kyd, 373.

(*y*) There cannot properly be any election to an office which is not actually vacant; though it may be a practice in some places to choose a person before-hand, which may be called an inceptive election, and on the death of the predecessor, to admit the person before nominated, which completes the election; but such an inceptive election is not binding on the electors; and when the vacancy really happens, they may elect another. Skin. 45. 2 Kyd, 5.

(*a*) Where a candidate is proposed in a corporate meeting, duly assembled, and a majority of the persons assembled protest against any election, and do not propose any other candidate, the minority may elect the candidate proposed. 2 Kyd, 12. 2 Burr. 1017.

(*b*) Where the number of electors is indefinite, and some persons who are unqualified to vote in the election, on the want of qualification being discovered, it would seem that the bad votes ought to be rejected, and the election to be decided according to the majority of good votes. It seems likewise that when, by the constitution of the corporation, the candidates to be put in nomination are not limited to a particular number; if some be qualified and some unqualified, and some of both kinds be chosen, the election is good as to those who are qualified, and void only as to the others. But where, by the constitution, the number of electors is limited, and in that limited number there are some who vote without being qualified, it would seem, from the reason of the thing, that the election is void for the whole, unless there be so many good votes for the candidates chosen, as would constitute a majority of the whole limited number. Where the number of candidates is limited, there seems still stronger reason why the election should be void for the whole, where there are unqualified candidates, even if none of the latter be chosen; for, perhaps, had there been no unqualified candidates, others might have been chosen in preference even to those of the candidates who were duly qualified. 2 Kyd, 7, 8.

(*c*) 1. In corporations consisting of a small number of members without a head, there is usually no distinction of rank, but all are equal in rights, privileges, and authority. 1 Kyd, 320. — 2. In small corporations, too, which have a head, such as dean and chapter, there is generally no other distinction of rank but that between the head and the body at large, all the members of the latter being equal and co-ordinate. Ibid. — 3. In

cil (*d*), shall choose; for there shall be intended an ancient ordinance for it. R. 4 Co. 77. (*e*)

If the charter says, the commonalty shall chuse, and by a subsequent charter, the mayor and aldermen, an usage to chuse according to the new charter is good: for it is evidence of the consent of the corporation to take it as a grant of a new privilege, and not as a confirmation of the former. R. per 2 J. Eyre cont. 1 Sal. 168. (*f*)

So, if the charter says, the burgesses (*g*) shall chuse a mayor *de seipsis*, by ancient constitutions and usage the election of one, out of two whom the common council shall propose shall be good. R. 1. Sal. 190. (*h*)

(F 21.)

corporations whose members are more numerous, and whose concerns are more complicated, there are usually some select bodies, which necessarily give rise to a distinction and gradation of ranks. Thus, in corporate towns, the common freemen, forming the great mass of the corporation, may be said to compose one rank, the livery in the city of London another, and in the greater number of cities and towns, the common-council-men and aldermen, or some equivalent descriptions, two others. 1 Kyd, 321.—4. The common freemen have, in general, only the right of exercising their trade within the town, and enjoying the common privileges and franchises of the corporation, though sometimes the right of voting in elections. Ibid.—5. The livery are a select body, whose principal privilege is that of forming some of the electoral assemblies of the corporation. Ibid.—6. The common-council-men have a more immediate concern in the government, sometimes forming a constituent part of the legislative body, which is the case in London, and sometimes only a part of the general executive council. Ibid.—7. The aldermen are still more select, forming what may be called the privy council of the corporation, and in general, also, a part of the common council. Ibid.

(*d*) In the corporate companies of towns there are generally two ranks, the common freemen of the company, and some select body who form the governing part. There is likewise an intermediate rank, as the livery in several of the companies of London. The common freemen have an inchoate right to have the freedom of the city at large; and from them the livery are nominated. The livery are the representatives of the company in matters concerning the city; they elect the members of parliament, and compose the common halls; from them, too, the court of assistants is taken. 1 Kyd, 329.

(*e*) The privilege of election may be in one body, and the privilege of approbation in another; thus the privilege of election to the office of alderman in London and in Norwich is in the ward, and that of approbation in the mayor and aldermen: but if the mayor and aldermen reject, without reason, one chosen by the ward, a peremptory *mandamus* will be granted to admit him. 2 Salk. 436. 2 Kyd, 6.

(*f*) If the election of a particular officer be, by ancient charter, vested in one body, a subsequent one cannot of itself alter the mode of election: but if the subsequent charter be accepted by the corporation at large, or if they acquiesce under it, and act in conformity to it, which is evidence of acceptance, the latter mode of election is valid. Skin. 574. 2 Kyd, 6

(*g*) 1. In some cities the term 'capital citizen,' and in many burghs, 'capital burgess,' correspond to 'alderman.' Vide Fortes. 200. 10 Rep. 93. 1 Rol. Rep. 173. 224. 1 Kyd, 323.—2. So, in some places, the word 'jurat.' Vide 1 Sid. 305. 1 Keb. 812.—3. Yet the term 'capital burgess' is sometimes equivalent to common-council-man, properly so called, and sometimes includes the mayor, aldermen, and common-council-men. 1 Kyd, 323.

(*h*) 1. When a corporate act is to be done, not on a charter day, and by a select number, all the members who, by the constitution of the corporation, compose the assembly, except those who have absolutely deserted the town, should have notice that such particular assembly is to be held for the purpose of doing some corporate act, though it be not in general necessary that the particular business should be specified. And where there are different assemblies in a corporation with distinct powers, and all the members of the smaller assembly are members of the more numerous; if the more numerous assembly be summoned to meet to exercise the powers lodged in them, those who are members of the smaller assembly cannot separate from the rest, and exercise their distinct powers: but there must be a summons for that purpose of the smaller assembly by itself. Str. 385. 1 Kyd, 430.—2. In one place it is said, "that if all be

## (F 21.) When not.

But regularly, the election ought to be conformable to the charter; and therefore, if the charter says, the mayor and aldermen shall chuse, an election by the aldermen, without the presence of the mayor or his deputy, is bad. R. 1 Rol. 514. l. 20. (i)

If a charter says, that upon such a day they shall chuse annually; they cannot chuse after the day, except upon death or removal, though a *mandamus* be granted for an election. R. 2 Mod. Ca. 112. 129. (k)

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present, though by accident, and without notice, their acts, done by unanimous consent, will be good; but that the acts of a majority present by accident will not be binding." B. R. H. 151. 1 Kyd, 434.—3. In another it is said, "that wherever notice is given for one particular business only, no other business can be transacted, unless the whole body be present, and every one consent:" which implies, that if all be present and consent, their acts will be good. 1 Kyd, 434. 1 Barnard. 80.—4. This proposition, "that if all be present by accident, or in consequence of a summons to attend on one particular business, the acts done by unanimous consent will be good," receives some countenance from what fell from the court in the case of Sir Christopher Musgrave against the Mayor of Appleby. Ld. Raym. 1358. Str. 584. 1 Kyd, 434.—5. Where a summons is necessary, it is not sufficient that the usual and general orders be given to the summoning officer; the latter must actually do every thing he possibly can to summon all the members of the select body. B. R. H. 147. 1 Kyd, 436.—6. It has been said, that though the assembly of a select number held not on a charter day be irregular, unless every member within reach of summons be actually summoned, yet that in the summons it is not necessary to specify any particular act. Str. 386.—7. However well founded this may be, as applied to the ordinary business of the corporation, it seems that in the case of an amotion of a corporator, a general summons to every member is not sufficient; but that it is necessary to mention, that it is intended to consider the question of removing the particular person; perhaps even that will not be sufficient, but it may be necessary to state the cause of his intended amotion. This, however, does not appear to be fully settled, for in the cases where the amotion of members has been held irregular for want of proper summons, the determination has generally proceeded on the circumstance of there having been no summons at all. 1 Kyd, 439.—8. All the cases hitherto mentioned, have been of the meeting on a day not prescribed by the charter or constitution of the corporation, and of a select body; but this case will shew that a summons is equally necessary to constitute a regular meeting, at least for the purpose of removing a corporator, where that power is exercised by the whole corporation. 2 Burr. 738.—9. In all the cases it seems implied, that a summons is not necessary where a member is not resident within the town: in the case of Grimes it was expressly so determined. 5 Burr. 2601. 1 Kyd, 443.—10. And it is laid down as a general rule, that where there is a usual method of notice, that cannot be dispensed with, though there be an actual summons of all the members, and that where that usual method is not observed, no act is good to which all who have a right to notice, do not unanimously agree on being all actually summoned. 5 Burr. 2682.

(i) Where a corporate assembly is duly summoned, and the members met, the next requisite is, that the proper person preside; unless this be observed, there are many acts which will be void. 1 Kyd, 451.

(k) 1. By the statute of 11 Geo. 1. c. 4., after reciting, "that in many cities, boroughs, and towns corporate, the election of the mayor, bailiff or bailiffs, or other chief officer or officers, was by charter, or ancient usage, confined to a particular day or time, without any provision how to act or proceed, in case no election were then made; and that it frequently happened, that by charter or usage, particular acts were required to be done at certain times, in order to complete such elections, and that by the contrivance or default of the person or persons who ought to hold the court, or preside in the assembly where such elections were to be made, or such acts to be done, or by accident, it had sometimes happened, and might frequently do so, that no courts or assemblies had been held, or elections made, or such acts done within the time fixed for that purpose; in which cases, if elections of such officers could not afterwards be made or completed, or if in consequence of such omission the corporation should be dissolved, great mischiefs might ensue:" it was enacted, "that if in any city, borough, or town corporate,

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no election should be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate, on the day or within the time appointed by charter or usage for such election, or such election being made, should afterwards become void, whether such omission or avoidance should happen through the default of the officer or officers who ought to hold the court, or preside where such election was to be made, or by any accident or other means whatever, the corporation should not thereby be deemed or taken to be dissolved, or disabled from electing such officer or officers for the future; but that in any case where no election should be made as aforesaid, it should and might be lawful for the members or persons of such city, borough, or corporation who had right to vote or be present at, or to do any other act necessary to be done, in order to or for the completing of such election, and they or such of them as should not be hindered by any reasonable impediment or excuse, were thereby required, respectively, to meet or assemble together in the town-hall, or other usual place of meeting for making such election within such city, borough, or town corporate, on the day next after the expiration of the time within which such election ought to have been made, unless such a day should happen to be Sunday, and then upon the Monday following, between the hours of ten in the morning and two in the afternoon of the same day; and that the members of persons having right to vote at, or to do any other act necessary to be done in order to such election, or such of them as should be so assembled or met together, should forthwith proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers for such city, borough, or corporation, and to do every act necessary to be done, in order to or for the completing of such election in such manner as was usual in, or in order to the election of such officer or officers, on the day or within the time appointed by charter or usage for such election; and that in case upon such day of meeting, thereby appointed for such election, the mayor, bailiff or bailiffs, or other proper officer or officers, who ought to have held the court, or presided at the assembly for such election, or doing any other act necessary to be done in order to such election, if the same had been made or done on the day fixed, or within the time limited by charter or usage for that purpose, should be absent, then such other person having a right to vote, being the nearest then present in place or office to the person or persons so absenting himself or themselves, should hold the court or preside in the assembly, and should have the same power and authority in all respects therein, as the mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough, or town corporate, at any court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election."—2. "Provided always, that no such election, nor any act done in order thereunto, should be valid, unless as great a number of persons having right to be present at and vote therein, should be present at the assembly holden for such purpose, and concur therein, as would respectively have been necessary to be present, and concur in such election or act in case the same had been made or done upon the day or within the time appointed for that purpose by the charter or usage of such city, borough, or corporation, saving only that the presence of the mayor, bailiff or bailiffs, or other chief officer or officers who ought to preside should not be necessary."—3. And it was further enacted, "that if any mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, should voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer in the same city, borough, or town corporate, upon the day or within the time appointed by charter or ancient usage for such election, the person or persons so offending, being thereof lawfully convicted, should, for every such offence, suffer imprisonment for the space of six months without bail or mainprize, and should be for ever disabled to take, hold, or exercise any office belonging to the same city, borough, or corporation."—4. And it was further enacted, "that if it should happen that no election should be made of the mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, on the day or within the time appointed by charter or usage for that purpose, and that no election of such officer or officers should be made pursuant to the directions before prescribed, or such election being made, should afterwards become void, in every such case it should and might be lawful for his majesty's court of king's bench, on motion to be made in the said court, to award a writ or writs of *mandamus*, requiring the members or persons of such city, borough, or town corporate, having a right to vote at, or to do any other act necessary to be done in order to such election respectively, to assemble themselves on a day and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers, as the case should require, and to do every act necessary to be done in order to such election, or to signify to the said court good cause to the contrary, and there-



upon to cause such proceedings to be had and made, as in any other cases of writs of *mandamus* granted by the said court for election of officers of corporations; and of the day and time appointed in and by such writ or writs of *mandamus* for holding such assembly, public notice in writing should, by such person as the said court should appoint, be affixed in the market place or some other public place within such city, borough, or town corporate, by the space of six days before the day so appointed; and such officer or other person respectively should preside in such assembly, as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same had been made or done on the day in the former part of the act prescribed for that purpose."—5. And after reciting, "that in certain boroughs and towns corporate, the mayor, bailiff or bailiffs, or other chief officer or officers, was or were to be nominated, elected, or sworn at a court leet, or view of frankpledge, or some other court, and that by reason of the contrivance or default of the lord or his steward, or such other officer by or before whom such court ought to be held, in not holding the same, or by some accident it had happened, and might thereafter happen, that no due nomination, election, or swearing of such mayor, bailiff or bailiffs, or other chief officer or officers had been or might be had or made;" it was further enacted, "that it should and might be lawful for his majesty's court of king's bench, on motion to be made in the said court, to award a writ of *mandamus*, requiring the lord or his steward or other officer, by or before whom such court ought to be held, to hold or cause to be holden, such court leet or other court, and to do every other act necessary to be done by him in order to such nomination, election or swearing, at such day and time as should be for that purpose judged proper by the said court of king's bench, and should be appointed in such writ, or to signify to the said court good cause to the contrary, and thereupon to cause such proceedings to be had and made, as in other cases of writs of *mandamus* granted by the said court for holding of any court; and of the day and time appointed in and by any such writ of *mandamus* for holding such court, public notice in writing should, by such person as the said court of king's bench should appoint, be affixed in the market place, or some other public place within such borough or town corporate, by the space of six days before the day so appointed: and that where a nomination of persons, in order to the election of any such mayor, bailiff or bailiffs, or other chief officer or officers, was to be made at such court leet or other court, in every such case, after such nomination made, all and every other act and acts necessary to be done in order to such election, should be had, made, and done at such assembly, and in such manner and form as the same ought to have been had, made, and done, in case such election had been made on the day next after the expiration of the time prescribed for such election by the charter usage of such borough or corporation, according to the directions before mentioned in the act."—6. On this statute it has been frequently determined, that the power of the court to grant a *mandamus* to go to an election, is not confined to the case where there has been no election at all: but that where there has been an election in point of fact, yet, if from the circumstances laid before the court, it shall appear clearly that the election cannot be supported, a *mandamus* shall issue: but that if the election appear doubtful, no *mandamus* shall issue, till the person actually exercising the office be ousted by judgment in *quo warranto*. Str. 1003. 3 Burr. 1454. B. R. H. 178. Str. 1157. Sayer, 211. 4 Burr. 2008.—7. It is no objection, that the application is not made within the year. B. R. H. 178.—8. But where there is a mayor or other officer in point of fact, he ought to be made a party to the rule to shew cause why a *mandamus* should not issue for a new election. 3 Burr. 1452.—9. On the third section of this statute, a *mandamus* will lie, commanding the proper person to hold a court leet, in order that a particular person may be presented and sworn into any of the offices within the intent of the statute, on a suggestion of his having been duly elected. Andr. 279.—10. At common law, when the day appointed by the constitution of a corporation for the election of a new mayor, was the day on which the old went out of office, the latter had no power to adjourn the election from that to the subsequent day, unless he had a power of holding over; and if, in fact, he had made such an adjournment, an election, completed at the adjourned meeting, would have been void: but this inconvenience seems to have been remedied by this statute: the principal intent of it, indeed, was certainly to enable corporations to proceed to an entirely new election; and it does not expressly give authority to the mayor to adjourn an election begun and not completed on the charter day; but the words of it seem general enough to comprehend this case, and the court will make a liberal construction of them; as the inconvenience arising from an election not completed is as great as that arising from a total omission. B. R. H. 27. 2 Kyd, 44.—11. The statute mentions some time between the hours of ten in the morning and two of the afternoon

By the st. 9 An. 20. no mayor, bailiff, or other officer, who should preside at an election, and return members to parliament, and who ought to be chosen annually, when he hath been in such annual office for one whole year, shall be capable of being chosen into the same office for the year immediately ensuing. And an information lies if he be. (l) 2 Mod. Ca. 133. (m)

Yet though an election be void, a corporate act by an officer chosen who officiates in fact shall be good; as an obligation sealed by a mayor *de facto*. (n) R. Lut. 519. Vide post (F. 29.)

(F 22.) Mayor, or bailiffs.

The mayor (o) or chief officer of a corporation has not any more authority than the charter gives him. D. 3 Mod. 12. (p)

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as the time of meeting for an election to be made according to the provisions of it; but it has been held, that this is directory and not restrictive, and intended only to prevent surprise which might arise from beginning at inconvenient times; and that, therefore, where no surprise appears, an election begun or continued by adjournment, at any other time, is good. B. R. H. 27. 2 Kyd, 44.

(l) At common law, where by charter the election of the mayor was appointed to be on a particular day, and also gave a power of holding over, then if no election was made on the charter day, there could be no election on any subsequent day in the same year, except on the death or removal of the mayor in being, because an election on any other day was not according to the authority given by the charter: and this statute of queen Anne does not seem to have made any alteration in the common law in this respect: it renders void the re-election of the same person, in the case "where his duty is to preside at the election, and make return of members to serve in parliament;" and it inflicts a penalty on every person holding over by means of his own wilful and unlawful act; but it makes no provision for the election of another officer, nor does it take away the right of holding over. 1 Kyd, 380. 8 Mod. 111. 127.

(m) Previous to which statute, where there was a clause of holding over, it had become a practice with the mayor and other head officers of corporations, to avoid holding an election on the charter day, by which means they continued in office for several years together. 1 Kyd, 379.

(n) 1. A distinction is made between a mere usurper and an officer *de facto*: an usurper is a man who, without any colour of election, gets possession of the office and acts in it; and the mere circumstance of being sworn into the office makes no difference; but to make an officer *de facto*, at least the form of an election is necessary, though, on legal objections, it may afterwards be overturned. Notwithstanding this distinction, however, in point of form, it is doubtful whether there be any in the effect. 1 Kyd, 451.— 2. Some acts, it is admitted, may be good, if done by a mayor *de facto*, or under his authority; but it does not appear whether the same acts would be good if done by a mere usurper: some acts are certainly void if done by an usurper; and probably so, if done by a mayor *de facto*. 1 Kyd, 451.— 3. Those acts which are good if done by a mayor *de facto*, or under his authority, are those which he may be compelled to do in favour of a person who has a precedent right to have them done. All voluntary acts, not necessary to carry on the business of the corporation, seem to be void, whether done by an usurper or a mayor *de facto*, or under the authority of either: some necessary acts, too, are certainly void in both in both cases. Andr. 116, 117. B. R. H. 150. 1 Kyd, 451.— 4. Where the mayor's presence is necessary at a corporate assembly, his departure before business regularly begun be concluded, will not invalidate that particular business, but the assembly cannot proceed to any thing else. 1 Barnard. 385.

(o) 1. By the provisions of some charters, the mayor or other chief officer is elected for a year, and until another be chosen; in which case, if no successor be chosen at the end of the year, the mayor of the preceding year is said to be over. But where a particular day is appointed for the election of a successor, which is generally the case, and a power of holding over is not expressly given, it does not exist by implication. Str. 394. 1 Kyd, 376.

(p) 1. If the king, by his charter, incorporate a town by the name of mayor and twelve

And therefore (*q*), if the charter does not require his presence in the election of officers, it may be without him. (*r*) D. 3 Mod. 13. (*s*)  
Vide London, (C.)

## (F 23.) Alderman.

An alderman (*t*) is the senior in years or prudence in a city, &c. Lat. 231.

And is a chief officer there to assist the mayor. Lat. 231.  
Vide London, (D).

## (F 24.) Recorder.

The recorder is not only concerned in holding the courts of the corporation, but is also their common council. 1 Vent. 145.

And therefore, where the charter requires *quod sit peritus in lege*,

twelve aldermen, they will not have any power as conservators or justices of the peace without an express clause for that purpose: they can neither fine nor imprison, and if they assume such authority, it will be an usurpation. 3 Mod. 12. Ld. Raym. 1030.—2. It is for this reason that charters usually add these powers by express words, and make the mayor or aldermen justices of peace or of gaol delivery; but they act in these capacities, not because they are mayor or aldermen, but because by the charter they are expressly annexed to their respective offices; and the union of distinct powers in one person, does not confound his several and distinct capacities. 1 Kyd, 327.

(*q*) Where there is no clause enabling the mayor expressly to hold over, that power is not incident to his office: in this respect he differs from those officers who are usually chosen for life, but may be directed to be chosen annually; for in this case, if there be no election at the end of the year, the former are to continue till others be chosen.

(*r*) 1. The powers and duties of the mayor or other head officer of a corporation, depend in general on the provisions of the charters, or prescriptive usage of the corporation, or the express provisions of an act of parliament. 1 Kyd, 324.—2. It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies; but whether, in a corporation by charter, this be necessarily incident to his office, where no express provision is made for that purpose, has, says Mr. Kyd, been made a question, though I do not find it any where solemnly decided; and he refers to 3 Mod. 14. 1 Rol. Abr. 514. 2 Ld. Raym. 1237.—3. Lord Hardwicke is reported to have said, that whenever any business is to be done by a particular part only of a corporation, the presence of the mayor is not requisite at the assembly; but that wherever the business is to be done by the whole corporation, his presence is indispensable. 2 Barnard. 370. 1 Kyd, 327.

(*s*) On the death of the mayor, or during the vacation of the office, the corporation can do no corporate act, but that of choosing a new mayor. 21 Edw. 4. 58.

(*t*) 1. It appears that in ancient times, in some cities and towns there were some districts called aldermanries, over each of which an alderman presided, so that the alderman was properly a local officer; and this is the case at this day in the city of London, and in some other places; and there are instances of an aldermanry being hereditary and grantable, and actually granted over like any other inheritance. 1 Kyd, 322. Madox, Firm. Burg. 14.—2. It appears, likewise, that the word alderman was used as the name of the head of a company, fraternity, or gild, of which Madox gives several instances, from whence, he says, it came to be used as the name of a chief officer of a gildated or corporate city. Ibid.—3. At present, it seems that no precise invariable idea is attached to the word 'alderman,' but it most commonly means one of the chief governors of the corporation, or one of the assistants of the mayor, or other head; and from the body of the aldermen the mayor is frequently chosen, which is the case in the city of London. 1 Kyd, 323. Latch. 231. Palm. 454.—3. But in some other places, those only can be aldermen who have passed the office of mayor. 1 Kyd, 323. 2 Keb. 488. 1 Str. 625.—4. The office of alderman is in general for life, and that of common-council-man only for a year; but there are instances of an alderman being for a year, and of a common-council-man being for life. 1 Kyd, 323. Str. 625. Ld. Raym. 1564.

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he may be removed for gross ignorance in the law. Semb. 1 Vent. 145. (u)

Or for unreasonable absence, to the detriment of the borough. Semb. 1 Vent. 145.

Or for non-attendance at the sessions, upon notice. R. Sal. 435.

So, if he be chosen during pleasure, he may be removed *ad libitum*. Vide post, (F 32.)

But where chosen for life, or (which is tantamount) generally, or *quamdiu bene se gesserit*, he cannot be removed without cause.

Vide London, (E.)

### (F 25.) Common council.

A power to assemble the corporation to elect and to advise, and assist the corporation, is lodged in the common council.

The common council consists of persons chosen pursuant to the charter for that purpose, which ought to be observed. Per Att. Gen. Quo W. 32.

Or if the charter be silent, all the corporation who assemble makes the common council. Per Att. Gen. Quo W. 32.

Or by ancient usage, a select number makes the common council: for there shall be intended an ancient ordinance, now lost, which directs it. R. 4 Co. 77. b.

The power of the common council is according to the charter or usage. Per. Pol. Quo W. 89.

An act of common council, pursuant to their power, binds the whole corporation. Per Finch, Quo W. 18. Per Treby, 49. Per Att. Gen. 33. Per Pol. 89.

But the court does not take notice of the power of the common council, unless it be shewn upon record. Per Pol. Quo W. 90.

Vide London, (F.)

### (F 26.) Liveryman.

The office of a liveryman is such of which B. R. will take notice. 1 Sal. 349.

And he may be bound by a by-law, &c. to all incident charges. 1 Sal. 349. Vide By-law, (B 4.)

### (F 27.) Town-clerk.

The office of town-clerk is ministerial.

And therefore, if he be made mayor, &c. who is the judge of the court, his office is void; for they are incompatible. Semb. but not determined. 1 Sid. 305. Vide Officer, (K 5.)

So if he be made alderman. Dy. 332. b. in marg. Poph. 176.

But if he be chosen mayor, alderman, &c. to avoid his place of town-clerk, he may be restored to it by *mandamus*. Noy, 78.

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(u) 1. But it is no cause to remove him that he was mistaken in a single instance, or that he refuses to give a positive opinion, or to advise a particular part of the corporation, for his duty is only to advise the whole body, and in a reasonable manner. *Ld. Raym.* 1238.—2. So a general neglect, or refusal to attend the duty of such an office, is a reason of forfeiture. 4 *Burr.* 204.

A town-clerk may be chosen during pleasure, and then he will be removable *ad libitum*. Vide post, (F 32.)

Or for life, when he is chosen generally, or *quamdiu se bene gesserit*. 1 Vent. 82.

And then he cannot be removed, except for good cause; as for absence or non-user. 1 Sid. 14. Vide Condition, (S 1, 2.)

So a town-clerk may be chosen in reversion. Dy. 332. in marg. Poph. 176. Noy. 78.

(F 28.) Common Burgess: — What will give a right to freedom.

A right to freedom (*x*) in a corporation accrues by charter, or prescription. (*y*)

By the custom of London, a man shall be free by birth, by service, or by the election of a court of aldermen upon a fine. 8 Co. 126. b. (*z*)

(*x*) 1. A freeman of a town differs from an inhabitant in this, that a freeman is a member of the corporation, and may or may not be an inhabitant of the town; and an inhabitant is so called from the circumstance of local residence, and may or may not be a member of the corporation. 1 Kyd, 321. — 2. The terms 'citizen' and 'burgess' are generally synonymous with 'freeman'; but sometimes burgess is the designation of a member of a select body, distinct from the common freeman; there are cases in which it is equivalent to common-council-man. Ibid. 1 Rol. Rep. 335.

(*y*) 1. The qualifications requisite for members or officers of corporations, depend in general on the constitution, usage, or bye-laws of each particular corporation. To entitle a man to be admitted to the freedom of a corporate town, the qualifications most commonly required are, that the person claiming to be admitted, should either be the son of a freeman, or have served an apprenticeship to a freeman; in some cases, to have married a freeman's daughter is a sufficient title; and in many, the freedom may be obtained by purchase. In the case of a title by apprenticeship, it is in many places expressly required, that the master of the apprentice should have been resident within the town during the time of the apprenticeship, and the reason of the thing seems to require this residence without any express provision; as the privilege granted to the apprentice is, in respect of the benefit which the town may receive from his service. It frequently happens, too, that where the party claims by apprenticeship, birth, or marriage; some conditions are superadded by particular bye-laws, without which, if they be reasonable, he cannot compel his admission. 1 Kyd, 330, 331. — 2. A quaker who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a corporation as well as any other person, and his solemn affirmation, by virtue of 7 & 8 W. 3. c. 34. is equivalent to taking the usual oaths; and that clause of the statute which provides, that no quaker by virtue of that act shall have any office or place of profit in the government, does not extend to the freedom of the corporation. Carth. 448. 1 Ld. Raym. 357. 5 Mod. 402.

(*z*) 1. Residence within a corporate town is not necessarily a previous qualification for the freedom of the corporation, nor is the freedom, when once obtained, necessarily forfeited by non-residence. 1 Kyd, 336. — 2. But by the constitution of the corporation, whether by prescription, or the express words of the charter, residence may be requisite as a previous qualification, or continuance in office. 1 Barnardiston, K. B. 138. — 3. And, where this is the case, the court of K. B. will grant leave to file an information in the nature of a *quo warranto*, against the governing part of the corporation, for admitting persons non-resident. Ld. Raym. 426. 1 Salk. 374. 376. Carth. 503. 1 Barnard. 137, 138. — 4. Where a man is already a member of a corporation, residence is not a precedent qualification to his being chosen to a corporate office, unless expressly required by the constitution of the borough. Cowp. 539. — 5. But though residence be not required at the time of the election, an absent person must not be chosen collusively for any sinister purpose, and if he be, the election will be absolutely void. 4 Burr. 2008. — 6. By the provisions of a charter, residence may be required as a previous qualification for some offices, and not for others. 1 Barnard. 416. — 7. As to what circumstances shall constitute a sufficient inhabitancy, when a requisite qualification. See 2 Barnard. 93. 94. 408. 439.

But



But a man shall not have freedom in a corporation by the king's grant. 8 Co. 126. b.

(F. 29.) What is requisite after election.

By the st. 7 Jac. 6. a mayor, &c. shall take the oath of allegiance before those who administer to him the oath of office, at his entry into his office.

Aldermen, and all officers of a corporation, shall take it before the mayor or chief magistrate, in the public hall.

So every freeman.

And therefore, every person chosen into an office, or freedom of a corporation, ought to take the oath of office, and the oaths of allegiance and supremacy.

So, by the st. 13 Car. 2. 1. a mayor, alderman, recorder, bailiff, town-clerk, common-council-man, or any chosen to any place concerning the government of a corporation, (a) if he has not received the sacrament within a year before, his election shall be void.

So, if he takes not the oaths of allegiance and supremacy, when he takes the usual oath of office.

So, if he does not subscribe the declaration against taking up arms and the covenant.—But this is now abrogated by the st. 1 W. & M. 8. (b)

So, by the st. 25 Car. 2. 2. every officer of trust, within 3 months, &c. shall take the oaths, and receive the sacrament, &c.

So, by the st. 13 & 14 (or 13) W. 3. 6., 1 An. st. 1 ch. 22., & 1 Geo. st. 2. ch. 13. (c)

And if any refuses (d) the oath, &c. required by statute, he may be fined in the same manner, as by charter he may be, for refusal of the

(a) 1. Soon after this statute, commonly called the Corporation Act, had passed, a burgess of Nottingham, being removed for not having taken the oath, and subscribed the declaration, applied for a *mandamus* to be restored, on the ground that a 'burgess' not being mentioned, was not within the meaning of the act, being no way interested in the government; but it appearing, in the return, that the burgesses were part of the common council, and had a voice in the election of parliament-men, a peremptory *mandamus* was refused. 1 Keb. 777. 2. But neither the corporation nor the test acts extend to common freemen, because they do not exercise any office relating to the government of the town. 2 Str. 828.

(b) And 5 G. 1. c. 6. Vide 1 Str. 120.

(c) 1. Vide 2 G. 2. c. 31., 9 G. 2. c. 26.—2. Besides the oaths to government, which are to be taken in consequence of the corporation act, there are oaths particularly applicable to the offices of corporations, which relate solely to the faithful discharge of the duty incumbent on the officers, or the preservation of the rights and privileges of the corporate body. Vide March, 179. 189. 1 Kyd, 363.—3. And the taking of these oaths, it is said, may be enforced by the courts empowered to administer them, by imprisonment, till the party submit. Ibid.—4. But where the charter is silent with respect to an oath of office, it is doubtful whether any such oath can be administered at all, and whether, under a general power to make bye-laws, a corporation can make a bye-law imposing an oath. If such an oath be prescribed, but the charter is silent as to the person who is to administer it, no particular person, it seems, is appointed by the law to do it, but a *dedimus* must be sued out of chancery for that purpose. 1 Str. 537. 539. 1 Barnard. 80. 1 Kyd, 363.

(d) It seems that the person elected to an office must, at his peril, take the oaths, and that it is no excuse that they were not tendered to him. 5 Mod. 316. Comb. 419. 3 Mod. 55.

office :

office: (e) for refusal of the oath, is a refusal of the office. R. 3 Lev. 116. (f)

And an information lies against him. R. 1 Sal. 168.

And it is no excuse, that he has not received the sacrament within a year. R. 1 Sal. 168.

But an office shall not be void for not taking the oaths, &c. if they are not tendered; and therefore the tender is traversable: for the clause 13 Car. 2. relates to the former clause, which says, he shall take, &c. when required. R. 2 Lev. 242. R. cont. 5 Mod. 318. Sal. 429.

So the office shall be void only as to himself; not as to a stranger: and therefore, a judicial act by him is good. R. cont. 2 Lev. 184. R. acc. 2 Lev. 242. If any corporate act. R. Lut. 519.

So judicial acts by a bishop *de facto* are not void. R. 2 Cro. 554. 2 Rol. 181.

So a quaker, who takes the affirmation, instead of the oath, in the usual form required of a freeman, ought to be admitted to his freedom. R. 5 Mod. 403. (g)

So, by the st. 5 Geo. 1. none shall be removed, or incur a disability, &c. by omitting the sacrament a year before his election, unless a prosecution be commenced within 6 months after election, and carried on without wilful delay. (h)

So

(e) 1. There are several ways in which a member of a corporation may be compelled to take upon him any office or place to which he is appointed, or elected, or at least in which he may be punished for his refusal.—2. The most usual of these is a penalty imposed by a bye-law, which may be recovered by an action of debt. 1 Kyd, 385.—3. And where a corporation have a power, by their charter, to fine any of their members for not undertaking an office to which he is elected, they may fine him for not qualifying himself to be elected. 3 Lev. 116. 1 Kyd, 393.—4. If a man be chosen to an office within a corporation, and he refuse to undertake the office, or to take the oaths necessary to qualify him for it, it is said, that a custom in a court of record of the corporation, as the court of aldermen in London, to imprison him till he take the oaths, is a good custom, because without such power the corporation may at length be dissolved for want of a sufficient number of officers, or the government of it may not be able to subsist, as a fine may not have the proper effect, because the person chosen may choose to pay the fine rather than serve the office. March, 189. 5 Mod. 158. 1 Kyd, 394.—5. But a custom for a private company within a city, to commit is not good. 1 Mod. 10.—6. In many cases the court of king's bench will grant a criminal information against persons for not taking upon them offices to which they have been legally elected. 5 T. R. 86.—7. It seems likewise, that an indictment may be maintained against a man for refusing to undertake an office in a corporation. 1 Kyd, 398. Ld. Raym. 499. 5 Mod. 440, 441.—8. Notwithstanding this power in a corporation, to compel their members to undertake the offices, yet, where two offices are incompatible, and a man is already in possession of one of the two, they cannot, against his consent, elect him to the other. 1 Dyer, 332. Vide 2 T. R. 88. 1 Kyd, 399.

(f) 1. Ld. Raym. 29. 4 Mod. 269, 274. Comb. 315.—2. But it is now settled, that the design of the corporation act, is to *exempt* any person from executing an office, not to *compel* him to qualify himself for the execution of it; it is intended to favour, not discourage dissenters. Cowp. 393. n.—3. If a corporator do not procure himself to be sworn into his office, within a reasonable time after his election, it is a *waiver* of the election. C. T. H. 255.

(g) 1. 12 Mod. 190.—2. The case arose out of the st. 7 & 8 W. 3. c. 34. which enacts, that for the ease of quakers, they shall, in all cases where by law an oath is required to be taken, be permitted to make a solemn declaration in words which it prescribes; with a proviso, that no quaker, or reputed quaker, shall, by virtue of this act, be enabled to bear any office or place of profit in the government.

(h) 1. Before the st. 5 G. 1. c. 6. the objection of not having received the sacrament within

So a freeman, who has not an office, or share in the magistracy of the corporation, need not take the sacrament. R. F. g. 47. (i)

(F 30.) Removal from an office : — By resignation.

Every member, or officer of a corporation may resign his place, or office. R. 2 Rol. 456. l. 10. 1 Sid. 14. Semb. cont. 1 Rol. 137. R. Poph. 134. R. 2 Rol. 11.

And a corporation has power to take such resignation. 1 Sid. 14.

And a resignation by parol, if it be accepted and an entry made of it, is sufficient. Semb. per B. R. H 11 W. 3. upon a return of a *mandamus* to the mayor of Rippon. Sal. 433.

And if the resignation be accepted, he cannot afterwards claim to be restored. R. 1 Sid. 14. Sal. 433.

(F 31.) By the corporation : — For what cause allowed, and for what not.

So a corporation by charter, or prescription, for good cause, may remove an officer from his office. (k)

So, if by prescription he was amovable, though the corporation accepts a charter, which does not give such a power. R. Ray. 439.

As, (l) if he does a thing contrary to the duty of his place, the weal of the borough, or oath of his office. 11 Co. 99. a.

So,

within a year, might have been taken to the candidate at the time of the election; if he had been actually elected, it might have been taken to his admission; and if he had been actually admitted, his title might have been impeached on this ground, at any distance of time, at which it might have been impeached for want of any other *precedent* qualification. 1 Kyd, 357.—2. Since that statute, the effect of this objection is to be considered in three different points of view. 1. When made at the time of the election, or at *any* time before the person elected has obtained possession of the office; 2. When made *after* he has obtained possession, and *before* six months have elapsed since the election; 3. When made after he has obtained possession, and *after* six months have elapsed since the election. In the *first* case, the effect is the same as it would have been before the statute; the election, of a person so disqualified, being still considered, before he is actually admitted, as absolutely void. In the *second*, the objection can be carried into effect only by actual *removal*, or a prosecution *seriously* commenced within the time limited; for *after* admission, the statute *permits* the election to be avoided within the six months, only by one of these modes. In the *third* case, the objection has no effect at all, as coming too late; the statute operates as a protection to the possession, and as a bar to the remedy. St. 5 G. 1. c. 6. Ld. Raym. 1354. 2 Burr. 1013. 1 Blk. 229. 2 Str. 1145. 1 Kyd, 357.—3. It seems that in all cases in which the objection of not having received the sacrament within the year, may be taken against a person elected to a corporate office, the proof of having received it must be upon him; both because it would be hard to put the opposite party to the proof of the *negative*, and because the party claiming under an election, must shew that he was qualified to be elected. 1 Kyd, 361.—4. But where a question is raised about a person's title to a corporate office, after the six months have elapsed, it is not incumbent on him to shew that there was no prosecution commenced within the six months; because six months' possession gives a presumptive title. 2 Str. 1145.

(i) Vide *supra*, in notis.

(k) Vide 2 Str. 819.

(l) 1. The cause for which a member of a corporation is disfranchised, or an officer removed, must be something which has arisen subsequently to the admission of the one to the enjoyment of this franchise, or of the other to the exercise of his office; the power of disfranchisement or amotion cannot be exercised for a defect of original quali-

So, if an alderman be convicted as a common drunkard: for he is not fit for government. R. 2 Rol. 455. l. 50. Dub. 1 Rol. 409. (m)

So, if an alderman removes out of the borough, and upon express summons refuses to attend the service there. R. 4 Mod. 36. Semb. Sho. 259. (n)

But

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qualification; that can only be questioned by a prosecution by information in the nature of *quo warranto*. 2 Kyd, 62.—2. The offences for which a corporator may be disfranchised, or a corporate officer removed, have been distributed into three distinct classes. B. R. H. 154, 155. 1 Burr. 538. 2 Kyd, 62.—3. First, such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office. 2 Kyd, 62.—4. Secondly, such as have no immediate relation to his corporate or official character, but are in themselves of so infamous a nature, as to render the offender unfit to enjoy any public franchise; such as perjury, forgery, &c. 2 Kyd, 62.—5. And, thirdly, offences of a mixed nature, being not only against his corporate or official duty, but also indictable at common law. 2 Kyd, 62.

(m) 1. Circumstances which have no immediate relation to the corporation, may be a sufficient cause to remove a man from an office of magistracy, provided they be such as render him incapable or unfit to execute the office; such as habitual drunkenness in an alderman, though if a man were drunk by accident, that would not be sufficient cause to remove him. 3 Salk. 231.—2. So, it has been held to be a sufficient cause to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though such a case would certainly not be sufficient to deprive a man of his freedom, 3 Salk. 229.—3. Bankruptcy, and not having obtained his certificate, is not alone sufficient cause for removing a man from the office of common-council-man, though some one or more of the consequences of bankruptcy may eventually become so: bankruptcy itself is not an offence against the duty of his office; neither is it an offence against the law of the land, whatever the old statutes may intimate to this purpose: a man may be a bankrupt without any fault of his own; he may be able to pay 20s. in the pound, notwithstanding his bankruptcy; or he may very soon obtain his certificate, after the commission has issued; and no particular census is requisite as a qualification to be a corporator; a power to disfranchise a man for having become bankrupt, might be turned to very bad purposes, by juntoes in corporations, or under particular circumstances, and with particular views; a run upon a man of great fortune and credit might be artfully managed, so as to reduce him to bankruptcy; and the case of a common-council-man, in this respect, is the same as that of a common freeman. 2 Burr. 752. 2 Kyd, 65.

(n) 1. Non-attendance at the courts of corporation is not sufficient cause of removal, when the presence of the party is not necessary, and no particular business is obstructed by his absence, though his absence be wilful, and notwithstanding he may have due notice to attend: though the usual signal for holding a court may be given, a member may not know of it; though he know of it, he may be innocently absent, where he thinks his presence not at all necessary, and where he does not imagine that any business of consequence is to be proposed; there is not an officer or freeman in the kingdom, who is a member of an assembly, who might not be removed or disfranchised, if such a cause were sufficient. At times, every alderman, every common-council-man, not necessary to the constitution of the assembly, knowingly omits attending: this doctrine applies equally to the case of non-attendance at courts held occasionally, and courts held on regular stated days. 1 Burr. 540, 541. 2 Kyd, 66.—2. Non-residence within a borough cannot be a sufficient cause to disfranchise a freeman; because he has his freedom for his own benefit, and his residence is of little consequence to the corporation at large. 2 Kyd, 75.—3. But a total desertation of the borough, by an alderman with his family, is a good cause to remove him from the office, because he is thereby rendered incapable of doing his duty to the corporation, but it is not a cause to disfranchise him, because, though he cease to be an alderman, he may still continue a freeman. Nor is it every temporary absence, that will be good cause for removing an alderman; he may have some reasonable cause of absence, as sickness, or going to the bath for the recovery of his health, or being employed in the service of the king; he may leave a servant in the house, which is a proof of his intention to return, and makes him virtually an inhabitant; and if he return before his actual amotion,

But it is no cause, (o) that an alderman is above 70 years of age. R. 2 Rol. 450. l. 5. 2 Rol. 11.

That he misbehaved himself when he was mayor. Semb. Sti. 151.

Or did not account for money, received by him to the use of the corporation. Sti. 151. (p)

Or wrote a letter to a secretary of state, which charged the mayor with subornation. Carth. 174.

Vide Post, (F 33, 34.)

(F 32.) When, *ad libitum*.

So a ministerial officer chosen *durante beneplacito* may be removed *ad libitum*; (q) as, a town-clerk. R. 1 Vent. 77. 82. Ray. 188. 1 Lev. 291.

So, a recorder. R. 1 Vent. 342. 2 Jon. 52.

So, if the charter says, that the recorder shall continue *durante beneplacito*, though there are no negative words. R. 2 Jon. 52.

And though the election be general, if it be not under the common seal. R. 2 Jon. 52. 1 Vent. 355.

amotion, that may cure the defect of his absence, however long continued. It has been held, that it was not a good cause to remove an alderman, that he had left the borough for four months, with his whole family; and, in general, wherever non-residence is assigned as a cause for the removal of an alderman, or officer of similar denomination, it must appear that residence is required by the constitution of the corporation, or that the business of the corporation has been obstructed by the non-residence of the party removed. 2 Kyd, 73.—4. Wherever non-residence is a cause of amotion, it does not render the office *ipso facto* void, but only voidable; and there must be an actual amotion before any proceedings can be had against the party for an usurpation. Carth. 227. Sayer. 245. 5 B. P. C. 287. 2 T. R. 772.

(o) 1. Misconduct in one corporate office is not a cause to amove the offender from another; thus if a capital burgess be appointed chamberlain of the corporation, and misconduct himself in that office, this is not a good cause to deprive him of the office of capital burgess. Ld. Raym. 1564.—2. So, where a recorder is also a justice of peace, and a voter for a member of parliament, misconduct in either or both of the two latter characters is not a good cause to remove him from his office of recorder. 4 Burr. 1999.

(p) 1. Though an offence may seem to have some relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cause of disfranchisement; thus, the misemployment or non-payment of money, belonging to the corporation, is no sufficient cause, the corporation having a remedy by action. Ld. Raym. 226.—2. Nor general disobedience to the laws and orders of the corporation, nor, as it would seem, the breach of any particular bye-law. Ld. Raym. 1566.

(q) 1. There are some officers in corporations, which, where there is no custom to express provision of a charter to the contrary, are generally understood to be held for the life of the possessor, unless he be removed for reasonable cause; such are the officers of alderman, jurat, or capital burgess, who, in their official capacity, are constituent members of the corporation; and of recorder, town clerk, and others, who are generally not members of the corporation, but merely ministerial officers or servants. 2 Kyd, 59.—2. A clause in a charter giving an arbitrary power of removal, is good as applied to the latter, but, according to the opinion expressed in some books, is void as applied to the former. 2 Kyd, 60.—3. The same observation applies to a claim of this power by custom, yet if the corporation possess a power by charter or custom, to elect an alderman or other officer, of an equivalent denomination, to continue during pleasure, and they so elect him, they may remove him at pleasure; because, by the express constitution of the corporation, the presumption of his holding the office for life is excluded. 2 Kyd, 60. 64.



So a custom to remove a (*r*) common-council-man *ad libitum* is good. Dy. 332. b. R. 2 Cro. 540. 2 Rol. 112. Sal. 430. (*s*)

So, where a mayor, &c. has power to chuse his town-clerk, he may also remove him *ad libitum*. R. 1 Sid. 15.

And where an officer is removeable *ad libitum*, he may be removed without summons or hearing of him, &c. 1 Sid. 15. 1 Lev. 291.

But, generally, an officer shall not be removed without cause.

Though the charter says, generally, that he may be removed. Dy. 332. b. in marg.

So a custom to remove an alderman, or judicial officer *ad libitum* is void; for he cannot be removed without cause. Dy. 332. b. in marg. 2 Cro. 540. 2 Rol. 112.

So, though the charter says, that they may chuse for life *si viderint expedire*, they cannot amove *ad libitum*, without a power for it. R. 1 Lev. 148.

(F 33.) What is a cause for disfranchisement, and what not.

So, if a burgess acts contrary to the duty of his freedom, the publick weal of his borough, or the oath taken upon his enfranchisement, he may be disfranchised; for he breaks the condition *tacite* annexed to his freedom. R. 11 Co. 98. a. Bagg. Carth. 176.

As, if he makes a riot in disturbance of the election of a mayor. R. Ray. 433. (*t*)

If he continues in court, and makes orders, after the court is adjourned, and the mayor, &c. departed. Sti. 479, 480.

If he destroys, or erases the charters and evidences of the corporation. 11 Co. 99. a. (*u*)

If he be convicted of a crime which renders him infamous: as, forgery, conspiracy, perjury, &c. 11 Co. 99. a.

But words to the chief magistrate *contra bonos mores* are no cause for disfranchisement: as, if he says, you are a knave, kiss, &c. R. 11 Co. 96. 98. 99. a. (*x*)

Though it be upon an admonition by the mayor, for a malicious act to another burgess. R. 2 Cro. 506.

Or says, that the mayor in the execution of his office did that which he cannot answer. R. 11 Co. 97.

(*r*) A common freeman cannot be deprived of his freedom at the pleasure of the corporation at large, or of any select body, whether that power be claimed by charter or prescription. Cro. Jac. 540. 2 Kyd, 60.

(*s*) The case of a common-council-man is, in several books, distinguished, in this respect, from that of an alderman; it being frequently held that a power of removal is good as to the former, and void as to the latter. Cro. Jac. 540.

(*t*) So if he endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the business of the corporation. B. R. H. 156.

(*u*) But in the case of a rasure of the books, the party must appear to have acted maliciously, and to the detriment of the corporation, for it might happen that the entry, as it stood, was wrong, and that he only made it as it ought to be. Ld. Raym. 926.

(*x*) Nor does it seem a good cause of amotion that a man has written a libel on the mayor, or on another member of the corporation. Fortes. 275, 276. It may, in some of these cases, be proper to commit the offender, till he find sureties for his good behaviour; or some of the offences may be a foundation for an action at the suit of the party injured; but they can be no cause of disfranchisement; so, neither can it be a good cause of disfranchisement or amotion, that the conduct of the party is troublesome or displeasing to the body at large. 11 Rep. 96.

Or

Or threatens the mayor. 11 Co.96. a. Sti.151. R. 2 Cro.506.

So a custom to disfranchise for contemptuous words, is not good. Sal.426. (a) 2 Lev.200. Semb. Lat.232. Pal.455.

Nor refusing to pay his proportion for the renewal of the charter. R. 1 Sid.282.

Or, if a livery-man refuses the usual payments for support of the company. Semb. cont. Ray.446.

If he sues out of the court of the city, or borough. R. Dy.333. a.

Or refuses to submit a thing in suit to arbitrament. Cro. El.39.

So an attempt, menace, or conspiracy to do an act contrary to his duty, or which tends to the destruction of the corporation, is no cause, if he does it not. R. 11 Co.98. b.

As, if he threatens the ruin of their charter, or privileges. 11 Co.97. b.

If he dissuades the payment of customs due. R. 11 Co.97. b.

So an indictment for felony, or other offence, is no cause of removal before he be convicted; for he may be falsely indicted. Sti.479.

Nor an indictment after removal, though the offence was done before. Sti.479. (b)

Vide post, (F 34.)

(F 34.) How a man shall be amoved, or disfranchised.

A corporation, having power by prescription, or the express words of the charter, to amove, or disfranchise, &c. may so do for good cause: and such amoval will be *per legem terræ*. R. 11 Co.99. a. (c)

If they have no express power, yet they may, after conviction of a crime, which is a good cause for amoval, or disfranchisement. 11 Co.99. a. Semb. 1 Sid.14.

So they may, if the corporation, which had power by prescription, takes a new charter which does not give such authority; for the antient power continues. R. Ray.439. 1 Vent.355. (d)

And

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(a) 1. L. Raym.777.—2. Even in the city of London, whose customs are confirmed by act of parliament, for that confirmation cannot extend to unreasonable customs, which this clearly is. 1 Vent.327. Vide 1 Vent.302. d. contra.

(b) See further, Carth.173.176.

(c) To the power of amotion, or disfranchisement, the power of holding a corporate meeting for that purpose is necessarily incident, whether the former be in a select body or in the corporation at large; and therefore it is not necessary that the latter should be expressly given by charter or claimed by custom. Dougl.153. 2 Kyd,62.

(d) 1. In the second year of G.2. an application for an information in the nature of *quo warranto* was made against Lord Bruce on a supposed forfeiture of the place of recorder; recourse was had to this mode of proceeding on an apprehension, that as there was no clause in the charter empowering the corporation to remove, they had no other remedy; the court rejected the application on this principle, that if there was an actual forfeiture, the defendant was out of the office, and the corporation might choose another; if there was no forfeiture, the offence stated was only a misdemeanor, for which a *quo warranto* would not lie: "besides," they added, "the modern opinion has been, that the power of amotion is incident to the corporation, though Bagg's case seems contrary." Str.819,820. 2 Kyd,53.—2. This modern opinion has been considered as completely established ever since the case in 1 Burr.317.—3. This power, like every other incidental power, is incident to the corporation at large, and to any select body, and as applied to the latter, the proposition is true "that there can be no power of amotion, unless given by charter or claimed by prescription, or in consequence of a bye law made by the body at large." But as all the powers of corporations are the subjects of positive institution a select body may possess the power of amotion, and frequently does, under one or other of these authorities. 1 Kyd,56.—4. And it is laid down as a general

And they may amove, if the party does not appear upon summons.

Though he was summoned but the very day of the amoval, if he resides in the same town. R. 1 Vent. 19.

But a corporation, not having express power by charter, or prescription, cannot amove from an office, or freedom, before the person be convicted of an offence, which is a good cause for removal. 11 Co. 99. a. (e)

So

general principle, that where by custom a particular body has acquired that power, and a subsequent charter in some respects new modelling the constitution of the corporation, but retaining the particular body, without restraining its customary power of disfranchisement, that power still continues in the particular body. Raym. 435. 439. — 5. This power, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at a regular meeting held in a corporate character, or at least held in the character, by virtue of which they are empowered to move. 3 Salk. 231. — 6. This power of amotion, when possessed as incident to the corporation at large, cannot be exercised without reasonable cause; nor can it be so exercised either by the corporation at large, or by a select body, whether given by charter or claimed by prescription, if it be given or claimed only in general terms. Dy. 332. — 7. But if a charter, by express words empower either the corporation at large, or a select body, to remove an officer at pleasure, or empower them to choose him during pleasure, they may in either case remove him without cause. T. Jon. 52. 3 Keb. 667. Raym. 188. 1 Vent. 77. 82. — 8. So, a corporation by prescription may, by custom, have the power of removing an officer at pleasure: but, in the return to a *mandamus*, commanding them to restore an officer so removed, it will not be sufficient to state, "that they are a corporation by prescription, and that the king, by letters patent, reciting that they had a custom to remove at pleasure, confirmed that with other customs;" they must allege the custom in positive terms, and not simply by way of recital in the letters patent. L. Raym. 391, 392. — 9. So, if an officer, either by the provision of a charter, or by custom, be eligible in the alternative for life, or during pleasure, and he be chosen to continue during pleasure, he may, at any time, be removed without cause. 2 Show. 69. 70. 1 Vent. 342. — 10. And where an officer is removable at pleasure, or chosen to continue during pleasure, the election of another is a determination of his office, without any formal removal, or notice of the intention to remove him. Str. 674. 2 Keb. 641. So, if the mayor for the time being have power to elect a town clerk, it follows of course, that he may remove the former town clerk at his pleasure. 1 Sid. 15. — 11. But where an officer is removable at pleasure, the corporation, in their return to a *mandamus*, commanding them to restore him, ought to rely solely on that circumstance; for they cannot take advantage of it, if they return a cause and that cause be not sufficient; because it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will. Ld. Raym. 1240.

(e) The distribution into three different classes, as already made, of the offences, for which a corporator or corporate officer may be disfranchised or removed, respects, principally, the power of trial; in case of offences of the first class, the power of trial as well as amotion belongs, exclusively, to the corporation. B. R. H. 154. 1 Burr. 539. — 2. But, for offences of the second class, as it is the loss of credit, which renders them the ground of forfeiture, the corporation cannot disfranchise or remove, without a previous conviction at common law; for, as such offences have no relation to the corporate character, the corporation cannot try the truth or falsehood of the accusation; it is for this reason, that it is no cause to remove or disfranchise a man, that he is indicted of felony, perjury, forgery, or other infamous crime, because he may be acquitted of the charge. Sty. 479. — 3. With respect to the necessity of a previous conviction, as the ground of amotion, writing a libel by one member of a corporation against another, has been ranked with the offences of this second class. Ld. Raym. 1304. 11 Mod. 270. Fortes. 275. Vide B. R. H. 155. 1 Burr. 539. — 4. With respect to offences of the third class, there has been great difference of opinion, nor does the point seem yet to be well settled, "whether, for such offences, the offender can be removed without a previous conviction at common law?" The great difficulty, in such cases, seems to be the possibility of a difference of determination by two different jurisdictions, as the party might be removed by the corporation, for the same fact, of which

So they cannot amove upon a command by the king and council. Cont. per 3 J. Twisd. tacentè. 1 Vent. 20. (f)

So, if they have an express power, &c. they cannot amove, without summoning the party to answer for himself, and hearing him; for he may have a good excuse. R. 11 Co. 99. a. R. 1 Sid. 14. Vide Mandamus, (D 3, 4.) (g)

Nor, without reasonable warning. 11 Co. 99.

Nor, by an order; for it ought to be a corporate act under the common seal. 5 Mod. 259. (h)

So,

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which he might afterwards be acquitted on a trial by jury. Thus, if a man produce a riot at a corporate meeting, and thereby interrupt the business of the corporation, this is an offence indictable at common-law; now, it might happen, that a corporator might be removed for such an offence imputed to him, and yet he might be acquitted of it on a subsequent indictment. 2 Kyd, 89. — 5. There is a case, however, in which a removal for a riot in the council chamber, without previous conviction, is said to have been held good. Styl. 477. — 6. It has been asserted, that, after conviction, the king might, by writ issuing out of the court where the conviction remains, or out of chancery, command the corporation to discharge the party convicted; but this doctrine has been justly disregarded. 1 Burr. 530.

(f) In some instances, too, the crown has reserved to itself the power of removing at pleasure all or any of the principal officers of the corporation; but whatever may be said as to the invalidity of such a reservation, as being repugnant to the purpose of the charter, such a power cannot certainly be exercised to such an extent as to destroy the whole body at once, and render the election of other officers impossible. 2 T.R. 516. 568. 2 Kyd, 94.

(g) 1. Where it is intended to remove any of the members or officers of a corporation, it is, in general, absolutely necessary, not only that he should be summoned generally to attend, but he must have a particular summons to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offences, which he may have had no opportunity of preparing to answer. 11 Rep. 99. 4 Mod. 33. 37. 1 Kyd, 444. — 2. But there may be particular circumstances, under which the summons may be dispensed with. Thus, says Holt, C.J. "a man ought not to be disfranchised until he has been heard in his defence, on notice and preparation, and notice is only necessary for that purpose. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare by such a time, this will be good, though there be no actual summons, because if the party be heard it is sufficient." Ld. Raym. 225, 226. 2 Salk. 42. 1 Kyd, 444. — 3. If a party be charged with a particular offence in one assembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it seems very doubtful whether his being charged and answering in the same assembly will cure the want of notice. 1 Kyd, 445. — 4. Where a person is removable for non-residence, there is no necessity to summon him before he is removed, because he has abdicated the town, and is out of the reach of summons. Comb. 198. 270. 1 Show. 359, 260. 364, 365. Ld. Raym. 1275. Vide Sty. 151. 446. Palm. 451. 1 Syd. 14, 15. 2 Syd. 97. Fortes. 205. 1 Kyd, 449. But if he be removable for non-attendance at the corporate assemblies, he must have had personal notice to attend, and that his presence was necessary; the usual notice of the intended meeting will not be sufficient, unless that usual notice be personal. 1 Burr. 517. 527. 540.

(h) 1. A man may be constituted a burgess, or appointed to an office, by deed under the common seal, and then he ought to be discharged in the same manner; but where the party is constituted or appointed by election, nothing more is required than an entry in the books of the corporation; and he may be discharged by an order entered in the same manner. Ld. Raym. 226. Carth. 390. 5 Mod. 257. 1 Kyd, 450. — 2. So, where an office is granted by deed, the resignation or surrender ought also to be by deed; but where an officer is appointed by election, the corporation may accept his resignation or surrender by parol before them; "If, indeed," says Holt, "a man speak at large, and say he will be no alderman, &c. that signifies nothing; but if he come in an open assembly of the corporation, and there resign his office, declaring that he will not continue in it any longer, and desire them to accept his resignation, and they accept it and elect another in his room, this is a good resignation. Ld. Raym. 563.

So, if it has a power by prescription, &c. the corporation ought to shew that it has used to remove; for it is not sufficient to say, that they are always removable. Sti. 479, 480.

If a freeman, or officer, in a corporation be amoved, &c. without cause, a *mandamus* lies. Vide *Mandamus*, (A.)

### (G) Franchises, how destroyed.

#### (G 1.) By re-union to the crown.

If franchises and liberties are granted by the king, which were before *in esse*, as flowers of his crown, and afterwards by escheat, surrender, or otherwise come back to the crown, they are re-united to the crown, and the king has them in *jure coronæ*, as before. R. 9 Co. 25. b. Vide *Liberties*, (C 1, 2.)

As, if the king grants *bona felonum*, &c. to an abbot, and his possessions are given to the king by the st. 27 H. 8. or 32 H. 8. the king is seised again of the same things, as before, in *jure coronæ*. 9 Co. 25. b.

So, a common in gross. Jon. 285.

So, a liberty to be quit of swanimote; or other liberties in the nature of purveyance. Jon. 270.

So, if liberties, franchises, &c. which were appendant to a manor, as wrecks, waifs, estrays, &c. come with the manor to the king; the appendancy is extinct, and the king is seised of them, as before, in *jure coronæ*. 9 Co. 25. b. Cro. El. 591. 1 And. 87.

So, if liberty to hunt within a forest be granted to an abbot, who has the manor of W. and the manor comes to the king; the liberty shall be extinct. Jon. 286.

But if franchises, liberties, &c. created *de novo* by the king, come back to the crown; they are not merged, or extinguished in the crown. 9 Co. 25. b. 1 And. 87.

As, a fair, or market, with toll, &c. for the king would lose them for ever, if they should be extinguished. R. Cro. El. 592.

A park, warren, &c. Cro. El. 592.

If a lieutenant of the king's chace has title by prescription to hunt within the manor of S. as in the purlieu of the chace; if the manor comes to the king, and afterwards is regranted, the liberty to hunt there is not extinct. R. Dy. 327. a.

If a hundred is severed from the county before the st. 14 Ed. 3. 9. and afterwards comes back to the crown; it shall not be extinct. Dub. 3 Mod. 200.

If a liberty to have a swanimote court held in his manor be granted; it shall not be extinguished, if the manor comes to the king, and is afterwards regranted. Jon. 286.

#### (G 2.) By surrender.

A surrender of a charter by writing shall be void, if it be not inrolled. R. 1 Sal. 191.

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Salk. 425. 1 Kyd, 450. — 3. And, in the case where a resignation ought to be by deed, it is sufficient, in legal proceedings, to say, that the party resigned, or that he resigned in due form, without shewing that it was by deed; for if that be necessary, it is implied. 1 Sid. 14. Ld. Raym. 564. 1 Lutw. 405. 1 Kyd, 450.

Every



Every surrender of their liberties, &c. does not dissolve the corporation. Semb. 2 Mod. Ca. 361.

If a surrender of a charter be void; a new grant in consideration of such surrender, shall be also void.

And if the old members act by themselves, after the new charter, and by colour thereof: their acts shall be good, in respect of their antient right. R. 1 Sal. 191.

But, after a new charter upon a void surrender, if the old members join with those, who have no authority but by the new charter; their acts will be void, though the old members are the majority. R. 1 Sal. 191.

### (G 3.) By forfeiture.

So franchises may be forfeited by breach of the trust, upon which they were granted, and perversion of the end of their grant, or institution.

As, if a leet be disused, and has no officers, or instruments for punishment. Jon. 283.

So a corporation itself may be forfeited, if the trust upon which it was created be broken, and the institution of it perverted. Per. Holt, Sho. 280. 4 Mod. 58. Skin. 310.

So franchises may be forfeited by misuser, or abuser, or other misdemeanor in him to whom they are granted.

### (G 4.) By the dissolution of a corporation :—What shall be a dissolution.

So franchises may result to the king, or donor, if the body to whom granted be dissolved, or extinguished: as, if land be given to an abbot and convent, who all die, by which the corporation is dissolved; the land does not escheat, but the donor shall have it again. Co. L. 13. b. 2 And. 107.

So, if land, or other possessions are granted to a dean and chapter, mayor, and commonalty, &c. who are dissolved. Co. L. 13. b. R. Godb. 211. 1 Rol. 816. l. 22.

So, if a corporation be constituted of brethren and sisters, and all the brethren die, or all the sisters; the corporation is thereby dissolved. 1 Rol. 514. l. 40.

So, if a corporation refuses to continue the election of officers, till all die who could make an election: for thereby the corporation is dissolved.

Or, if the king names the head of the corporation, and they refuse his nomination till the body be dead. Jon. 168.

So, if the abbot, and all the monks of a convent are deraigned, and relinquish their habit and order; the corporation is dissolved. Dav. 1. b.

If a chapel, and all the possessions thereto annexed be aliened; the chaplain ceases; for he cannot be a chaplain of nothing. 3 Co. 75. a.

But if a corporation gives an obligation under the common seal, and some of the principal members sign it, but the words are, *noverint nos magistrum et guardian'*, &c. *teneri*, &c. by their corporate name; if the corporation be afterwards dissolved, the particular members shall not be charged. R. 1 Lev. 237.

## (G 5.) What shall not be a dissolution.

But by a change of the name, or a new incorporation of the same persons, the old corporation is not extinct, nor the privileges granted to it.

So, if a dean and chapter grant their church, and all their possessions; their corporate capacity continues. 3 Co. 75. a. Jon. 168.

If a manor, which is the whole body of a prebend, be evicted, the prebend continues. 3 Co. 75.

If by surrender, or act of parliament, all the possessions of an hospital are resumed, the master and brethren of the hospital continue. Dav. 1. b.

So, if the franchises of a corporation are seised, or surrendered, the corporation itself continues. Per. Holt, Skin. 311.

## (G 6.) When franchises are not gone by the dissolution of the corporation.

If a corporation have granted over their possessions to another, before their dissolution, they do not return to the donor. R. 1 Rol. 816. l. 10. 20.

Vide Prærogative, (D 30. 53.) — Return, (B 1. &c.)

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FRANK-FEE.

Vide ANCIENT DEMESNE, (B).

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FRANK-MARRIAGE.

Vide ESTATES, (B 6.)

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FRAUD.

Vide BANKRUPT, (C 2, &c.) — CHANCERY, (2 Q 5.) — DECEIPT, and the references there marked.

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FREEDOM.

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FREEHOLD.

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FRUITS.

**FRUITS.**

Vide Dismes, (H 10.)

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**GAMING.**

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**GARDIAN.**

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**(H) Remedy by a guardian.**

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**(A) Guardian in chivalry.**

Guardian is by the common law, or by statute. 3 Co. 37. b.

There are four guardians by the common law: in chivalry, by socage, by nature, by reason of nurture. 3 Co. 87. b. Co. L. 88. b.

If a man had died seised of lands holden by knight's service, the lord had the wardship of the land, and the person of his heir-male, till his age of 21 years. Lit. s. 103.

And of his heir, if it was a female, till her age of fourteen years. Lit. s. 103.

And by the st. W. 1. 22. if such heir-female was within fourteen years at the death of her ancestor, and unmarried, till her age of sixteen years, viz. for two years longer; but if she was above fourteen, or married before fourteen, it remains as at the common law. Lit. s. 103.

If the lord die, his executor shall have the ward, till his age of twenty-one years. Lit. s. 125.

By the st. 32 H. 8. 1. which allows of devising two parts of lands holden in chivalry, the wardship of the heir for the other third part is saved to the lord.

And if two are joint-tenants of land for life, and to the heirs of one, who dies; his heir shall be in ward during the life of the other.

So, by the equity of the same statute, if land be settled to the mother for life, remainder to the father in fee, and he dies; the lord shall have the wardship of the heir within age, and not his mother. 2 Cro. 40.

Or, to the mother for life, remainder to the father for life, and afterwards to the heirs of his body, and afterwards to him in fee. R. 2 Cro. 40.

But if land descend to the son as heir to his mother, in the life of his father, the father shall have the wardship of the person of his heir apparent, though the lord has the wardship of his land. Co. L. 84.

Though a daughter be his heir apparent, the father shall have the of her body, and her marriage. R. 6 Co. 22. Mo. 738.  
 If the father marry his daughter, who is his heir apparent, and by a second venture has a son, he shall not answer to the lord for the marriage, though he could not have her marriage after the death of his son. Mo. 739.

Yet the mother after the death of her husband shall not have the wardship of his heir apparent, though she has land descendible to him. Mo. 738. Lit. s. 114.

So,

So, the father shall not have the wardship of any other than his son or daughter, though it be his presumptive heir. Co. L. 84. a.

Nor, shall the father, if he be an alien, attainted, &c. have the wardship of his son; for then he is not his heir apparent. Co. L. 84. b.

But now, by the st. 12 Car. 2. 24. all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by socage *in capite* of the king, and the fruits and consequences thereof, are taken away and discharged. And all tenures of honours, manors, &c. held either of the king or any other person, are turned into free and common socage.

## (B) Guardian in socage.

### (B 1.) Who shall be.

If a man die seised of lands holden in socage, his heir within the age of fourteen years, the next friend of the heir, to whom the inheritance cannot descend, shall have the wardship of the land, and of the heir, till his age of fourteen years. Lit. s. 123. 2 Rol. 40. l. 10.

And by the st. 12 Car. 2. 24. all tenures are turned into free and common socage. (a)

And therefore, if the ancestor die seised of lands holden in socage, the next friend of the heir, to whom the inheritance cannot descend, shall be his guardian.

As, if land descend on the part of the father, the mother, or next friend on the part of the mother, shall be guardian. Lit. s. 123.

Or, if land descend on the part of the mother, the father, or next friend on the part of the father. Lit. s. 123.

If a woman has two sons by divers husbands, and dies, her youngest son within fourteen, his brother of the half blood shall be guardian before his uncle. Per two J. Warb. cont. Mo. 635. Ow. 128. Cro. El. 825. Dub. 2 Jon. 17.

If there are three sons, and the youngest dies seised of lands in socage, his heir within the age of fourteen years, the eldest shall be his guardian; for he shall be preferred as the most worthy. Co. L. 88. a.

So, if a man be donee in frank-marriage, and die, his heir within fourteen, the next friend of the part of the mother shall be guardian; for the mother was the cause of the gift. Co. L. 88. a.

Yet generally, where there are several in equal degree, he who first seizes the heir shall be guardian; as, if land be given to A. and the heirs of his body, the next cousin on the part of the father, or on the part of the mother, who first takes the heir, shall be his guardian, and the friend on the part of the father shall not be preferred. Co. L. 88. a.

So, if a man dies seised of land on the part of his father, and other land on the part of his mother, the next of blood on the part of the father shall enter into the land on the part of the mother, and the next of kin on the part of the mother into the land on the part of the father. Co. L. 88. a.

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(a) The nearest friend of an infant, copyholder of inheritance, to whom the land cannot descend, his mother for instance, is, in the absence of any custom to the contrary, entitled to the guardianship of his person and copyhold. 2 M. & S. 504.



- If *A.* be guardian in socage to *B.* and another dies, his heir within whom *B.* is next friend, *A.* shall be his guardian by Co. L. 88. b.
- a guardian in socage, though the heir be issue male, 88. a.
- a brother, or other cousin of his ancestor. Co. L.

See also 22.

### (B 2.) Who not.

• But the guardian in socage ought to be the next in blood; and therefore the next in affinity shall be excluded. Co. L. 88. a.

• So, every one shall be excluded, to whom the inheritance by possibility may descend; and therefore, if a man has two sons by several ventura, and the youngest dies seised of land in borough-english, his heir within fourteen, the eldest son of the half blood shall not be guardian; for the land by possibility may descend to the uncle, and afterwards to him. Co. L. 88. b.

• So, if an infant claims by purchase, not by descent as heir, he shall not be in ward. 2 Mod. 176.

• So, an infant cannot be guardian; for account does not lie against him. Co. L. 88. b.

• Nor, an idiot, lunatic, or *non compos*. Co. L. 88. b.

• Nor, a leper, removed by a writ *de leproso amovendo*. Co. L. 88. b.

• Nor, *surdus*, *cæcus*, and *mutus*. Co. L. 88. b.

• If the guardian die, his executor or administrator shall not have the ward. Vau. 181.

• If a wife, being a guardian, die, her husband shall not have it, though he survive. Co. L. 89. a.

• So, a guardian in socage cannot devise his wardship to another, but the next friend to the heir, after the death of the first guardian, shall have it. Vau. 178. 181.

• Nor, shall it be forfeited by his outlawry or attainder. Co. L. 88. b.

### (B 3.) What things he shall have.

Guardian in socage shall have the custody of the land, and body of the heir, till his age of fourteen years.

If the heir has a rent-seck, common of pasture, or other inheritance which does not lie in tenure, the guardian shall have the custody of them as well as of his land. Co. L. 87. b.

### (B 4.) What he may do.

Guardian in socage may take all the profits of the estate of the heir for his benefit.

• So, he may make a lease of the infant's estate till his age of fourteen years. 2 Rol. 41. l. 17. 2 Cro. 98.

• And upon such lease the lessee may maintain an ejectment. 2 Rol. 41. l. 17. (b)

• And acceptance of a lease by a guardian by the lessee of the father,

(b) Where an ejectment is brought by a guardian in socage, he must prove, in addition to the title of his ward, that the ward is under fourteen. 5 T.R. 471.

is

is tantamount to a surrender of the first lease. R. 1 Leo. 158. 392. Ow. 45.

So, a guardian may make an admittance, or vol. copyhold; for he is *dominus pro tempore*. Vide Cop.

So, a grant of a reversion of a copyhold; though it ing the nonage. 2 Rol. 41. L. 12. 2 Cro. 99. Vide

So, a guardian in socage may avow in his own name upon a lease by him. 2 Cro. 98.

So, he may have trespass, or ravishment of ward. 2 Cro. 99. F. N. B. 140. C.

So, an ejectment of ward, for the land of the infant. F. N. B. 140. C.

### (C) Guardian by nature.

If a son has lands as heir to his mother, which are holden by knight's service, his father shall be guardian of his body, and shall have his marriage, and not the lord; for none shall be in ward to another, living his father. Lit. s. 114. Co. L. 88. b. Mo. 738.

And therefore, if the father be lord of the land holden by knight's service, he shall have the custody of his heir apparent as father, and not as lord. Co. l. 84. a. 3 Co. 39.

Be the heir apparent son, or daughter. Co. L. 84. a. 3 Co. 38.

And the father shall have the guardianship of his heir apparent till his age of twenty-one years. Semb. Carth. 385. 5 Mod. 223.

But this extends only to the custody of the body and the marriage of his heir; for the lord in chivalry shall have the custody of the land. Co. L. 84. a.

So, it does not extend to a collateral heir, but only to his son or daughter, his heir apparent. Co. L. 84. a.

So, it extends only to the father; for the grandfather shall not have the wardship of his heir apparent. 6 Co. 22. b.

Nor, the mother by the common law. Semb. 3 Co. 38. Co. L. 84. b.

So, if the father be an alien, he shall not have the wardship of his son; for he cannot be his heir. Co. L. 84. b.

Or, if he be attainted. Co. L. 84. b. 3 Co. 38. a.

If the father be outlawed, it shall not be forfeited. 3 Co. 39. a.

Nor, shall it go to the executor or administrator of the father. 3 Co. 39. a.

Nor, can it be granted or disposed by the father to another. R. Vau. 180.

So, if the father be guardian in socage, he shall have the custody of his son as guardian, not as father. Co. L. 88. b.

So, if the father commits waste, he forfeits his guardianship. Hard. 96.

### (D) Guardian by reason of nurture.

So, the father and mother of an infant, who is not an heir apparent, shall be guardian to him, till his age of fourteen years, by reason of nurture. 8 Ed. 4. 7. b. 3 Co. 38.

And by the course of the law, the wardship is cast upon him, when the infant has no land. 8 Ed. 4. 7. b.

So, after the death of the father and mother, the grandfather or great-

great-grandmother shall have the care of the grandsons and grand-daughters. Fl. 1. c. 6.

*So, nepotes et neptes sunt in potestate avi paterni, et eo mortuo recidunt in potestate patris.* Fl. 1. c. 7.

But it was agreed, that the father or mother shall have the nurture of the infant, and not the grandfather. Mo. 738.

And the father or mother by reason of the nurture shall have trespass against a stranger, who takes the infant. Mo. 738.

[Children have a natural right to the care of their mother; and the court will order a grandfather to deliver them up to her. *Mellish v. Da Costa*, M. 1737. 2 Atk. 14.]

[But if a rich uncle takes three infant nieces into his house, and leaves them large fortunes, and they remain in the house with one of the executors, the court will not, on petition of their father, order them to be delivered over to him. *Hopkin's case*, M. 1732. 3 P. W. 152.]

But, a stranger to the infant cannot be his guardian by reason of nurture. 8 Ed. 4. 7. b.

*So, natus ex filia non erit in potestate avi sed patris.* Fl. 1. c. 6. Co. L. 84. b.

Guardian by reason of nurture is for the education or governance of an infant, who has no other guardian, till his age of discretion. 8 Ed. 4. 7. b.

And therefore he cannot detain the infant against his guardian in chivalry, or socage. 11 H. 4. 54. b.

If he discharges the infant out of his house, and he binds himself apprentice, he cannot afterwards retake him. 8 Ed. 4. 7. b.

If he grants the infant to another, that binds himself, and he cannot afterwards retake him. Dub. 8 Ed. 4. 7. b.

If he makes a lease of the lands of the infant, nothing passes but only at will; for he has no interest in the land. 1 Leo. 158. R. Cro. El. 678. 734.

But if a guardian by reason of nurture delivers the infant to another for his instruction, he may afterwards retake him. R. 8 Ed. 4. 7. b.

If he grants the infant to another, he need not stay with the grantee. 8 Ed. 4. 7. b.

If there be an action against him by the guardian in chivalry, or socage, it will be a good plea to say, that he claims only by reason of nurture, and the other claims as ward, and he is ready to render him as the court thinks fit. 8 Ed. 4. 7. b.

So, the father or mother shall not have the wardship of the son or daughter by reason of nurture, beyond the age of fourteen. 3 Co. 38. b.

### (E) Guardian by statute.

(E 1.) By the st. 4 & 5 Ph. & M.

By the common law there was guardian by chivalry, socage, nature, and by reason of nurture only. Co. L. 88. b. 3 Co. 37. b.

But, now by the st. 4 & 5 Ph. & M. 8. no persons shall take away any maid child unmarried under the age of 16 out of the possession, and against the will of her father, or of such person to whom the father by his

his will, or other act in his lifetime, shall appoint, bequeath, give, or grant the governance of such child, &c.

And if any shall take away such child from the possession, &c. against the will of the father, or mother of such child, &c.

And if any shall take away and deflower, &c. such child, against the will, or unknowing of the father, if living, or of the mother of such child, having the custody, or governance of such child, if the father be dead, &c.

And by this act two other guardianships are allowed; viz. guardianships by nature, or by assignation. 3 Co. 38. b.

And therefore, upon the construction of this act, the mother, after the death of the father, shall have the guardianship, of his heir, or other son or daughter, till its age of sixteen years. Semb. 3 Co. 39. a.

And this custody is inseparable from the person of the mother; for if she marries, it shall not be vested in the husband. R. 3 Co. 39.

So, by the st. 4 & 5 Ph. & M. 8. the father by will, or other act in his life-time, may bequeath or appoint the guardianship of his child. Semb. per Dyer, that he may. Dal. 74. R. 3 Co. 39. a. Semb. cont. Vau. 178.

But the custody of the mother after the death of the father, of his heir apparent after 14 till 16, was only for this purpose, that he who takes her and marries her shall incur the penalty of the st. 4 & 5 Ph. & M. Semb. 3 Co. 39. a.

[A bastard is within this statute. *Rex v. Cornforth*, H. 15 G. 2. Str. 1162.]

### (E 2.) By the st. 12 Car. 2.

But now, by the st. 12 Car. 2. 24. the father, of age, or under age, by deed, or by his last will in writing, executed in the presence of two or more witnesses, may dispose the custody and tuition of his child, or children born, or in *ventre sa mere*, till their respective ages of 21 years or less time, in possession or remainder, to any, but a popish recusant.

And such disposition shall be good against all claiming as guardian in socage, or otherwise.

And such person may maintain trespass, or ravishment of ward against any who detains such child, and may recover damage in such action for the benefit of such child.

And may take into his custody, to the use of such child, all profits of lands, tenements and hereditaments of such child, and his goods, chattels, and personal estate, and may bring such actions as guardian in socage might do.

[Testamentary guardian cannot make a lease of infant's lands; and such lease is absolutely void. *Roe v. Hodgson*, T. 33 & 34 G. 2. H. 1 G. 3. 2 Wils. 129. 135.]

The guardian appointed by the st. 12 Car. 2. has the same interest in all respects as a guardian in socage had before, except as to the time and *modus habendi*. Vau. 179.

And therefore, he cannot by deed, or will, transfer the custody of his ward to another. Vau. 179, &c. R. Eq. Ca. 42. (2d part of 2 Mod. Ca.)

Nor,

Nor, shall it go to his executor or administrator. Vau. 180. 182.

And if the guardian dies, it determines, as if it was never disposed. Vau. 185.

If a *feme* guardian marry, the guardianship is not transferred to the husband, nor shall it be forfeited by the attainder or misdemeanor of the husband. Eq. Ca. 138. (2d part of 2 Mod. Ca.)

So, the ward has the same remedy against his guardian by this act, as there was before against a guardian in socage. Vau. 179.

But the mother cannot by her deed or will, dispose the custody of her son. Vau. 180.

If a mother by will appoints a guardian, it is void; and the infant (being fourteen) shall choose a guardian in court. Ex parte Edwards, T. 1747. 3 Atk. 519.

Neither can the grandfather appoint guardians of his grandson; but he may give his estate to him on condition that such and such persons be his guardians; and if the father do not submit to the will, the court will make the father's opposition work a forfeiture of his son's estate. Amb. 306.

[So, neither can a man regularly appoint a guardian to his natural child; but, if in fact he name guardians, the court will appoint them, unless some objection appear to them, without referring it to the master to examine, who is proper to be appointed guardian. 2 Brown. 583.]

So, if the father devise his land to B. during the minority of his heir for his benefit, this does not amount to a devise of the custody of the heir. Vau. 184.

So, if he devise the custody of his heir, without saying, for what time, it will be void for the uncertainty, if the heir was above 14. Per Vau. 184, 185.

Otherwise, if he was under 14; for then it will be good till such age. Vau. 184.

So, if a freeman of London devise the custody of his son, it will be void; for by the st. 12 Car. 2. 24. the custom of London is saved. R. 1 Sid. 363.

[If there are four testamentary guardians of the children of a presbyterian, and one of them has put them to a school, to be educated according to the church of England, the court will not order them to be delivered to the other three. Storke v. Storke, T. 1730, 3 P. W. 51. (c)]

### (F) Guardian by election.

#### (F 1.) Of the heir himself.

If a man die seised of a rent-seck, common of pasture, or such hereditament as does not lie in tenure, and of no other hereditaments, his heir being within 14 years, the heir having no guardian assigned, &c. may chuse his guardian. Co. L. 87. b.

#### (F 2.) Of the court.

If an infant be of such a tender age, that he cannot chuse, a guardian may be assigned to him.

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(c) The testamentary guardian of an infant cannot make a lease of the infant's lands, and such a lease is absolutely void. 2 Wils. 129.

If



If he sue, or be sued in B. R. or C. B. a guardian may be assigned for him by the court. Vide Pleader, (2 C 1, 2.) — Vide Chancery, (3 R 1, 2.)

So, in the spiritual court, it is usual to assign a curator to the infant. 2 Jon. 90.

And it may be done as to personal estate. 2 Lev. 163.

And the ordinary, when he assigns such curator, may take a bond from him for performance of the trust. Semb. 2 Lev. 163.

And the bond may be taken to him and his commissary. Dub. 2 Lev. 163.

[The ecclesiastical courts ought not to appoint guardians *ex officio*, without a suit instituted; for it is breaking in upon the jurisdiction of chancery; and *semb.* that a *quo warranto* would lie. Buck v. Draper, H. 1747. 3 Atk. 631.]

So, if the father or guardian do wrong to the infant, any one may sue as guardian to the infant. R. Hard. 96.

[A guardian may be appointed by chancery, though no suit is depending. *Ex parte* Birchell, T. 1754. 3 Atk. 813.] Vid. 1 Brown. 556, where it is said the petition in such a case must be according to the statute.

[The court never appoints a guardian to a woman, after marriage. Roach v. Garvan, M. 1748. 1 Ves. 157.]

When chancery will appoint, or remove a guardian, vide in Chancery, (3 O 1, &c.)

## (G) Guardian by custom.

As to guardian, by custom of a manor, for a copyholder, vide Copyhold, (K 5.)

### (G 1.) Orphans.

By the custom of London, the mayor and aldermen of London have the custody of every orphan within the city, viz. when any one free of the city dies, leaving an orphan within age and not married. 1 Rol. 550. l. 40.

And custody of the lands and goods of the orphan was given by the st. 1 R. 2. Rot. Par. No. 130. R. Hob. 247.

So, by custom within other cities and boroughs. Adm. by the st. 4 & 5 Ph. & M. 8.

And they have the custody of males till the age of 21 years, of females till 18 or marriage. 1 Sid. 250.

And therefore, the mayor and aldermen of London have the government of the body, lands, and chattels of an orphan. 1 Sid. 250.

Though the land lies out of London. Semb. 1 Sid. 250.

Though the father devise the guardianship to another; for by the st. 4 & 5 P. & M. 8. and 12 Car. 2. 24. the custom of London, and other boroughs as to orphans, is saved.

Though the father at the time of his death did not live in London. Semb. cont. 1 Sid. 250.

So, the wife of a freeman is within the custom. 1 Rol. 550. l. 40.

After the death of a freeman of London, the mayor and aldermen may summon his widow or executor, to appear at a court of orphanage,  
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age, and give security to exhibit an inventory. 1 Rol. 550. l. 45. Hob. 247.

The chamberlain of London is a corporation sole, able to take a bond or recognizance to him and his successors, for orphans. R. 4 Co. 64. b.

And may oblige an executor to give security for performance of the will, and payment of legacies to the orphan. Hob. 247.

And if the executor or administrator refuse an inventory, or security, he may commit him till compliance. 1 Rol. 550. l. 45. Hob. 247.

Though he had given security before to the spiritual court to account. 1 Rol. 550. l. 35. Hob. 247.

And, if the executor or administrator be not a freeman, nor lives within the city, chancery will assist in the security. Semb. Ca. Ch. 203.

So, if a man agree before marriage, that his wife may devise 200*l.* which she devises to orphans; the court will oblige the husband to give security for the money, though he had given a judgment before for security. 1 Rol. 550. l. 30.

So, they may commit an orphan to the custody of another. 1 Sid. 250.

So, if any one take an orphan out of their custody, he may be imprisoned till he produce the infant. R. 1 Sid. 250.

And if there be a woman free of the city, or the widow of a freeman, the custom, if there be such a one, shall be reasonable as to her. Hob. 247.

Money due to an orphan from the chamber of London is a debt, and not a deposit. Ca. Ch. 182.

And the whole personal estate, which belongs to an orphan, ought to be paid there, and the chamberlain of London pays interest for it. Vide Ca. Ch. 182.

So, a mortgage in fee shall be reputed part of his personal estate. Ca. Ch. 285.

And an estate which he had as residuary legatee. Ca. Ch. 310.

Though he was likewise executor, and had not made his election. R. Ca. Ch. 310.

But land of inheritance is not part of the estate of an orphan.

Nor, a lease which attends the inheritance. 1 Ver. 104. 2 Ver. 57.

Nor, a lease to the father, who afterwards purchases the fee in another name. R. 1 Ver. 104.

Nor, receipts in chemistry, physic, surgery, &c. 1 Ver. 62.

### (G 2.) What estate belongs to an orphan.

By the custom of London, if a freeman die, the surplus of his personal estate, after his debts and funerals paid, shall be distributed, one-third to his wife, another third to his children, and the other third part he may dispose of by his will. Sal. 426.

If he has no children, one moiety shall be to the wife, and the other moiety he may dispose of. Ibid.

Or, if all his children are advanced. 2 Ver. 665.

If he has no wife, a moiety shall be to the children. Sal. 426. 2 Ver. 612.

So, if his wife be advanced by jointure, &c. 2 Ver. 665.

[If a wife is compounded with on marriage, by having a jointure in lieu

lieu of her customary share, the husband shall not be considered as a purchaser of her third, but the orphanage share shall then be a moiety of his estate. *Morris v. Burroughs*, H. 1737. 1 Atk. 399.]

If he makes no will, administration shall be granted to the wife, who after a third due to her by the custom, and another third to the children, shall make a dividend of the remaining third part between herself and the children. Sal. 426.

If any child die after the father, before 21 unmarried, its share goes to the other children. 2 Ver. 559.

[A child of full age may, in consideration of present advancement, bar himself of the customary share. *Lockyer v. Savage*, H. 6 G. 2. Str. 947.]

If the father advance any child in his lifetime, he shall have no part in the distribution, except where the father by his will or other writing declares expressly, that it was only in part of his advancement; and then, if he puts his share into hotchpot, he shall have a proportion with the other children out of their whole part. Co. L. 176. b. 12 Co. 113. 2 Ca. Ch. 116, 117. Sal. 426. 1 Ver. 216. 2 Ver. 630.

[If a freeman by will gives 200*l.* to a son, and in his life pays him 200*l.* and takes receipt in full of what was intended him by the will, this shall be considered as an advancement, and be brought into hotchpot. *Car v. Car*, H. 1741. 2 Atk. 277.]

[If a father settles 5000*l.* on his son's marriage, on himself for life, wife for life, son for life, son's wife for life, and then to the issue of the marriage; if the son would come in for a share, he must bring the whole 5000*l.*, and not the value of his estate in it for life only, into hotchpot. *Weyland v. Weyland*, P. 1742. 2 Atk. 632.]

And the share of the child advanced shall be put into hotchpot with the whole personal estate, and not with the third part due only to the children. Semb. 12 Co. 113. Cont. 1 Ver. 345. 2 Ver. 281. 630.

Any provision will be an advancement. 1 Ver. 189. cont. unless it be upon marriage. Ver. 61.

[If the children, or the only child of a freeman, are advanced in the father's lifetime, they shall be deemed fully advanced, unless the *quantum* of the advancement appears. *Fawkner v. Watts*, H. 1741. 1 Atk. 406. *Elliot v. Collier*, T. 1747. 3 Atk. 526. 1 Ves. 15. 1 Wils. 168.]

[Advancement in marriage with a first husband dead in the father's lifetime is a bar to a second husband. *Ibid.*]

[Parol evidence of a father's declarations of advancement shall not be admitted; but of a first husband's or of the wife's in his time, it shall. *Ibid.*]

If the father declares that his daughter is advanced, she is not excluded, unless he says, to what value. 2 Ver. 630.

And if the value to which she is advanced does not amount to her share, if she puts it into hotchpot, she shall have her whole share. R. 2 Ver. 630. Eq. Ca. 137.

If the father declares by his will, that the money given to the daughter was not a full advancement, it is sufficient, though by a subsequent will he declares the contrary. R. 2 Ca. Ch. 117. Vide 2 Ver. 631.

[If a freeman on the marriage of his daughter gives 10,000*l.*, and there is a covenant, that if he should give more to any other daughter

than 10,000l., then he would make his daughter's portion equal to it ; and afterwards by will directs, that one moiety of his estate should go according to the custom, and if that does not make 10,000l. for every other daughter, then it is to be made up out of the other moiety, and the orphanage shares come to 1700l. more than 10,000l.; this is not such a contingency as shall augment the first daughter's portion, for this will could not operate on the orphanage part. *Hanbury v. Ld. Bateman*, M. 1740. 2 Atk. 63.]

If a child advanced, afterwards dies in the life of his father, the distribution shall be to the surviving children, without regard to the dead one. 2 Ca. Ch. 119.

[If a man makes an executor in trust, and devises his personal estate among his seven children, and four are advanced by him in his life-time, and one dies before the testator ; the children advanced shall have their shares of this seventh part, without bringing what they had received into hotchpot. *Cowper v. Scott*, H. 1731. 3 P. W. 119.]

If the father settles an inheritance upon any son, though he says, for his advancement, he is not excluded from a share of the personal estate. 2 Ca. Ch. 160. 1 Ver. 181.

So, if the father settles an inheritance upon a daughter co-heiress. R. 1 Ver. 181. 216.

[Yet if a freeman by will charges 1500l. on his real estate for his daughter, and gives her a share of his personal estate, she may not take the sum charged on the real estate, and also claim an orphanage part, but must abide entirely by the will, or by the custom. *Cowper v. Scot*, H. 1731, 3 P. W. 119.]

If a daughter marry in the life of her father against his consent, and he is not reconciled before his death, she shall lose her portion. R. 1 Ver. 354.

If the father by his will declare his son advanced so much, proof of more shall be allowed. Semb. Eq. Ca. 137.

If there be no wife, the whole shall be divided among the children. 2 Vent. 341. viz. a moiety by the custom, and a moiety by the statute of distributions. Sal. 426.

And if any child die within age, his part survives to the others. 2 Vent. 341. R. Prec. Ch. 537.

If any child have a son, and die in the life of his father, the other children shall have the whole, and the son of the deceased child shall have nothing. Sal. 426.

For grandchildren are not within the custom. R. 1 Ver. 397. Eq. Ca. 137. 2 Sho. 467.

If the father settle an estate of inheritance in his lifetime upon his son, he shall have a share of the personal estate, without putting the value of the land to hotchpot ; for land is not taken as an advancement within the custom of the city. 2 Ca. Ch. 118. 160. 1 Ver. 345. 2 Ver. 754.

Though the father covenant to lay out so much in the purchase of land for his son, which is purchased in his life time. R. 2 Ca. Ch. 118. 1 Ver. 345.

[If *A.* on his marriage with the daughter of *B.* has an estate in land settled on him, the purchase money whereof is included in a receipt which he gives for his wife's fortune, it shall be considered as money,  
and

and brought into hotchpot. *Morris v. Burroughs*, H. 1737. 1 Atk. 399.]

If an only child be advanced in part, he shall have the whole share of the children, without putting his part received into hotchpot, which extends only to children, not to the wife. Sal. 426. Semb. cont. 2 Lev. 130.

For there it is said, that a voluntary settlement upon a son will be fraudulent upon the custom by which the wife claims. Ch. R. 16. temp. Finch. Acc. 2 Ver. 234. 629. 630. 754.

But any sum given in money to a son or daughter by the father, shall be taken for an advancement. R. 2 Ca. Ch. 118.

[Sums, however small, if given as advancement, must be brought into hotchpot, but petty sums given as presents shall not. *Morris v. Burroughs*, H. 1737. 1 Atk. 399.]

[So, small sums given occasionally, of maintenance money or allowance, at the university or travelling, shall not be deemed part of child's advancement, it is only education; nor money given with him as apprentice. *Hender v. Rose*, T. 1718, 3 P. W. 317.]

[If a freeman has two daughters, *A.* and *B.* On *A.*'s marriage he gives 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gives 428*l.* to buy a house, which is done; and *B.* marries without his consent, but he is afterwards reconciled, often stays weeks with her, and gives her presents from time to time to about 500*l.*, but no advancement; *A.*'s 2000*l.* and 2000*l.* shall be brought into hotchpot, but not her 428*l.* nor *B.*'s 500*l.* *Hume v. Edwards*, H. 1746, 3 Atk. 450.]

[A gold watch or wedding clothes are no advancement, nor a gift of 50*l.* in money, where the orphanage share is considerable. *Elliot v. Collier*, T. 1747, 3 At. 526. 1 Ves. 15. 1 Wils. 168.]

[Consent to a daughter's marriage does not bar her; it must appear under his hand *quantum* he has advanced her. *Ibid.*]

[If a father maintains his daughter, after her husband's death, his executor shall be considered as a creditor for so much as that maintenance deserved, which shall be deducted out of the daughter's customary share. *Ibid.*]

[But buying an office, though but at will, or a commission, are advancements. *Norton v. Norton*, M. 1692. *Rawlinson v. Hutchins*, 3 P. W. 317.]

[If some years after the marriage of a freeman's son, the parents on both sides meet, and agree to advance 200*l.* a-piece to lie by till they can purchase a commission in the army for him; this is a marriage-portion, and bars him of his orphanage part. *Hearn v. Barker*, H. 1744, 3 Atk. 213.]

[But he is entitled to his share of the testamentary part if his father die intestate. *Ibid.*]

[Judd's law does not make money advanced a bar, unless it is an advancement on marriage. *Ibid.*]

So, a term for years assigned to a son by the father. Semb. 2 Lev. 130.

So, a gift or present after marriage shall be taken into hotchpot, though they are no advancement to bar from a share of the personal estate. 1 Ver. 61.

A legacy for mourning goes out of the legatory part. 2 Ver. 240.

So, a devise to a trustee for a daughter. 2 Ver. 754.



[If a loss happens in a freeman's estate by the insolvency of the executor, it shall be borne wholly out of the testamentary part, and not out of the customary. *Redshaw v. Brasier*, T. 1 G. in Can. 2 Ld. Raym. 1328.]

When an orphan attains his full age, he shall have his proportion with customary interest. 2 Vent. 341.

Or, if it be a woman, when she marries. 2 Vent. 341.

Though the woman die after marriage before the age of 21 years. R. 1 Ver. 89.

So, an orphan shall have his share, though his father die within the province of York; for the custom of London shall be preferred to the custom within the province of York. 2 Ver. 48. 82. 111. Vide Chancery, (3 D 3.)

So, an orphan after 21 may dispose of his orphanage part, though it be not received; but not before 21. Pr. Ch. 537.

And if he die intestate, it shall be distributed according to the st. 22 & 23 Car. 2. c. 10. Pr. Ch. 537.

So, if he die within age, though his orphanage part survives to the other orphans, if he has any part by the death of another orphan as survivor, that shall be distributed. Pr. Ch. 537.

But before recovery or receipt by an husband of the share of his wife, who was an orphan, the interest does not vest in him. 2 Vent. 341. R. Ca. Ch. 182.

And he cannot dispose of it by his will. R. 2 Vent. 341.

And if he gives it to the wife in compensation for her dower, his wife shall have her dower, and likewise the money due to her as an orphan. R. Ca. Ch. 182.

[If husband and wife, she being under age, covenant before marriage, in consideration of her portion, to release her orphanage share; if the father dies in the husband's life, he is barred of any customary share in right of his wife; but if the husband is dead, the articles would not bind the wife, and she would by survivorship be entitled to the customary share, as a *chose en action* not recovered by the husband. *Metcalf v. Ives*, T. 1737, 1 Atk. 63.]

[And this covenant of the husband shall be considered in equity as actual release, and so an extinguishment of the wife's right to the orphanage part, and leaves the father's estate as if never charged with it; and therefore must be considered as part of his general personal estate, and not go wholly to his executors as part of the dead man's share. Ibid.]

If the husband devise a lease, books, &c. the wife by custom shall have a moiety of the specific legacies, and likewise of the other personal estate. R. 2 Ver. 110.

And the specific legatee shall have no recompence out of his testamentary part. R. 2 Ver. 111.

So, a settlement by a freeman in trust for himself for life, and afterwards to his grandchildren, will be a fraud upon the custom. R. 2 Ver. 612. 635.

Otherwise, if he makes a gift to his grandchildren in his lifetime. 1 Ver. 612.

Or, purchases land in his lifetime. 2 Ver. 612.

Or, gives the whole to one daughter in his lifetime. Ibid.

So,

So, a voluntary settlement, by a freeman, of a term, does not bind his wife. R. 2 Lev. 130. 2 Ver. 98.

So, a father, freeman of London, cannot by his will dispose of his personal estate to the prejudice of the customary part of his children and wife. 1 Lev. 227. R. 1 Ch. R. 84.

[If a freeman of London devises no more than his testamentary part, his children shall have both their legacies and their customary shares; but if he devises his whole estate, they must make their election. *Wilson v. Philips*, P. 1725, Bunb. 195.]

[If the daughter of a freeman has 10,000*l.* legacy left her by her father, on condition that she renounce her orphanage part, and being told by her brother she may make her election, to have an account of the father's estate, and have her orphanage part, she declares she will accept the legacy, and executes a release; yet if the orphanage part is greatly superior, it shall be supposed she did not rightly understand it, and the release may be set aside. *Pusey v. Desboverie*, T. 1734, 3 P. W. 315.]

[If a freeman by will disposes of all his estate, orphanage and testamentary, and some of his children abide by the custom, others by the will, the shares of the latter shall not go among the other, but shall accrue to the testator's estate, and go according to the will. *Morris v. Burrows*, T. 1743, 2 Atk. 627.]

Nor can he by will direct, that the share of the infant shall not survive, if he dies within age. R. Wild. cont. 2 Vent. 341.

Or, that if the infant die within age, his share shall go to another. R. Ca. Ch. 199. 2 Vent. 341.

[A freeman cannot devise either the orphanage part or the contingency of the benefit of survivorship, among orphans; nor can an orphan devise his orphanage part, nor the part which accrued by survivorship: but such freeman may by will give his children legacies inconsistent with the custom, and then they must make their election, to abide by the will, or by the custom; but they cannot abide by the will in part, and have the benefit of the custom also. *Harvey v. Desboverie*, T. 9 G. 2. C. T. T. 130.]

Yet he may direct by will, that if they all die, the survivor shall have their shares. R. 1 Lev. 227. but Lev. makes a quære.

So, if an husband, being an orphan, marry a woman with a portion, and die within age, the wife shall not be relieved for any part of the portion of her husband, which by the custom survives. Semb. 1 Ch. R. 26.

So, if the husband settle an estate upon his wife in lieu of her customary part, he may dispose of it. R. 1 Ver. 6.

[If a woman, before marriage with a freeman, accepts of settlement to take effect after his death of part of his personal estate, (without taking notice of custom of London,) she is thereby barred of her customary part. *Lewin v. Lewin*, M. 1727, 3 P. W. 15.]

[If a wife was divorced *a mensa et thero* for adultery, she forfeits her right to her moiety, and widow's chamber, though entitled thereto by custom of London. *Pettifer v. James*, T. 1717, in Sc. Bunb. 16.]

If the husband acknowledge a judgment without consideration, to secure money to be paid after his death; this does not prejudice his

debts upon simple contract, nor the customary share of his wife or children, but only his legatory part. R. 2 Ver. 202.

So, a term for years taken by a freeman upon his purchase of the inheritance, is not part of his personal estate within the custom. 2 Ver. 57.

The custom shall not be eluded; and therefore, a settlement in fraud of the custom shall be avoided. Eq. Ca. 137.

[If A., having three children of age, and two under age, enters into agreement signed by him and the three of age, that if he takes up his freedom of London, they release and disclaim all right to his personal estate as freemen's children, it is void. *Morris v. Burroughs*, H. 1737, 1 Atk. 399.]

[If a freeman, for love and affection, without pecuniary consideration, make a settlement, but still keeps possession and receives the rents, the property continues in him, and is subject to the custom. *Smith v. Fellows*, M. 1740, 2 Atk. 62.]

[If a father obliges a son, merely for maintenance, and not for advancement in marriage or trade, to release his right to the orphanage share, such release is void; and even though he had in his life given him small sums, to the amount of 3 or 400*l*. *Heron v. Heron*, P. 1741, 2 Atk. 160.]

[If a freeman assigns over to trustees a leasehold, reserving to himself an estate for life, the trust to commence after his death, it is a fraud on the custom, and the assignment shall be cancelled, and the premises and profits since his death deemed part of his personal estate. *Smith v. Fellows*, T. 1742, 2 Atk. 377.]

[If a freeman, several years before his death, purchases a leasehold for 40 years, in the joint names of himself and wife, it is a fraud on the custom, and the estate shall be applied as the rest of his estate. *Coomes v. Elling*, H. 1747, 3 Atk. 676.]

[But had it been given to trustees to the separate use of the wife in possession, it had been good. *Semb. ibid.*]

[The funerals of a child dying after the father, shall be paid out of its orphanage share. *Ibid.*]

[If a freeman aged 72, ill of the gout, and two days before his death, by deed of same date with will, assigns part of his personal estate to trustees to the separate use of his daughter, and that she shall not have power to give it to her husband, (whom she had married without consent, but father is reconciled,) and does not deliver the deed to his daughter, it is a testamentary disposition, and a fraud on the custom, and may be disputed by the husband; but he must make a settlement, even if there is a provision for the wife before. *Tomkyns v. Ladbroke*, T. 1755, 2 Ves. 591.]

[By st. 11 G. 1. c. 18. s. 17. any person becoming free of the city after 1st June 1725, may dispose of his personal estate, to such person or persons, and to such use and uses as he shall think fit; unless he shall before marriage agree by any writing under his hand, in consideration of his marriage, that his personal estate shall be subject to the custom, or unless he shall die intestate; and the personal estate of such person so making such agreement, or so dying intestate, shall be subject to and be distributed and distributable according to the custom of the city.]

(G 3.) Allowance to an orphan.

The mayor and aldermen make an allowance to orphans for maintenance, in proportion to their estate. D. 2 Vent. 341.

And at their age, or marriage, their estate with interest is paid to the orphans. 2 Vent. 341.

(G 4.) Marriage.

By the custom of London, the mayor and aldermen have the care of the marriage of every orphan within their custody.

And if any marry such orphan within the age of 21, without their licence, they shall be fined according to the quality and portion of the orphan, and committed to Newgate till payment. R. 2 Lev. 32.

Or, at least, shall give bond for the payment.

Though the estate of the husband deserves a larger portion than the orphan had.

And it is sufficient to say, that he married such an one being an orphan without assent, though it is not said, that the marriage was within the city. R. 2 Lev. 32.

Though it is not said, that he had not a reasonable excuse for it; for that shall not be intended, unless it be shewn, R. 2 Lev. 32.

Though it is not said, that he took her out of the custody of the mayor and aldermen; for she is in their custody wheresoever she is. R. 2 Lev. 32.

(H) Remedy by a guardian.

(H 1.) Right of ward.

If tenant in chivalry die in the homage of the lord, and a stranger enter into the land, or take the body of his heir within age, the lord may have writ of right of ward. F.N.B. 139. B.

And he may have it for the land and body together, or for the land, or body by itself. F. N. B. 139. C.

So, the lord paramount may have it for the land and body of the *mesne*. F. N. B. 139. E.

Or, the lord by reason of ward. F. N. B. 130. D.

So, a guardian in socage may have right of ward for the land and body by reason of ward. F. N. B. 139. H.

So, he shall have right of ward for the body in his own right. F. N. B. 139. H.

But a guardian in socage shall not have right of ward for the land; for he is only bailiff to his ward for the land, and has no right to the land. F. N. B. 139. H.

Right of ward may be sued by justices in the county, or in C. B. F. N. B. 139. F.

If it be sued by justices, the plaintiff may remove it by *pone* into C. B. without cause, and the defendant with cause, as in *replevin*. F. N. B. 139. G.

By the st. Mert. 20 H. 3. 6. in right of ward the plaintiff shall recover *valorem maritagii*, and the defendant shall be imprisoned till he satisfy the plaintiff for his default, and the king for his trespass. 2 Inst. 90.

(H 2.)

## (H 2.) Ejectment of ward.

So, if a guardian be ousted of the body and land of his ward, he may have a writ *de ejectione custodiæ*. F. N. B. 140.

Or, he may have an ejectment for the land only. F. N. B. 140. A.

And a guardian in socage shall have a writ *de ejectione custodiæ* for the land, as well as a guardian in chivalry. F. N. B. 140. C.

So, a grantee of the ward. F. N. B. 140. B.

## (H 3.) Ravishment of ward.

So, by the st. W. 2. 35. a guardian in chivalry may have a ravishment of ward, if any one takes the body of his ward. 2 Inst. 439.

So, a guardian in socage, by the equity of W. 2. 24. which gives a writ *in consimili casu*, shall have a ravishment of ward. 2 Inst. 439. F. N. B. 140. D.

So, every ancestor, male or female, shall have a ravishment of ward against him, who wrongfully takes an heir apparent, male or female. R. 3 Co. 38. b.

So, an executor shall have it for a ward, which was taken out of the possession of his testator. 11 H. 4. 55. a.

But it does not lie by a father, for taking and marrying his son after his full age; for then he may marry without the consent of his father. R. Mar. Pl. 8.

## (H 4.) Information.

So, by the st. 4 & 5 Ph. & M. 8. if any above fourteen convey away any woman child unmarried under sixteen, out of the possession and against the will of her father, mother, or such person as shall have by any lawful ways or means the order and governance of her, except it be by or for the master or guardian of such woman child, &c. he shall suffer two years' imprisonment without bail.

And if any woman child, above twelve and under sixteen, consent to a contract of matrimony with any who so takes her way against the will, or unknowing of her father, or, if he be dead, of her mother, having the custody or governance of her, the next of her kin, to whom the inheritance should descend after her decease, shall enjoy all her lands, tenements, &c. she had at the time of such assent, during the life of him who so contracts matrimony with her.

An information lies upon this statute in B. R. as well as in the Star-chamber, or before justices of assise. R. 2 Lev. 179.

And an information lies, where the woman takes as a real estate, though no goods. R. 2 Lev. 179.

But it shall not be within this statute, if the son of B. to whom the mother intrusts the care of her daughter, marries her in a public manner, without the privity of the mother. Semb. 3 Mod. 85.

Or, if he does not use force or craft to compass the marriage. Semb. 3 Mod. 169.

Or, if the mother assent at any time, though she afterwards disagree. 3 Mod. 169.

So, an information lies against any person, who takes out of another's custody, and marries his daughter and heir. R. 1 Sid. 387, 1 Lev. 257. Cro. Car. 557, 558. Dub. 5 Mod. 221. Carth. 385.

(H 5.)



## (H 5.) Trespass.

So, by the common law, trespass lies against him, who takes, detains, or marries his ward. 2 Inst. 90.

So, trespass lies by every ancestor male, or female, against him who wrongfully takes the heir apparent. R. 3 Co. 38. b.

By a father or mother guardian by reason of nurture, against a stranger, who takes the infant from them. R. Mo. 738.

And in an action upon the case by a father for the marriage of his son and heir, it is not necessary to say, that he is within age. Sti. 216.

Nor, *cujus maritagium ad ipsum pertinet*; for it belongs to him by law. R. Sti. 216, 217. 303.

But trespass does not lie for taking and carrying away a son or daughter who is not heir. R. Cro. El. 770.

Nor, for a battery, or imprisonment. R. Cro. El. 55. 770. Vide Trespass, (B. 5.)

Nor, an action upon the case for the battery of his heir, being his apprentice, whereby he became decrepit, and the father lost his marriage; for the loss of the marriage of an heir is not a cause of action, except where he is taken and married by a stranger. R. Cro. El. 55.

Nor, for the defamation of his daughter, whereby the father loses her marriage. Cro. El. 770.

So, an action lies by the father for the marriage of his son and heir, after his full age. Jon. 411, 412.

## (H 6.) Intrusion of ward.

If the ward himself, during his nonage, had entered upon the land, and ousted the lord, he might have a writ of intrusion of ward against him. F. N. B. 141. A.

And it lies after the full age of the heir, as well as during his nonage. F. N. B. 141. E.

(H 7.) *Valore maritagii*.

So, if the heir had married himself without the assent of the lord, after convenient marriage tendered to him, the lord might have a *valore maritagii* for the value of the marriage, F. N. B. 141. D. F. G.

For more concerning Guardian, vide Accompt, (A 2. — E 3.)— Chancery, (3 O 1, &c.)— Copyhold, (K 5.)— Prærogative, (D 26, 27.)— Prohibition, (G 20.)— Wast, (F 1.)

## . GARNISHMENT.

Vide ABATEMENT, (I 30.)— ATTACHMENT— PLEADER, (2 X 8, &c.)

## GARRANTY.

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(K 2.) By voucher. p. [405.]

(K 3.) By rebutter. p. [405.]

(A) Warranty; by what words it shall be.

A warranty is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value, if they are evicted by a former title. Co. L. 365. a.

Warranty is express or implied. Co. L. 365. a.

No word in law makes an express warranty, except the word *warrantizo*. Lit. s. 733.

But a feoffment by the word *dedi*, implies a warranty to the feoffee and his heirs during the life of the feoffor. Co. L. 384. a.

And before the *st. quia emptores terrarum*, 18 Ed. 1. 1. if a feoffment was by *dedi tenendum* of the feoffor and his heirs, the heirs as well as the feoffor himself were bound to warranty in respect of the tenure. Co. L. 384. a.

So in an exchange, the word *excambium* imports a mutual warranty. Co. L. 384. a.

So, in a partition, it is implied that the one warrants the other. Co. L. 384. a.

So, in *homage auncestrel*, the lord is bound to warrant his tenant. Co. L. 384. a.

So,

So, if a gift in tail, or lease for life, be by or without deed, rendering rent, the donor or lessor is bound to warranty. Co. L. 384. b.

So, if the heir assign dower, he is bound to warranty. Co. L. 384. b. 2 Rol. 738. l. 50.

But *concessi* does not imply a warranty. Co. L. 484. a.

So, *dedi*, in letters patent of the king, does not import a warranty; for the king is not bound to warranty except by express words. 2 Inst. 269.

So, a grant, *cum clausula warrantia*, these words do not create a warranty. 3 Rol. 739. l. 17.

What words make a covenant express, or in law, vide Covenant, (A 1, &c.)

### (B) Who are bound by a warranty.

An express warranty never binds the heir to warranty, unless he be named; as, *ego et hæredes mei warrantizabimus*, &c. Co. L. 383. b. 384. b.

But an exchange, partition, *homage auncestrel*, which are warranties in law, bind the heir to warranty. Co. L. 384. a. (a)

So, if a father and his heir apparent join in a warranty, the heir is doubly bound, by his own warranty and as heir to his father. R. Mo. 20.

If two join in a warranty, and the one dies, the heir and the survivor may be vouched. Mo. 20.

Or, the survivor alone may be vouched at election. Mo. 20.

### (C) To whom a warranty extends.

If a man warrant land without saying to whom, it shall be intended to the feoffee. Co. L. 383. b.

If he warrant to B. without more, this extends only for his life, for default of the words, his heirs. Co. L. 47. a. 384. b.

Though he warrant to B. against him and his heirs. Cro. El. 602.

So, if a man warrant, without saying, for him and his heirs, it will be a warranty for his life only. R. Cro. El. 602.

But if a man warrant to B. and his heirs, the warranty extends to the heirs. Vide Co. L. 47. a.

So, *dedi* extends to the feoffee and his heirs, during the life of the feoffor. Co. L. 384. a.

So, an exchange, partition, *homage auncestrel*, import a warranty to the party and his heirs. Co. L. 384. a.

So, if there be a feoffment to A. and his heirs, and a warranty to him *in forma prædicta*, that extends to his heirs. Co. L. 385. b.

So, if a warranty be to A. and his heirs, it shall be general against all persons, though it does not say, against all persons. R. 2 And. 118.

So, if a man warrant to B. his heirs and assigns, this extends to all assigns and their assigns *toties quoties* for ever. Co. L. 384. b.

If to A. and B. *et eorum hæredibus et assignatis*, it extends to an assignee of the heir of the survivor, &c. Co. L. 384. b.

So, it extends to an assignee of part of the land. Co. L. 385. a.

So, it extends to an assignee by parol. Co. L. 385. b.

So, if a feoffee makes a gift in tail, or a lease for life, remainder in fee, the donee or lessee may vouch as assignee; for his estate and the remainder make but one estate. Co. L. 385. a.

If there be a feoffment to A. and B., and A. assigns his part, B. might vouch for his moiety. Co. L. 385. a.

If there be a feoffment to three, and one releases to the two others, they may vouch. Co. L. 385. a.

If there be a feoffment to A. who enfeoffs B., who re-enfeoffs the heir of A., he may vouch as assignee. Co. L. 385. b.

But generally a warranty does not extend to assigns, unless they are named. Co. L. 384. b.

If there be a feoffment to A. and B. their heirs and assigns, and one of them assigns, it does not extend to such assignee. Co. L. 385. b.

So, a warranty to one, his heirs and assigns, does not extend to an assignee of part of the estate; as, if the feoffee makes a gift in tail or a lease for life, the donee or lessee is not an assignee, but he may vouch his donor or lessor, and so take advantage of the warranty. Co. L. 385. a.

So, if the donee make a feoffment, the feoffee cannot vouch as assignee, but must vouch his feoffor. Co. L. 385. a.

If there be a feoffment to A. who enfeoffs B., who re-enfeoffs A., he or his heirs cannot vouch; for he cannot be assignee to himself. Co. L. 385. b.

Yet by an exchange, or feoffment with the word *dedi*, the assignee may rebut, though he cannot vouch. Co. L. 384. b.

So, if there be a feoffment with warranty, without saying, 'to the assigns,' yet an assignee, or any tenant of the land, may rebut. Co. L. 385. a.

So, though a disseisor, abator, intruder, &c. cannot vouch or have a *warrantia chartæ*, because he has no privity, yet he may rebut. Co. L. 385. a.

So, *cestuy que use* may rebut, though he comes in the post. R. Sal. 685.

But a man who claims paramount, and not under the warranty, cannot vouch or rebut; as, if a feoffment be to two brothers, with warranty to the eldest and his heirs, who dies without issue; the youngest cannot vouch or rebut, for he does not claim as heir, but by the feoffment. Co. L. 385. a.

If there be a gift in tail with warranty to the donee, his heirs and assigns, who makes a feoffment and dies without issue; the feoffee cannot vouch or rebut, for the estate to which the warranty was annexed, is determined. Co. L. 385. a.

When a covenant binds or extends to heirs or assigns, vide Covenant, (B 1, &c.—C 1, &c.)

### (D) By what conveyance created.

Warranty may be created by any conveyance of lands, tenements, or hereditaments; as, by fine, feoffment, &c. Co. L. 371. a.

By gift in tail, or lease for life. Co. L. 371.

By fine *sur grant et render*. Carth. 141.

So,

*What rights, or titles, are barred by warranty.* [399]

So, by release or confirmation, which enlarges the estate. Co. L. 371. 385. a. (b)

So, though the release or confirmation pass no estate or right, and the releasor has nothing in the land. Co. L. 371. b. 385. a.

And such release, &c. is sufficient for a warranty to the assignee. Dub. Co. L. 371. b. Acc. Co. L. 385. a.

So, a warranty in law may be created by will; as, if a man by his will devise land in tail, or for life, rendering rent. Co. L. 386. a.

But an express warranty cannot be created without deed. Co. L. 386. a.

And therefore, a devise in fee with warranty; the warranty is void, for a will is no deed. Co. L. 386. a.

[In old conveyances there is a reservation made of such deeds as tend to deraign the warranty paramount. By Ld. Kenyon Ch. J. *Yea v. Field*, B. R. M. 29 G. 3. 2 T. R. 709.]

**(E) To what estates annexed.**

A warranty may be annexed to all estates of freehold or inheritance, which pass by livery. Co. L. 366. a.

So, to estates incorporeal which lie in grant; as, advowsons, rents, common, estovers, &c. Co. L. 366. a. (c)

Though the rent, &c. be newly created, and was not *in esse* before; for though there cannot be a prior title to the rent, there may be to the land, by eviction whereof the rent will be lost. Co. L. 366. a.

So, if a rent newly created be given in exchange for land, or for owelty of partition, the warranty in law extends to it. Co. L. 366. a.

So, if a rent-seck be released with warranty to the tenant of the land, although it enures by way of extinguishment generally, it shall be annexed to it. Co. L. 366. b.

But a warranty cannot be annexed to chattels real or personal; for if a man warrants them, the party shall have covenant, or action upon the case. Co. L. 101. b. 389. a.

Nor, to the estate of tenant by statute, or *elegit*. Co. L. 389. a.

**(F) What rights, or titles, are barred by warranty.**

Warranty extends to warrant the land in the same plight as it was at the time of the warranty. Co. L. 388. b.

And therefore, if any person have an elder right at the time of the warranty, the warranty extends to it. Co. L. 388. b.

So, a warranty extends to a rent, common, &c. issuing out of land, which was discharged or suspended at the time of the warranty. Co. L. 366. b. 388. b.

As, if the grantee of a rent disseise the terre-tenant and make a feoffment with warranty; that extends to the rent, for it was discharged at the time of the warranty. Co. L. 388. b.

So, if the grantee release to the terre-tenant, with warranty of the tenements. Co. L. 366. b.

So, a right shall be barred, though it descend in one respect, and the

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(b) 4 M. & S. 178.

(c) Reversionary interest. 4 M. & S. 178.



warranty in another; as, if husband and wife sue in right of the wife, they shall be barred by a collateral warranty of the ancestor of the husband. Co. L. 365. b.

Or, if a woman, heir of a disseisor, enfeoff with warranty, and afterwards marry the disseisee; in a *præcipe* they shall be barred by the warranty of the woman. Co. L. 365. b.

So, a right not *in esse* at the time of the warranty, but future, may be barred by warranty; as, if a father be disseised, and the son release with warranty, though he had no right at the time but only *in futuro* upon the death of his father; for otherwise there would be a circuit of action. Co. L. 265. a.

Though the warranty and right descend to the heir at the same time; as, if A. tenant for life, remainder to his son, be disseised, release with warranty, and die, the son is barred. Co. L. 388. b.

So, though the warranty descends first, if the right was *in esse* in any of the ancestors at the time of the descent. Co. L. 388. a.

So, a right of entry, or action, shall be barred by warranty. R. Sal. 686.

### (G) What not.

But warranty does not extend to naked titles; as, to a title of entry for a condition broken; for that cannot be divested, neither can there be an action for it, and so no voucher, or *warrantia chartæ*. Co. L. 389. a. 379. b.

So, it does not extend to a title of entry by force of an exchange. Co. L. 389. a.

Nor, to a title of entry for mortmain, consent to a ravisher, &c. Co. L. 389. a.

So, if made by a parcener, &c. upon alienation of his part, it does not extend to avoid the partition. R. Mo. 21.

So, a warranty does not extend to a right, which commences after the warranty made. Co. L. 388. b.

And therefore, if a son has a rent, common, &c. out of the land of his father, who makes a feoffment with warranty, and afterwards the son is disseised, and the warranty descends: this does not extend to the rent, which was put to a right after the warranty. Co. L. 388. b.

So, if a woman who has a rent, &c. intermarry with the terre-tenant to whom A. releases with warranty; this does not extend to the demand of rent by the wife, or her heir; for their title of action for it commences after the warranty, *viz.* upon the death of the husband, or wife. Co. L. 388. b.

So, if the grantee of a rent grant it to the terre-tenant upon condition, who makes a feoffment with warranty; this does not extend to the rent afterwards claimed for breach of the condition. Co. L. 389. a.

If tenant in tail, remainder in tail, levies a fine with warranty, and afterwards suffers an erroneous recovery, and dies without issue; though the warranty descends upon him in the remainder, it does not bar him to have error upon the recovery. Dub. 2 Rol. 741. l. 35.

So, it does not extend to an estate in reversion, remainder or possession, which was not divested or put to a right at the time or before the descent of the warranty. Co. L. 388. b.

And therefore, if there be tenant for life, remainder or reversion in fee to A., and a collateral ancestor of A. release to the tenant for life in fee with warranty, and die, and the warranty descends upon A., his remainder or reversion is not barred, for it was not divested. Co. L. 388. b.

So, if the father has land in fee, and the son has a rent, common, &c. out of the land, the father makes a feoffment with warranty; this does not extend to the rent, &c. which was not divested. Co. L. 388. b.

So if the husband makes a feoffment, and a collateral ancestor of the wife release with warranty; this does not bar her right of dower, which was not changed from its original essence. Co. L. 389. a.

## **(H) What warranties are bars.**

### **(H 1.) Lineal warranty; what shall be.**

Warranties are of three kinds; lineal, collateral, or which commence by *disseisin*. Lit. s. 697.

Lineal warranty is, where the heir to the warranty would have conveyed his descent to the lands (if there had been no warranty) from the same ancestor, who made the warranty. Co. L. 370. a.

As, if a father seised in fee makes a feoffment with warranty and dies, the warranty will be lineal to his son, for he would have made his descent to the land from his father. Lit. s. 703.

So, it will be a lineal warranty, if the heir conveys his descent by means of the ancestor who made the warranty, though he does not make his title immediately as heir to him; as, if the grandfather be disseised, and the father release with warranty, and die in the life of the grandfather; his warranty will be lineal to the son, for he claims by means of the father, although he makes his title to the grandfather, who was last seised. Lit. s. 706.

So, if by possibility the heir could convey his descent by means of such ancestor; as, if the father be disseised, and the eldest son release with warranty, and die in the life of his father; his warranty will be lineal to the youngest son. Lit. s. 707. 715.

If A. tenant in tail, and his eldest son, make a feoffment with warranty, and the eldest son dies in the life of his father; this warranty is lineal to the youngest son of A. R. Hut. 22.

So, it will be a lineal warranty, if the heir derive his title from the ancestor who made the warranty, though he does not derive from him alone; as, if there be a gift in tail to husband and wife and the heirs of their bodies, and the husband discontinue; the warranty of the husband or the wife is lineal to the issue in tail, though he claims as heir of both their bodies. Lit. s. 714.

So, if there be a gift to a man and a woman and the heirs of their bodies, who afterwards intermarry; though the donees took by moieties. Co. L. 375. a.

### **(H 2.) Collateral, what shall be.**

But, where the heir to the warranty does not derive his title from the ancestor who made the warranty, it will be a collateral warranty; because his title is collateral. Lit. s. 704, 705. 717.

As, if a father disseise his son, and make a feoffment to another with

warranty, it will be a collateral warranty; because the son does not derive his title from the father. Lit. s. 704.

If the father be disseised, and the youngest son release with warranty, it will be collateral to his eldest brother. Lit. s. 707, 708.

So if tenant in tail discontinue, a release by the uncle with warranty will be collateral to the issue in tail. Lit. s. 709.

### (H 3.) Collateral in part, and lineal in part.

So the same warranty may be collateral in part, and lineal in part; as, if the eldest daughter enter, and enfeoff B. of all the land, which descended to her and her sister, with warranty, and die without issue; the warranty will be collateral for the moiety, which was the part of the youngest sister, and lineal as to the other moiety. Lit. s. 710.

So, a warranty, which was collateral to some, may become lineal to others; as, if a man be disseised, and his youngest son release to the disseisor with warranty, it will be collateral to his eldest brother and his issue, but if he die without issue, the warranty becomes lineal to the issues of the youngest son himself. Co. L. 371. b.

If tenant in tail discontinue, and his middle son release to the discontinuee with warranty, and die without issue; the warranty is collateral to his eldest brother; but if he afterwards die without issue, it is lineal to his youngest brother. Lit. s. 708.

### (H 4.) When lineal warranty shall be a bar.

By the common law, all warranties, which did not commence by *disseisin*, were bars to the heir upon whom they descended.

And therefore, if a lineal warranty descends upon the heir to a fee-simple, it will be a bar to him without assets. Lit. s. 711.

So, a lineal warranty, which descends upon the issue in tail with assets, will be a bar, notwithstanding the st. *de donis*, 13 Ed. 1. But this is by an equitable construction of the st. of Glo. 3. Co. L. 374. Vau. 365.

But by construction upon the st. *de donis*, a lineal warranty is no bar to the issue in tail, without assets by descent from the same ancestor. Co. L. 374. Vau. 365. Hut. 22.

And they ought to be of equal value with the land warranted at the time of the descent. Co. L. 374. b.

So, they ought to be assets in fee-simple, and not in tail, or *per auter vie*. Co. L. 374. b.

So, they ought to be lands, or tenements, rents, &c. issuing out of lands, and not personal inheritances. Co. L. 374. b. Vide Assets.

### (H 5.) When collateral warranty shall be a bar.

By the st. Glo. 6 Ed. 1. 3. warranty of the father tenant by curtesy, either in the life of his wife, or afterwards, with assets, shall be a bar to the heir, who claims the inheritance on the part of his mother. 2 Inst. 292.

And before this statute, warranty by tenant by the curtesy was a bar to his heir, without assets. 2 Inst. 292.

So, warranty of the father or mother, tenant for life, since the st. Glo. 3. without assets, will be a bar to the heir; for the statute only reme-

remedies in the case of a tenant by the curtesy. 2 Inst 292. R. Sal. 685.

So, warranty of the mother, tenant in dower, till the st. 11 H. 7. 10. Co. L. 381. 2 Inst. 292.

So, a donee in tail discontinuing, if his wife after his death release to the discontinnee with warranty, it will be a bar to the issue in tail. Lit. s. 713.

So, if a donee in tail, remainder to A. his sister in fee, levy a fine with warranty to the use of D. and his heirs, and die without issue, A. and B. his sisters being his heirs; A. shall be barred by this warranty for the whole, though the warranty descends to B. and her. R. 2 Cro. 217, 218.

But by the st. of Gloc. 8. warranty of the tenant by the curtesy is no bar to the heir, without assets. 2 Inst. 222. 293.

So, by the equity of this statute, the warranty of tenant in tail is no bar, unless there be assets in fee-simple descended. 2 Inst. 293. Vide ante, (H 4.)

So, if a collateral warranty be annexed to an estate for three lives, (which is good within the st. 32 H. 8. and no discontinuance, but determined by the death of the tenant in tail without issue,) the warranty does not bind after the estate determined. R. Cro. El. 602.

And there was a bill to prevent a collateral warranty's being a bar, without assets.

So now, by the st. 4 An. 16. s. 21. all warranties by tenant for life made after the 1st day of Trinity term 1706, descending on him in reversion or remainder, shall be void.

And all collateral warranties, made after that by any ancestor not in possession, shall be void as to his heir.

## (I) What warranties are no bar.

### (I 1.) Warranty, which commences by *disseisin*.

But warranty, which commences by *disseisin*, does not bar the heir upon whom it descends. Co. L. 366, 367. Lit. s. 698.

As, if the father tenant for years or at will of his son's land, make a feoffment with warranty. Lit. s. 698.

Or, if tenant by statute or *elegit*, make a feoffment. Ibid.

Or, guardian in chivalry, socage, for nurture, &c. Lit. s. 699. Co. L. 367. b.

So, if a man abate, intrude, &c. into land, and make a feoffment with warranty. Co. L. 367. a.

If a man enter before the lord by escheat, and make a feoffment with warranty. Ibid.

So, if a joint-tenant make a feoffment of the whole, with warranty, it shall be void for a moiety. Lit. s. 700.

So, if a *disseisin* be made with intent to make a feoffment, or to have a release with warranty; the warranty will be void, though it be not a *disseisin* and warranty together. Co. L. 367.

So, if he who makes the warranty be of covin with the disseisor, though the *disseisin* is not done immediately to the heir upon whom the warranty descends; as, if a lessee for life, or donee in tail, be disseised,

a release with warranty by the ancestor of the lessor, or donor, does not bind, if it was by covin with the disseisor. Co. L. 366. b.

But if one parcener enters generally, and makes a feoffment of the whole with warranty; this is not a warranty which commences by *disseisin*, and therefore binds the other parcener as to a moiety; for it was no *disseisin* to him who had no seisin, though the freehold descended to both, but the feoffment of one of them shows that his entry gave him seisin of the whole. Co. L. 374. a.

(I 2) If the warranty does not descend upon him, who claims the land.

So, if a warranty does not descend upon him, who claims the land to which the warranty was annexed, it will be no bar; as, if tenant in tail of land of the nature of borough-english discontinue with warranty, and die, leaving two sons; the youngest son shall not be barred by the warranty, though assets descend; because a warranty always descends upon the eldest son, who is heir by the common law. Lit. s. 735.

So, if it was a collateral warranty. Ibid.

So, if the warranty descends upon the heir, who at the time of the descent of the warranty is an infant, and his entry *congeable*, it is not barred by the warranty, but he may afterwards enter and avoid the estate within or after his full age. Co. L. 380. R. 1 Co. 140. a. 1 And. 311.

So, if a woman, upon whom a warranty descends, be *covert* at the time, and her entry *congeable*. Co. L. 380. b.

(I 3.) If the warranty be defeated. — By defeat of the estate to which, &c.

So, a warranty is no bar if it be defeated; as, if the estate, which a man had at the time of a warranty made to him, be defeated, the warranty is defeated. Lit. s. 741.

As, if discontinuee of tenant in tail be disseised, and afterwards he or his ancestor release to the disseisor with warranty, and afterwards the discontinuee enters; the warranty is defeated, and the issue in tail may recover. Ibid.

So, if a man by fine warrant to A. and his heirs, and the use be declared to A. for life, remainder to others in tail; the warranty is defeated by the limitation of the use to several. R. Mo. 859.

So, by limitation of a different estate to A. from that to which the warranty was granted. Ibid.

So, if tenant for life or in tail, remainder to A. in tail or fee, be disseised, and the ancestor of A. release to the disseisor with warranty, and, before his death, the tenant for life enters; the warranty is defeated. 2 Rol. 740. l. 45. 50.

(I 4.) By determination of the estate.

So, if the estate, which the party had at the time of the warranty, be determined, the warranty will be defeated; as, if the ancestor of him in reversion release to the tenant for life, or for years, with warranty, and afterwards the term determines, or the lessee dies; he in reversion may enter.

So,



## *How a man may take advantage of a warranty. [405]*

So, if A. make a lease for life, or years, and his son release to the lessee with warranty, and A. dies; after the death of the lessee, or the determination of the years, his son may enter. 2 Rol. 739. l. 40.

So, though there was a release with warranty to the lessee and his heirs; for the warranty cannot enlarge his estate. 2 Rol. 739. l. 35.

Though the release was to the grantee in fee of the lessee who had it for life, remainder to A., remainder to the lessee in fee; for the warranty extends only to the estate which he had at the time of the release. 2 Rol. 739. l. 30.

So, if the estate of him, upon whom a collateral warranty descends, determines, and another takes the estate to whom the warranty is lineal, his right revives; for the warranty does not give a right but is only a bar to the recovery, and therefore, when a warranty determines; is removed, or defeated, the right revives. Lit. s. 708. Co. L. 372. a.

And a warranty does not extinguish the right, but only binds it as long as it stands in force. R. Sal. 686.

### **(I 5.) When a warranty is not defeated.**

But if an estate be bound by a warranty, and afterwards the estate to which, &c. be defeated as to a particular estate, the warranty shall not be defeated: as, if tenant for life, remainder to A., be disseised, and an ancestor of A. releases to the disseisor with warranty and dies, and afterwards tenant for life enters or recovers; yet the remainder will be bound by the warranty. 2 Rol. 740. l. 40.

If husband and wife are tenants for life, remainder to a son in tail, and the husband makes a feoffment with warranty, and dies, and then the wife enters by the st. 32 H. 8. whereby she is remitted for life; yet the warranty will not be defeated as to the son; for his estate was bound by the warranty before the entry of the wife. 2 Rol. 741. l. 5.

If A. having nothing in the land levies a fine of it with warranty to B., who devises to C., and C. enfeoffs A. and his son, and A. releases to the son; the warranty is not destroyed. Jon. 457.

## **(K) How a man shall take advantage of a warranty.**

### **(K 1.) By *warrantia chartæ*.**

A man shall take advantage of a warranty by writ of *warrantia chartæ*, by voucher, or by rebutter. Vide Co. L. 365. a.

When a *warrantia chartæ* lies, and how the proceedings shall be, vide in Pleader, (3 N 1, &c.)

### **(K 2.) By voucher.**

So, in an action in which voucher lies, a man who has a warranty, being impleaded, may *vocate ad warrantizandum* the person bound to warranty. Vide Co. L. 365. a.

In what actions voucher lies, and the proceedings upon it, vide in Voucher, (A 1, &c.)

### **(K 3.) By rebutter.**

So, if a man who has a warranty, be impleaded by him who made the

warranty, or by him upon whom the warranty descends, he may by plea rebut, or repel him, by force of the warranty. Co. L. 365. a.

## GAVELKIND.

### (A) Gavelkind, what shall be; descent of, and customs belonging to it, &c.

Gavelkind land, that is, *gave all kind*, is so called, because this custom giveth to all the sons alike. (a) Co. L. 140. a. Vide Somner. (Vide Borough-English.)

The lands (b) in Kent generally are of the nature of gavelkind, which custom there, is like the common law elsewhere. 1 Sid. 135. 138.

By the st. 18 H. 6. it is recited, that not above 30 or 40 persons at most had any lands in Kent, which were not gavelkind, the greatest part or well nigh all that county being of that tenure.

And this custom obtains in North Wales, and other places. Lit. s. 265. Co. L. 175. b. Vide Parceners, (B).

And it was general in Wales till the time of H. 8. Pl. Com. 129. b. Dy. 363. b.

Land of the nature of gavelkind is held by the service of socage, and not of chivalry. Cro. Car. 561. 1 Sid. 138.

And therefore the st. 31 H. 8. 3. which disgavels lands in Kent, whereof 34 persons there named were seised in fee or tail, says, that those lands shall descend as lands never holden in socage, but always held by knight's service descend.

Yet gavelkind land may be held of a manor holden by knight's service.

And if the gavelkind land escheat, whereby it will be held in chivalry, yet the custom is not thereby destroyed when it shall be severed. Per Twisd. 1 Sid. 138. Semb. Cro. Car. 562.

So, if it descend to the king, though it be privileged in the hands of the king, the custom is not thereby destroyed. Per Twisd. 1 Sid. 138. Semb. Pl. Com. 234. b. 247. a.

So, if the king be seised of lands in the nature of gavelkind, and die, having several sons; the whole descends to the king his successor, and the younger sons shall have no part; for the custom is suspended in the hands of the king. Cont. per Southcot, Pl. Com. 234. b. Acc. per Moile, Pl. Com. 247. a.

If the king's ancestor die seised of lands in gavelkind, and the king has a brother, the land descends to the king and his brother. Pl. Com. 247. a.

By the st. 31 H. 8. 3. the lands of which 34, viz. the Lords Cromwell, Burgh, Cobham, Windsor, Sir Thomas Cheine, Sir Christopher Hales, Sir Thomas Willoughby, Sir Anthony St. Leger, Sir Edward Wotton, Sir Edward Boverton, Sir Roger Cholmly, Sir John Champ-

(a) The possession of one coheir in gavelkind is not the possession of the other, where he enters with an adverse intent to oust the other. 1 Blk. 675.

(b) 1. Tithes cannot be subject to the custom of gavelkind. 2 N.R. 491. — 2. Lands in Kent formerly belonging to one of the dissolved monasteries, are subject to the custom of gavelkind. 2 N.R. 491.

neys, John Baker, Reynold Scott, John Guldford, Thomas Kemp, Edward Thwaites, William Roper, Anthony Sands, Edward Isaac Percival Hart, Edward Monyns, William Whetnall, John Fogg, Edmund Fettiplace, Thomas Hardres, William Waller, Thomas Willford, Thomas Moile, Thomas Herlakenden, Geoffrey Lee, James Hales, Henry Hussey, and Thomas Royden, were seised in fee or in tail, shall be disgavelled.

Land of the nature of gavelkind descends to all the sons equally. Co. L. 140. a.

And if there be no issue male, to all the daughters. Som. 7.

And if there be no issue, to all the brothers. Semb. Co. L. 140. a. Som. 7.

If one son die in the life of his father, having issue a daughter, it shall descend to the other son and the daughter. 1 Sal. 243. Som. 7.

So, if a brother die having issue, the descent shall be to all the brothers and the nephew. Som. 7.

So, if a rent be issuing out of land of the nature of gavelkind, that shall descend to all the sons; for it follows the nature of the land. R. 2 Lev. 87. 1 Mod. 97. 1 Ver. 487.

But if land of the nature of gavelkind be granted with warranty or upon condition, the warranty or condition descends to the heir by the common law, 1 Mod. 96. Lit. s. 736. Co. L. 376.

So, by the custom of gavelkind, the descent shall not be to all the sons and daughters; for females do not take with males. St. Prær. Reg. 17 Ed. 2. 16.

[The adverse possession of one tenant in gavelkind does not operate as the possession of both. 1 Bl. 678.]

So, other customs are incident to lands of the nature of gavelkind; as, that the owner may devise them. Cro. Car. 562.

[If a man devises gavelkind lands to trustees, and directs them to convey them to the use of his daughter for life, for her sole use, and after her death in trust for the heirs of her body for ever, the lands shall go according to the rules of common law, and not according to the custom of gavelkind, this being an executory devise. Roberts v. Dixwell, M. 1738, 1 Atk. 607.]

So, he may alien them at his age of 15 years. Bend. pl. 52.

Though he has only the reversion. Ibid.

Though they are of his own purchase. Ibid.

So, upon his sale he may make a feoffment, and it will be good. Ibid.

But a feoffment, or alienation within age, unless it be for a sale, is not allowed by the custom. Ibid.

Nor, a feoffment, where he has only the reversion. Ibid.

Or, where he himself purchased the same lands within age. Ibid.

Or, a feoffment by him, who has only an estate-tail. R. 2 Cro. 80.

So, by the custom of Kent, the husband shall be tenant by the curtesy, though he has no issue. Co. L. 30. a. 111. a.

The wife shall be endowed of a moiety, *quamdiu vidua et casta vixerit*. F.N.B. 150. O. R. 1 Leo. 133. Cro. El. 121. Cro. Car. 562. 1 Sid. 77. Vide st. Prær. Reg. 17 E. 2. 16. 1 Rol. 558. B. Co. L. 83. b. 111. a.

And she cannot waive her dower by the custom, and take it according

ing to the common law. R. 1 Leo. 62. D. Cro. El. 121. R. Cro. El. 825. R. Mo. 260. Co. L. 33. b.

And if the plaintiff demands dower at the common law, it is a bar to say, that the land is gavelkind, whereof the plaintiff ought to be endowed of a moiety *dum sola*. R. 1 Leo. 133.

So, gavelkind land is not forfeited by an attainder of felony; for, the rule is, 'the father to the bough, the son to the plough.' Dy. 310. b. St. Præ. Reg. 17 Ed. 2. 16.

Yet the custom does not prevail, if the father be outlawed or abjured; for it shall be taken strictly. Dy. 310. b. in marg.

But these customs are collateral, and therefore not lost if the land is disgavelled. Semb. 1 Sid. 77. Cro. Car. 562. R. 1 Sid. 137. Ray. 76. 1 Lev. 79. Hard. 325.

If land be of the nature of gavelkind, it is sufficient only to mention in pleading, that it is gavelkind, without a prescription for it. Co. L. 175. b. Cro. Car. 562. 1 Sid. 77. 138.

But it ought to be mentioned in pleading, that it is gavelkind; otherwise it shall not be intended, though the land lies in Kent. Co. L. 175. b. R. Lut. 754.

So, in a special verdict. Lut. 754.

So, in collateral customs, which belong to gavelkind land, in pleading, a prescription must be made for them: as, to devise to have a moiety *dum casta*, &c. for dower, &c. Semb. Cro. Car. 562. 1 Sid. 77. Ray. 76. R. 1 Sid. 148. 1 Lev. 80.

So, land of the nature of gavelkind has fealty incident; and therefore, every tenant in gavelkind shall do fealty to his lord. Wright's Introd. to the Law of Tenures, 210.

And must do suit of court. Wri. Int. 210.

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## GENTLEMAN.

Vide DIGNITY, (B 9.)

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## GLEBE.

Vide DISMES, (B 2.)

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## GOLD AND SILVER MINES.

Vide GRANT, (G 7.) — WAIFE, (H 1.)

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## GOODS AND CHATTELS.

Vide ADMIRALTY, (E 9.) — BEINS, *per totum*. — CHANCERY, (4 W 5.)  
TRESPASS, (A 1. — B 4.)

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## GRAND CAPE.

Vide PROCESS, (D 4.)

GRAND

## GRAND SERJEANTY.

Vide HOMAGE, (F.)

### GRANT.

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- (A 2.) By what name. p. [410.]
- (A 3.) When the grant shall be void. p. [411.]
- (B 1.) Who may be a grantee. p. [411.]
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- (C) What things may be granted : — A present estate or interest in lands, franchises, &c. p. [411.]
- (D) What cannot be granted : — A chose en action, right, possibility, &c. p. [412.]
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[It is not necessary that the word 'grant' should be used in a grant, it being sufficient if the intention to grant be manifested by a deed; therefore the words, 'limit and appoint,' in a deed, may operate as words of grant, so as to pass a reversion. *Shove v. Pincke*, B. R. H. 33 Geo. 3. 5 T. R. 124.]

As to the premises in a grant, vide in Fait, (E. 3, 4.)

As to the *habendum*, vide in Fait, (E 9, 10.)

As to an exception, or indorsement, vide in Fait, (E 2, 5, &c.)

As to the exposition of the covenants, or words of a grant, vide in Covenant, (D 1, 2.)—Devise, (N 1, &c.)—Parols, (A 18, &c.)

### (A 1.) Who may be a grantor.

To every grant there must be, a grantor, grantee, and thing to be granted. Dy. 49. a. Perk. 1.

A grantor is the king, or a subject; a person natural or politic.

Every common person being *sui juris*, *indigena*, of sane memory, of full age, has capacity to make a grant. Vide Capacity, (C—D 1, &c.)

If an act of parliament enable the city of London to dispose of an office, it may make a grant of it. Hard. 48.

So, the king, as well a common person, may make a grant. Vide post. (G 1, &c.)

But a person professed in religion, attainted, or covert-baron, alien, *non compos*, or infant, cannot make a grant, except in special cases. Vide Capacity, (D 1, &c.)

### (A 2.) By what name.

The grantor and grantee, regularly, ought to be named by the christian and surname. Vide Capacity, (B 4, 5.)—Devise, (I—K)—Fait, (E 3.)

Or, by the name of confirmation.

But it is enough, if there be a sufficient description of the grantor or grantee, whereby he may be known; as, by his name of dignity, or office. Vide Capacity, (B 4, 5.)

Though

Though his addition be omitted, or mistaken. Vide *Fait*, (E 3.)

Though the addition be not true.

Yet the person described ought then to be *in rerum natura*. Vide post, (B 1.)—Capacity, (B 4, 5.)

And a mistake of the christian name shall not be supplied. Vide *Fait*, (E 3.)

(A 3.) When the grant shall be void.

A grant by a person professed in religion, who is *civiliter mortuus*, will be void.

So, a grant or contract by a *feme-covert*, without the assent of her husband. Vide *Baron and Feme*, (Q).

So, a grant, or contract by an infant, which does not take effect by the delivery from his hand. Vide *Enfant*, (C 2.)

Vide post, (E 14.)

(B 1.) Who may be a grantee.

So, every person *in esse* at the time, and not professed in religion, may take by grant. Vide Capacity, (A 1, 2.—B 1, &c.)

Though it be a *feme covert*, or infant. Vide *Baron and Feme*, (P 2.)—*Enfant*, (B 1.)

Though he be an alien, person attainted for treason or felony, or clerk convict. *Perk. Grant*, 48. Vide *Alien*, (C 2.)

Though he be villein to the king, or a common person. *Perk. Grant*, 48.

A person outlawed, or in prison. *Ibid*.

Bastard, excommunicated, or *non compos*. *Perk. Grant*. 48. 51.

But a person not *in esse* at the time of the grant cannot be a grantee; as, if a grant be to the right heirs of B. who is then alive. *Perk. Grant*, 52.

Yet a grant to a person uncertain may be good, if it be ascertained in the life of the grantor; as, a grant to him who shall come first to St. Paul's the next day, if the grantor does not die before any one comes there; for if any one capable come there, he shall take. *Perk. Grant*, 56.

(B 2.) When a grantee is not necessary.

But the king may make a grant by way of ordinance, without naming any grantee: as, he may appoint, that such and such men be incorporated. 2 *Rol.* 197. l. 30. 50.

So, the king may grant a fair, market, forest, warren, chase, &c. to be erected, without granting it to any one. 2 *Rol.* 197. l. 47.

(C) What things may be granted:—A present estate, or interest in lands, franchises, &c.

Every one, who has a present estate, or interest in lands and tenements may grant it. Vide *Assignment*, (A).

Though it cannot take effect in possession till a future time. Vide *Assignment*, (A).

So, every one may grant things incorporeal, and not manurable, which properly lie in grant: as, a rent, common advowson, &c.

Though

Though it be only a franchise, or privilege: as, the grantee of a fair, or market, may grant it to another. 2 Rol. 46. l. 15.

So, the grantee of common of pasture. 2 Rol. 45. l. 46.

So, the grantee of common *sans nombre* in fee. 2 Rol. 46. l. 1. 3. 2 Rol. 73.

The grantee of a warrant in fee. 2 Rol. 46. l. 12.

Though the interest be accompanied with a trust: as, guardian in chivalry, or socage, may grant his guardianship. 2 Rol. 46. H.

So, the grantee of a corody certain. 2 Rol. 45. l. 49.

The grantee of the next avoidance. 2 Rol. 45. l. 35.

So, the grantee of an annuity, *pro consilio impenso et impendendo*, made to him and his assigns, may grant it to another. R. 7 Co. 28. b.

So, if the estate or interest in the thing granted be certain, the grant will be good, though the thing itself is contingent and uncertain: as, if the lessor grant to the lessee all the emblements, which he shall have at the end of his term, it will be good; for he has an interest in all that will be, though it be uncertain whether any will be. R. 2 Rol. 48. l. 5. Hob. 132.

Or, all fruits which grow annually upon such land. 2 Rol. 48. l. 10. Hob. 132.

So, if a parson grant all the tithes of wool which shall arise in such a year, though perhaps none will arise. 2 Rol. 48. l. 20. Hob. 132.

So, a grant, that if a tenant die, his heir within age, he shall not be in ward. 3 Leo. 154.

That there shall be a discharge for his house, when the clergy grant tithes to the king. 3 Leo. 154.

Or, that he shall not be collector. Ibid.

### (D) What cannot be granted:—A chose en action, right, possibility, &c.

But a grant of a *chose en action*, bare right, or possibility, will be void. Vide Assignment, (C 1, 2, 3.)

So, a personal privilege cannot be granted over to another: as, if a man lend his horse to another to ride to Y., he cannot lend him to another. 2 Rol. 46. l. 7.

If a way be granted to A. for his life, he cannot grant it to another. 2 Rol. 46. l. 10.

So, a thing uncertain cannot be granted: as, if A. has a corody uncertain, he cannot grant it to another. 2 Rol. 45. l. 48. 50.

If he has a common *sans nombre* for life or years. 2 Rol. 46. l. 3. 2 Rol. 73.

Or, *estovers* uncertain. 2 Rol. 46. l. 5.

If A. holds three acres by fealty and rent, and the lord grant the services of one of the acres, it is void. Perk. Grant, 67.

Or, three joint-tenants hold, &c. and the lord grant the services of one of them. Perk. Grant, 68.

So, a man cannot grant a thing which he has not, though he afterwards possess it: as, if he grant a rent out of land, and afterwards purchase the same land, the grant is void. Perk. Grant, 65.

So, a grant of the wool of all the sheep that he ever shall have, is void. 2 Rol. 48. l. 22. Hob. 132.

If there be a lessee of sheep for two years, the lessor cannot grant them during the term. 1 Leo. 43.

So, if the lessee covenant to leave so many sheep at the end of his term, the lessor cannot grant them before the term ends; for there is no property in him. R. 1 Leo. 42.

But a grant by fine executory will be good, if he afterwards purchase, though he had it not at the time of the grant: as, if he grant a reversion by fine, and afterwards purchase it, the grantee after the death of the tenant for life may execute it by *scire facias*. Perk. Grant, 66.

## (E) By what names things shall pass in grants.

### (E 1.) What passes by a grant of an hereditament.

Hereditament is a very extensive word, whereby every thing passes which may be inherited, corporeal, or incorporeal, real, personal, or mixt. Co. L. 6. a. Vide Fait, (E 4.) — Devise, (N 2, 3.)

As, a rent, common, piscary, &c. in gross. 2 Rol. 186. l. 5.

An advowson, rectory, parsonage, &c. R. Dy. 351. a.

### (E 2.) Tenement.

Tenement is an extensive word, whereby all lands and inheritances, which may be held, pass. Co. L. 6. a. 1 Leo. 188.

[The office of marshal of B. R. is a tenement, and he is qualified by it to act as commissioner of land-tax. *Sone v. Ashton*, H. 2 G. 3. 3 B. M. 1287.]

And also offices, commons, rents, profits *à prendre* out of land, and every thing whereof a man may be seised *ut de libero tenemento*. Co. L. 6. a.

And therefore, by a grant of all his lands and tenements, a reversion passes. 2 Rol. 57. l. 10.

So, a common, though it be in gross. Dub. 2 Rol. 57. l. 5. 7.

A rent-charge. R. 2 Rol. 57. l. 15.

But a common, way, &c. not appendant or appurtenant to tenements, do not pass. Semb. 2 Rol. 57. l. 7. 12.

### (E 3.) Land.

*Terra est nomen generalissimum*, and comprehends all species of land, as meadow, pasture, wood, moor, water, marsh, furze, and heath, &c. Co. L. 4. a. R. 1 Rol. 19.

And it includes castles, houses, and other buildings erected upon the land. Co. L. 4. a. 2 Rol. 265.

And therefore, if a man grant all his lands in D. his houses there pass. 2 Rol. 57. l. 17.

So, if he has an house in A., and houses and lands in B., and devises his house in A. to one, and (having demised the houses and lands to D. rendering rent) all those his lands, meadow, and pasture in B. to another, his houses there pass by the word lands, though he mentions his house in A. expressly. R. 2 Rol. 57. l. 20.

If

If a man let his land, open mines in it pass. 2 Lev. 185.

If he let the mines in his land, and there are any open mines, they pass, but not mines which are not open. R. 2 Lev. 185.

If he let the land with all the mines in it, and none are open, he may open new mines. 2 Lev. 185.

So, if a man grant his lands, all profits within the bowels of the land pass :

As, mines of tin, lead, iron, coal, &c. Co. L. 4. a. 14 H. 8. 1.

So, all profits upon the land; for *cujus est solum, ejus est usque ad coelum*. Co. L. 4. a.

And therefore, water upon the land, and fish and a piscary in it pass. Co. L. 4. a.

So, if a man demise the herbage of his woods, though the soil does not pass thereby, yet if he afterwards grant all his land in the tenure or occupation of the lessee, the wood passes. Co. L. 4. b.

#### (E 4.) By the grant of a seignior, or general words.

As to the grant of a seignior. Vide Seignior.

By the grant of an honour, divers manors, lands, &c. may pass. Co. L. 5. a. Vide Honour.

So, by the grant of an isle. Co. L. 5. a.

Or, a town. Co. L. 5. a.

Or, a castle. Co. L. 5. a.

Or, a knight's fee. Co. L. 5. a. 2 Rol. 1. l. 32.

By the grant of a manor, a castle, lands, liberties, &c. may pass. Co. L. 5. a. Vide Copyhold, (Q 1, &c.)

So, a reputed manor. R. 2 Rol. 45. E. Sav. 113.

So, by the grant of a farm, houses, lands, and tenements may pass. Co. L. 5. a.

So, by a grant *de virgata, carucata, bovata terræ*, &c. Co. L. 5. a.

By the grant of a grange, not only the house for storing of corn, &c. but barns, stables, sties, &c. necessary for beasts, husbandry, &c. and the curtilage, and close where they are situated, pass. Co. L. 5. a.

#### (E 5.) By what words the soil passes.

So, if a man grant *prata sua*, the land itself passes. Co. L. 4. b.

Or, *pasturas suas*. Co. L. 4. b.

Or, *brueras suas*, the soil, where heath grows, passes. Co. L. 4. b.

So, by a grant of *joncarias suas*, the soil where rushes grow. Co. L. 5. a.

By a grant of *ruscarias suas*, the soil where broom grows. Co. L. 5. a.

By the grant of a marsh, *mora, jampna*, &c. the soil of that nature passes. Co. L. 5. a.

By the grant of a manor for three crops and all profits, the manor passes. 2 Rol. 57. l. 40.

By the grant of a park the soil passes: for he cannot have it in *alieno solo*. 2 Rol. 60. l. 3.

So, if a man grant *omnes boscos suos*, the land as well as the wood passes. Co. L. 4. b.

Though



Though he says, *omnes boscos crescentes*. Co. L. 4. b. R. 5 Co. 11. a. Cro. El. 522. 2 Rol. 455. l. 15.

Wood, underwood, coppices, and hedge-rows. R. 2 Cro. 487. 2 Rol. 455. l. 20.

So, by the grant of a forest, chase, vivary, or warren in his own land, the soil, as well as the privilege there, passes. Co. L. 5. b. Vide Chase.

So, if he grant the profits of his land, the land itself passes. Co. L. 4. b.

So, if he grant a boillery of salt, the land passes; for that is the whole profit. Co. L. 4. b.

Or, a mine of lead, &c. Co. L. 6. a. Vide Waife.

If he grant *firmam* of his tenants at will *manerii sui de B.*, the lands of the tenants pass. Per Clerks in Duchy, Welsh cont. 3 Leo. 12.

By a grant of the herbage or vesture of his land, the soil does not pass; for though he may have trespass *quare clausum fregit*, yet he shall have only the corn, grass, &c. and not houses, trees, mines, &c. which are fixt to the soil. Co. L. 4. b. Dal. 47.

So, by the grant of a liberty to dig turf, the soil does not pass. Co. L. 4. b.

By the grant of a piscary, the soil, or water, does not pass. Co. L. 4. b.

By a grant of water, the soil does not pass. Co. L. 4. b.

Nor, if a man grant *pascua sua*; for the pasturage only passes. Semb. Co. L. 4. b.

If he grant *viginti acras saliceti, fraxineti, lupuliceti*, &c. the wood growing only passes. Semb. Co. L. 4. b.

If a man let his warren, the soil does not pass. 2 Rol. 59. l. 55. 60. l. 7.

So, a grant of all saleable woods growing, does not pass the soil. R. 2 Cro. 524.

Or, all the great wood, viz. oaks, ashes, &c. for the viz. explains what wood is intended. 2 Rol. 455. l. 10.

Or, all timber-trees; for nothing passes except the trees, and so much of the soil as is requisite for their growing. 2 Cro. 487. 2 Rol. 455. l. 20.

#### (E 6.) What passes by the grant of a messuage.

So, by the grant of a messuage, or house, (a) the garden, orchard, and curtilage pass. Co. L. 5. b. R. Cro. El. 89.

And an acre of land or more may pass by the name of an house. Co. L. 5. b.

So, by the name of a messuage, a church is comprised. Semb. 1 Sal. 256.

By the grant of a messuage *prout includitur aquis*, the soil of the moats pass. 2 Rol. 50. l. 25.

But, by the devise of an house, (and not called messuage,) without saying, *cum pertinentiis*, the garden and curtilage do not pass. 2 Ca. Ch. 27. Vide Cro. El. 89.

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(a) There seems now to be no distinction between the words "house" and "messuage" in grants. 2 T. R. 498.

## (E 7.) By the grant of a curtilage.

So, by the grant of a curtilage, the house passes. 2 Rol. 1. l. 30.

## (E 8.) By a grant of pannage.

So, by the grant of pannage, the mast of the tree passes, not the trees themselves. Per two J. Dal. 47.

(E 9.) By a grant *cum pertinentiis*.

So, by the grant of a messuage *cum pertinentiis*, the orchard, garden, yards, and curtilage pass. 2 Cro. 526.

So, every thing appendant or appurtenant, as common, turbary, estovers, &c. passes by a grant of the land to which, &c. *cum pertinentiis*. R. 3 Lev. 165.

So, by the grant of a messuage *cum terris pertinentiis*, land occupied continually with the house passes, though land is not properly appurtenant to an house. R. Pl. Com. 170.

So, by the demise of an house *cum pertinentiis*, a shop annexed to it for thirty years, and reputed parcel, passes. Semb. Cro. Car. 17.

Though it be a demise, or grant of the king. R. Cro. Car. 169.

So, by a devise of land in N. with all lands belonging, two acres four miles distant, continually enjoyed with it, pass. Adm. Cro. Car. 57. Vide infra.

By the devise of a tenement *cum pertinentiis* in which N. inhabited in A., lands always used with it pass, though out of A. R. Cro. El. 113.

So, by the devise of an house *cum pertinentiis*, the land passes, when the instruction was, to devise all the lands as well as the house. R. Cro. El. 114.

So, if the land was used with it. R. Cro. El. 704.

By the grant of a manor *cum pertinentiis*, every thing reputed parcel of the manor passes. R. 6 Co. 39. R. 1 Sid. 190.

By the grant of a messuage *cum pertinentiis*, a conduit with water pipes to it, enjoyed any time, passes. R. 2 Cro. 121. Mo. 682.

Though erected by a lessee, and the lessor occupies them together. R. 2 Cro. 122.

So, if he grants the land, (excepting the house,) the conduits are excepted. 2 Cro. 121.

By the grant of a chapel *cum pertinentiis*, tithes appendant pass. 2 Rol. 151.

But by the grant of an house, or land, *cum pertinentiis*, another house, or land, does not pass, unless it be found to be parcel. R. 1 Lev. 131.

As, by the grant of a mill *cum pertinentiis*, the close where the mill is, or the kiln there does not pass, without more. R. 1 Sid. 211. 1 Lev. 131.

So, by the grant of a messuage *cum pertinentiis*, a shop annexed to it for thirty years does not pass, unless it be found to be parcel. R. Cro. Car. 17.

By a devise of land in N. *cum pertinentiis*, two acres four miles distant enjoyed with it, do not pass. R. Cro. Car. 57. Hutt. 35. Vide supra.

Nor, by a devise of a copyhold messuage *cum pertinentiis*, can freehold land pass with it, though used with it. R. Cro. El. 704.

So, by the surrender of a copyhold message *cum pertinentiis*, copyhold lands appurtenant do not pass. R. 2 Cro. 526.

So, by the grant of an house *cum pertinentiis*, a conduit erected by a lessee, disseisor, &c. and never enjoyed with the house by the lessor, disseisee, &c. does not pass. 2 Cro. 122.

So, by the grant of a manor *cum pertinentiis*, a forest, parcel of the manor, does not pass. (a)

(a) 1. It is a general rule, that a grant of the soil will pass every thing under it. 2 T.R. 705.—2. Excepting where a set form of words is prescribed, (thus, “heirs,” to create a fee, and “heirs of the body,” to create an estate tail,) the apparent intention is, the governing principle in the exposition as well of deeds and conveyances as of wills, and to give it effect, the court will ascribe a meaning to words contrary to that commonly accepted, but in which the party must have used them; thus they will construe the word “or,” “and.” 3 T.R. 470.—3. Where, in a grant, the premises are described by abutments, the abutments are not to be construed literally, unless, by such construction, the occupation of the premises is rendered more beneficial; and whence an intention that they should be so construed may be inferred. 1 Taunt. 495.—4. A remote reversion in fee held to pass under general words, in an act of parliament, by way of settlement in execution of articles, though the reversion was not particularly in contemplation at that time, the intention being, and the words being sufficient, to pass it. Cowp. 360.—5. A. by deed, in consideration of love and affection of his name, blood, &c. and for settling the one undivided moieties of his manors, lands, &c. thereafter mentioned, grants the said undivided moieties, particularly describing them, together with all other his lands, tenements and hereditaments, in the kingdom of Ireland, *Habendum*, the said undivided moieties before granted, together with all other his estate in the kingdom of Ireland, to B. to the several uses thereafter declared, and for no other use whatsoever; and then declares the uses of the undivided moieties only. Held, that he did not mean to pass any lands but the undivided moieties; and even supposing that the sweeping clause did extend to any other lands, yet as no use was declared of them, they descended to the heir at law. Cowp. 9.—6. By a lease of “the fishery of a pond, with the spear’s edge, flags, and rushes, growing in and about the same,” the soil must be taken to pass. 1 T.R. 358.—7. Under the grant of a liberty of passage and to lay waggon-ways, an easement only, and not the ownership in the soil or its profits, passes. 2 T.R. 90.—8. The fee simple of a mineral passes by a grant from the land-holder of liberty to take it. 1 Taunt. 402.—9. Grant to one, his heirs and assigns, in consideration of a sum of money, of a liberty for him, his heirs and assigns, to carry up a sough (or a drain for colliery) from the bottom of a piece of land of the grantor, to an adjoining piece of land of the grantee; and also liberty for him, his heirs and assigns, to make two little sough pits in the said land of the grantor, in a certain place there, for the more easy and safe carrying up the tail of the sough, one of them to be covered from the top of the intended sough to the surface of the ground, as soon as conveniently may be done after the making thereof, and the other to be kept open for examining the sough, as long as is necessary for that purpose and no longer. The grant of the sough is a continuing grant, and the right of opening the sough pit occasionally, for the necessary repair of the sough, is incident thereto by virtue of the grant. 3 Smith, 538. 7 East, 613.—10. The grant of a close “with the appurtenances,” will not pass an occupation-way, which the grantor had been in the habit of using over his other lands. 1 B. & P. 371.—11. A grantee of a fee-farm, rent, without any deduction, defalcation, or abatement, for or in any respect whatsoever, is entitled to the full rent, without deducting the land-tax. Dougl. 624.—12. Where there were two persons of the name of A. in a grant, one of whom had throughout been described as the son of B., a limitation to the heirs of the said A. was construed to be to the one without addition, though in grammatical construction the word “said” referred to the other, especially as the probable intention, as collected from other parts of the deed accorded. 9 East, 405.

## (E 10). What passes as parcel, &amp;c.

In the grant of a common person of all lands, &c. *antehac cognit.*, *accept.*, or reputed as parcel, &c. land, wood, &c. which was parcel *quocunque tempore præterito*, will be included. Dy. 362. 2 Rol. 186. l. 20. Co. Ent. 2. Mod. 69.

If they were enjoyed together for a convenient time. Mo. 190.

If they were purchased and used together and reputed parcel only for two years; for a small time is sufficient to make a reputation. R. Cro. Car. 808.

So, in a grant of the king, if they were used and demised together for a convenient time. R. Cro. Car. 169.

If by rentals, records, &c. it be reputed parcel, though in truth it be not. R. Sav. 26.

So, if there be a fine or recovery of a manor *cum pertinentiis*, lands reputed parcel for eighty years pass. R. 1 Lev. 27.

But a grant of the king with all lands, woods, &c. *antehac parcell.* extends only to things parcel in a convenient time, as within seventeen or twenty years, according to the nature of the thing. Semb. Co. Ent. 384.

So, if a manor be granted, and all woods, parcel, &c. and the manor does not pass for default for livery, &c. the wood does not pass. Sav. 63.

So, if one convey a rectory and all tithes, &c. to the rectory belonging, if the rectory does not pass for defect of livery, &c. the tithes, though they lie in grant, do not pass. Sav. 63.

## (E 11.) What, as incident.

So, by a grant of any thing, another thing which is incident passes : as, if the lord grant the homage of his tenant, who holds by homage and fealty, the fealty passes as incident. Perk. Grant, 112.

Or, if he holds by fealty and rent, and the lord grant the rent. Perk. Grant, 113. Co. L. 151. a.

So, if he holds as of the honour of his castle by castle-guard ; if the lord grant the castle, the service passes as incident. 2 Rol. 59. l. 25.

So, if a man grant the reversion, the rent passes as incident. Perk. Grant, 113.

If there be a grant of land *cum pertinentiis*, a common, &c. passes as incident. 1 H. 4. 5. a.

Though it be in the king's grant. 1 H. 4. 5. a.

So, by the grant of a parsonage, the patronage of the vicarage passes as incident. 2 Rol. 50. l. 32.

So, a corody, as incident to a patronage. 2 Rol. 59. l. 52. 1 H. 4. 5. a.

So, a thing appendant or appurtenant passes by a grant of the thing to which, &c. as incident, without saying *cum pertinentiis*. Co. L. 307. a. Cont. Cro. El. 18.

So, if a rent be granted with a *nomine pænæ*, by a devise of the rent, the *nomine pænæ* passes. Per two J. Cro. El. 895.

So, by the grant of an house, the curtilage passes. R. Cro. El. 89, Vide ante, (E. 6.)

So, by the grant of any thing, *conceditur et id sine quo res ipsa haberi non*

*non debet* : as, if one grant his trees, the grantee may enter upon his land, for the cutting down and carrying them away. Pl. Com. 16. a.

But if the incident be separable, it does not pass by a grant of the thing to which it is incident, if it be excepted ; as, if the lord grant a rent, except or saving the fealty, the fealty does not pass. Co. L. 154. a. Perk. Grant, 113.

So, if a man grant a reversion saving the rent. Perk. Grant, 113.

So, by the grant of any thing, a liberty which was convenient shall not be granted as incident, unless it be of necessity ; as, if A. grant his fish in such a water, the grantee cannot dig a trench for letting out the water ; for he may take them by a net. Pl. Com. 16. a.

So, if he grant his land and all his trees, mines open and not open, in it ; though he may open mines, he cannot cut down trees for the working and use of the mines. R. Hob. 234.

Though the mines were open, and the lessor used the trees for them. Hob. 234.

(E 12.) The extent of a grant.

[Ancient grants must be expounded according to what the law was at the time of making them. Co. Lit. 8. b. Ambler, 288.]

A grant shall be extended to every thing comprised within the words, though they are not regularly described in the deed ; as, if A. grant his manor of D. *in com.* N., and all his land in England, parcel of the same manor ; all lands parcel of the manor pass, though they do not lie in the county of N. R. 1 Rol. 407.

If one demise a garden-plot to A. and afterwards to B., who builds an house upon part, and afterwards the lessor grants *totam illam peciam fundi sive* garden-plot *nuper in tenurá A. et nunc in tenurá B.*, the reversion of the house as well as the garden passes. R. 2 Rol. 261. 265. 267.

But if a man bargain all his wood and underwood upon such land being, to have for the life of B., rendring 10*l. per ann.* if the grantee cut down the whole wood at once, he shall not cut it down afterwards, though it be granted for the life of B. under an annual rent. R. 3 Leo. 7. Mo. 15.

(E 13.) When confined to the tenure, &c. of such an one.

If a man grant a tenement *vocat.* D. *in tenura sive occupatione* B., all lands of that name, though part of them are demised to him, and part enjoyed by him without lease, pass ; for both are in his occupation. R. 1 Rol. 19.

Though part be wood inclosed adjoining to the land demised, but, by reason of fences being thrown down, the beasts of B. have the herbage of the wood ; for if he has the occupation by right or by wrong, it is sufficient. R. 1 Rol. 19, 20.

If a man grant land by name, in the tenure of A. and lately demised to B., in the parish of D., land so named in the tenure of A. passes, though never demised to B., nor in the parish of D. Semb. 3 Leo. 162.

If he grant all tithes, which belong to the rectory of B., all which were in the tenure of D., tithes belonging to the rectory pass, though



never in the tenure of D., for there was a plain and certain description of them before. R. Jon. 437.

But by a grant of the manor of B. and all lands *in tenurâ* A. lately demised to C., in the parish of D., land *in tenurâ* A., if never demised to C. nor in the parish of D., does not pass. R. 3 Leo. 162. 1 And. 148.

If a man declare the uses of a fine or recovery of lands in E. and F., as to all that farm and the lands belonging called *Vines* in E., and twenty-one acres of the same farm lie in F., those do not pass: for without the last words, which are restrictive, the sense is not complete. Per Atkyns, Hard. 225.

(E 14.) When a grant shall be void: — If it be uncertain.

A grant shall be void, if it be totally uncertain; as, if a man grant as many trees as can be spared in his manor. Bridg. 12. Vide ante, (A 3.)

If he grant 10*l.* *per ann.* parcel of his manor, without other certainty. Bridg. 12.

(F) A grantor cannot defeat his own grant.

A grantor cannot defeat his own grant: and therefore, if a man grant twenty of his best trees to be taken in ten years, the grantor cannot cut down trees without the consent of the grantee. R. 2 Lev. 142.

(G) Grant by the king. (b)

(G 1.) What things he may grant.

How a grant by the king shall be made, by writ or patent, and under what seal, vide in Patent, (A—B—C 1, &c.)

The king, as well as a common person, may make a grant of all lands, and tenements, or other inheritances, which are vested in him at the time of the grant. 2 Rol. 198. l. 15.

As, he may grant lands, which come to him by descent, or escheat before office found; for the freehold is cast upon him by law. Vide in Prærogative, (D 66, &c.)

So, lands, which come in remainder, or reversion, after a particular estate determined.

Or, if the particular estate be determined by a condition broken, though the breach does not appear upon record. 2 Rol. 184. l. 10. 15. Vide Prærogative, (D 70.)

So, if an office be forfeited for being in arrear in an account, or other neglect of a thing required by the patent upon pain of forfeiture, where it appears by the record, that the party is in arrear, &c. the king may grant the office to another, without a *scire facias* against the patentee, or office, or other matter of record, which finds the forfeiture. Dy. 211. 2 Rol. 184. l. 25.

So, if lands forfeited for treason are vested in the king by the st. 33 H. 8. or any particular statute, the king may grant them before office found, notwithstanding the st. 18 H. 6. 6. 2 Rol. 184. l. 40.

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(b) Vide Estate.

So,

So, the king may grant a condition, right, possibility, or *chosc en action*. Vide in Assignment, (D.)

A ward, &c. *cum acciderit*. 2 Rol. 198. l. 28.

All wards, marriages &c. to such a value until such a time. 2 Rol. 298. l. 21.

So a power of assenting to an election of a bishop, abbot, &c. 2 Rol. 187. l. 22. 25.

What jurisdictions, franchises, exemptions, offices, impositions, &c. the king may grant. Vide in Prærogative, (D 28, &c.)

(G 2.) What not.

But the king cannot grant a thing intrusted to him in respect of his sovereignty; as, the lapse of a church, before or after it becomes void. 2 Rol. 187. l. 32. 35, Vide Esglise, (H 11.)

Nor, purveyance, butlerage, prisage, &c. 2 Rol. 187. l. 35. Vide Prærogative, (D. 41, 42. 45.)

Nor, the power to make a dispensation of a statute. 7 Co. 36. b.

So, he cannot grant the lands or goods of a recusant convict, before the commission returned. 2 Rol. 184. l. 20.

Nor, the lands or goods of one attainted of treason, before his attainder. Per six J. five cont. Dy. 108. a.

Though the treason was committed at the time of the grant, and the forfeiture has relation to the offence. Qu. Dy. 108.

So, the king cannot grant the prosecution, or execution of any penal statute to another; for it is intrusted with him as the head of the weal-public. R. 7 Co. 37. a.

Nor, the penalty, or benefit of a penal statute, before it be recovered. 7 Co. 36. b. 37. a.

Nor, any fine or forfeiture of a particular person, before he be convicted. Declared by the st. 1 W. & M. 2. that such grant or promise is illegal and void.

[If the king's grant by letter's patent be void, as being contrary to law, yet if the letters patent are confirmed by act of parliament, it makes all good. *Sherlock v. Norwich*, H. 5 G. Fort. 222. Str. 159.]

(G 3.) When it binds his successor.

If the king grant lands or tenements, of which he has the fee, the grant binds his successor.

So, if he grant a wine-licence; for he has an inheritance in it, and the interest passes, and not the authority. R. 1 Sid. 6.

So, in all cases, where the king grants an interest. Adm. Hard. 443.

As, if he grant to an alien, for him and his successors, to be free from alien customs. Hard. 444.

To his tenant, that his heir shall not be in ward; for he has an inheritance in the seignior. Hard. 444.

Or, that he may alien in mortmain. Ibid.

So, if the king grant to a college to be discharged of toll, without saying, for him and his successors; it shall be discharged in the time of the successor, as well as where an interest passes. R. Yel. 15.

But a grant by the king during his will determines by his death. Mo. 176.

So, a grant of a mere licence, or authority. Hard. 443.

(G 4.) What grant shall be good : — In respect of the estate of the king, or the mentioning of it.

Every grant of the king, of a thing which he may grant, where he is apprised of his interest, and of the cause and circumstances of the grant, will be good.

Though every thing is not performed which seemed designed, if the words of the consideration are answered ; for no inference shall be made beyond the words ; as, if the king grant, in consideration of the surrender of a patent by A. and his wife, where the wife cannot surrender ; for mention is made only of the surrender of the patent, and not the estate. R. 1 Co. 43. a.

Or, in consideration of the surrender of a former patent to be cancelled ; if it be delivered into chancery, though it be not cancelled. R. 10 Co. 67. b. 2 Rol. 199. l. 35.

In consideration, that the lessee for years, being then in possession, surrender, the king grants a new lease, it is sufficient : for the acceptance of the new lease is a surrender, and the king takes notice that he was then possessed. 10 Co. 67. 2 Rol. 199. l. 40.

Though the king does not recite his own estate ; for he need not do so. 1 Co. 45. b. 51. a. Mo. 318. 320.

So, if he recite falsely, that he has an estate in possession by the surrender of a grant in tail, and grants the manor to B., he shall have the reversion, though he cannot take the possession. R. 6 Co. 55. 8 Co. 56. a.

So, if he recites a grant in tail, and afterwards grants *manerii reversionem, necnon manerium prædictum*, the grant is not void for uncertainty ; but if the tail be *in esse* the reversion passes, otherwise the possession. R. 8 Co. 167.

So, if the king license his tenant to alien in mortmain, he need not mention how he holds. 41 Ass. 19.

Though the king does not mention when the grant shall commence ; as, if the king recite a grant of pannage, &c. to A. for life, and then grant it to B., without saying, *post mortem*, &c. it will be good ; for he shall take when he can by law. R. 8 Co. 56. a. 2 Brownl. 232. 234.

So, if the king grant an office, *habendum* from the full age of B. which was then passed, it will be good for the future time. R. 9 Co. 47. b.

So, if the king grant an advowson to A. and the heirs male of his body, who, re-grants it to the king in fee, and the king afterwards grants it to B. and his heirs ; the grant to B. will be good, for the king is seised in fee presently, and the recital of his estate is not necessary. R. Cro. El. 519.

So, the king's grant will be good, though it does not mention what estate the grantee shall have ; for he shall take at the will of the king. R. 8 Jac. ut dicitur per Hale, 1 Vent. 408.

So, if the king has a conditional estate in fee, and grants in fee, it will be good. 1 Co. 49. b.

Or, has it *pur autre vie*, and grants *totum statum*, or for 40 years ; for the grant was lawful, though the grantee cannot have it for 40 years absolutely. R. 7 Co. 12. a. Mo. 321.

(G 5.)

## (G. 5.) In respect of certainty.

So, a grant of the king, which has sufficient certainty for showing fully that the king was not deceived, will be good; as, if the king grant the manor of B., without saying, in what county it lies: but the county must be alleged in pleading. 9 Co. 47. a.

Though he has another manor of the same name; for it shall be distinguished by the tenure, value, occupant, or particular, &c. 9 Co. 47. a.

So, if the king grant all his lands tenements, and hereditaments in D., an advowson, mill, piscary in gross, &c. pass though not particularly named: but they shall be severally demanded in a *præcipe*. 2 Rol. 186. l. 5. 193. l. 15. 194. l. 5. 7.

If the king grant a messuage and all lands *spectantes aut cum eo dimissas*, lands enjoyed with it for a convenient time pass. R. Cro. Car. 169.

So, if the king's grant refers to another thing which is certain, it is sufficient; for *id certum est quod certum reddi potest*: as, if he grant to a city, &c. all liberties which London has, without saying, what liberties London has. 20 H. 7. 7. b.

Though the reference be to a matter *in pais*: as, if the king grant an office, liberties, &c. *adeo plene sicut aliquis alius* enjoyed them, the grantee shall have all advantages which any former patentee enjoyed; as, he may make a deputy, if the former patentee had made one. R. 9 Co. 30. a. 52. a. R. 10 Co. 64. 2 Rol. 185. l. 45.

An advowson appendant passes, though the st. *Præer. Reg.* says, that it does not pass without express mention; for it shall be satisfied by words *æquipollent*. 43 Ed. 3. 22. b. Dy. 350. b. 2 Rol. 185. l. 30. R. 10 Co. 64. b.

If he grant a manor *cum tot tal. franchises. libertat., &c. qual.* A. had; the grantee shall have all franchises, &c. which A. enjoyed. Pl. Com. 12. b. 2 Rol. 185. l. 5. 20. Co. L. 121. b. Jon. 349.

Or, *tot tal. franchises., &c. qual.* A. or any predecessor had; he shall have all that any tenant for life of the manor had, though A. had them not. R. 9 Co. 30. a.

If he grant a manor with all franchises, &c. belonging at the time of his purchase. 2 Rol. 184. l. 54.

*Cum omnibus exitibus amerciamentis et proficuis residentium infra M. prædictum.* Pl. Com. 12. b.

So, if the king, in consideration of 20*l.* paid, grant; it is sufficient without shewing that it was paid: for it is a personal thing executed, and accepted by the king. R. 10 Co. 67. b. 2 Rol. 200. l. 10.

Or, in consideration, that the grantee shall repair; if the grantee does not repair, the grant is not void, for the king may have covenant. 2 Rol. 200. l. 5.

So, if the king grant, in consideration of a surrender; it is sufficient, though the surrender was not inrolled till after the grant: for the surrender was good, though not completed. Per Hob. 221.

So, if the king be misinformed, but not deceived, it will be good: as if he let land, which is recited to be 10*l. per annum* when it was 20*l. rendering 20*l. per annum**. Per Poph. Yel. 48.

If he recite land to be concealed, when it was not; where it appears that he intends a grant of the land, though not concealed. Sal. 561.

If he grant the manor of B. *quod manerium fuit seisitum in manus nostras*, &c. though it was not so. R. 10 Co. 113. a.

Or, the office of parker of B. *quod H. habuit*; for it was added for the more certainty. 10 Co. 113. a.

Or, the manor of D. *quod fuit in tenura de B.*, when it was not. Ibid.

Or, a manor and advowson, *adeo plene* as we by any means had it *cuiusdam archiepiscopo dudum spectan.*; where the archbishop had the manor, but not the advowson. R. 2 Mo. 1.

Or, if he grant lands, all which are of such a value; though the value be misrecited, if there be a *non obstante* of the misrecital of the value. R. Hard. 232.

### (G 6.) What shall be void: — If it be uncertain.

But generally, the king's grant will be void for uncertainty; as if the king grant such a toll as was taken at B. *aut alibi in Anglia*; it will be void, though toll was taken at B. 2 Rol. 196. l. 30.

Or, all amerciaments before his justices, without saying, what justices, of B. R, in eyre, or justices of peace, &c. Co. Ent. 384.

Or, a grant to A. to be exempt from the office of sheriff, without saying, of what county. Ibid.

Or, to have *catalla felon.*, without saying, in what manor, or county. Ibid.

To have the custody of all his houses, without saying, what in particular. R. Jon. 293, 294.

### (G 7.) If too general.

So, words too general are not sufficient in the king's grant: as, if *bona felon.*, &c. which lie in grant, and not in prescription, are reunited to the crown, or extinguished, and afterwards the king grants the manor *cum tot tal. libertat. privileg.*, &c. *qual. A. nuper abbas habuit*, who claimed the same privileges by charter; the grantee shall not have *bona felon.* by such general words. R. 2 Rol. 193. l. 40. Jon. 349. Vide Franchises, (G 1.)

So, general words in the king's grant never extend to a grant of things, which belong to the king by virtue of his prerogative; for such ought to be expressly mentioned. 2 Rol. 195. E.

If the king has land by extent for a debt, and grants the land to A. that does not pass the debt, without special words. R. 3 Lev. 135.

If he grant such a waste, that does not pass royal mines there. 1 Co. 46. b.

Or, if he grant all mines, gold or silver mines do not pass, not being expressly mentioned. 1 Co. 46. b.

If he grant all the demesnes of the manor of D., copyholds, though they are part of the manor, do not pass. R. 1 Co. 46. b.

If the king seised of the rectory of D. which was appropriated to an abbey, grant the advowson of the church of D., the rectory does not pass,



pass, nor the advowson as an advowson in gross; for by the appropriation that was extinguished. R. 2 Lev. 80.

(G 8.) If the king be deceived: — By misinformation of his interest.

So, if the king be deceived in his grant, it will be void. 9 H. 6. 28. b. 1 Co. 44. a.

As, if the king grant a greater estate than he could lawfully do: as, if the king, seised for life, or for years, grant in fee; it will be void for the whole, for the king was deceived. 1 Co. 44. a. Mo. 321. R. 3 Lev. 135.

So, if the king, seised in tail, grant in fee.

Or, seised in tail, remainder to himself in fee, grant in tail; for his intent was to make an estate-tail in possession, which he could not. R. per seven J. two cont. 1 Co. 49, 50. Alt. Woods.

So, if he grant for life, and afterwards the reversion in fee, it will be void for the whole. 1 Co. 50. b.

So, a licence to a tenant to alien generally, if he had only an estate-tail, will be void. 21 Ass. 15. 40 Ass. 36.

So, if the king grant *manerium de R. et M. in com. L.* where they are several manors. R. 1 Co. 46.

Or, *manerium de R. cum M.* 1 Co. 46. b.

If he grant a fair, market, &c. on the same day on which there was an antient fair, &c. 1 Co. 49. a.

If he grant a rectory *cum decimis, &c. prout abbas*; the advowson does not pass, for the king intended a grant of a lay-fee. 2 Rol. 189. l. 15.

Or, a manor with the franchises, &c. which A. had; when the liberties were resumed from A. 2 Rol. 185. l. 10.

Or, lands in N. and all courts leet, &c. *præmissis spectan.*; where the leet belongs to the hundred. R. Mo. 427.

(G 9.) By false suggestion.

So, if the king's grant be founded upon a false suggestion, it will be void; as, if land be recited to be only 10*l.* per ann. when it was 20*l.* 9 H. 6. 28. b. 2 Rol. 188. l. 15. Yel. 48.

Or, that the king had it by escheat, when he had not. 2 Rol. 188. l. 20.

So, if any thing mentioned as the consideration of the grant, or which sounds for the benefit of the king, (be it executed or executory, matter of record, or *in pais*), be false; the king is deceived, and the grant will be void. R. 5 Co. 94. a. 2 Rol. 188. l. 25. 199. l. 30. 50. Lane, 75. 109.

As, if the king grant, in consideration of the surrender of a prior interest or estate; when the surrender was only in appearance. Dy. 352.

Or, the whole was not surrendered. Dy. 352. R. 5 Co. 94. a. Dub. 2 Rol. 189. l. 35. R. ibidem, l. 25. 45.

If he grant, in consideration of a grant or surrender by an husband and wife; for the wife could not surrender. R. Hob. 223. 2 Rol. 199. l. 45.

In consideration of a surrender; when part was leased to another. 2 Rol. 188. l. 25. Per three Bar. Lane, 75. 109.

In

In consideration of an ancient rent of 5*l.* 16*s.* 8*d.* when the rent was 6*l.*, but 3*s.* 4*d.* allowed for payment at the exchequer; for the rent here is the consideration. R. Yel. 43. 48.

In consideration of a surrender, when the surrender was conditional. 2 Rol. 199. l. 52.

In consideration of the surrender of a lease; and the lease was void. R. 5 Co. 94. a.

So, if the king grant a rectory, if it is not in lease, or if it be, after the term, when part was in lease: it will be void: for it was intended that all should pass at the same time. R. Yel. 43. 48. 2 Cro. 34, 35.

So, if the recital of a thing in a patent which sounds to the king's benefit be false, the grant will be void, for the king is deceived. 2 Co. 54. 1 Co. 43. a. Dy. 352. a. 11 Co. 90. 2 Rol. 188. l. 12.

As, if it recite a grant of a reversion which was void, and the grant to commence after it. R. 11 Co. 4. b. 2 Rol. 188. l. 32.

If it recite an institution of his presentation; and he then confirms it; where the presentation was repealed. 2 Rol. 188. l. 45.

If the king lease for 21 years after a former lease to A. determines; which was before surrendered. R. 3 Leo. 5, 6.

If he grant a manor *adeo plene* as such an abbot had it; the advowson appendant in the hands of the abbot, which was then in gross in the hands of the king, does not pass. 2 Mod. 2.

But a recital which is true in terms is sufficient: as, if the king recite that the estate was upon condition; though the condition be broken, it does not hurt: for he does not say that the condition continues, and the breach is only matter *in pais*. R. 2 Co. 54. b.

So, a false recital of a matter *in pais* executed does not hurt: as, if the king recite, that his estate is fraudulent *prout nobis satis liquet*. R. 2 Co. 54.

So a false recital of a thing, which need not be recited, does not hurt. Vide ante, (G 4.)

So, the recital of a consideration which is false does not hurt: as, if the good service by A. in war; where none was done. Semb. Bro. Patent, 1.

#### (G 10.) When a recital is necessary.

If the king grant a reversion upon an estate for life, or years, he ought to make a recital of the particular estate, otherwise it will be void. R. 1 Co. 44. a. 50. R. 4 Co. 35. b. 8 Co. 56. Sav. 58, 59.

Or, a reversion expectant upon an estate-tail. Mo. 206.

Though a subsequent lease recites both the former leases, the lease not reciting the former will be void. Sav. 58, 59.

So, if he grant a presentation to B. after a presentation of A. without mentioning of it; the first shall not be revoked, but the second presentation is void. Dy. 339. b. 2 Rol. 188. l. 40. R. cont. 190. l. 30. Vide Esglise, (H 10.)

So, if the king grant an office for life, and afterwards grant the same office *post mortem*, &c. to another, he ought to recite the first grant, though it is not properly a reversion. R. 2 Rol. 190. l. 20. 8 Co. 57. a.

So, if the king lease to A. and afterwards make a new lease to him, without

without mentioning the first; it will be void, though it operates as a surrender of the former lease. R. 2 Rol. 190. l. 25.

But if the king make a lease at will, and afterwards grant the same land to another, he need not mention the lease at will.

Or, a grant, which imports a charge or trust, without fee or profit. Bro. Patent, 2.

So, if a reversion, depending upon an estate for life, or years, come to the king: in the grant of it he need not mention the lease, because it is not upon record. Bro. Patent, 93. Per Moor acc.: sed And. cont. Mo. 206. Acc. Dy. 233. a. 6 Co. 56. a. 2 Rol. 199. l. 10. 2 Brownl. 241. Hard. 499.

So, if the king lease a copyhold, and afterwards grant the same land to another. 2 Rol. 196. l. 50.

Or, lease part of a manor, and afterwards lease the manor to another, without recital of the former lease. R. 1 And. 46.

So, where the recital of a lease is necessary, it is sufficient if he grant the land in lease for life, or years, or the reversion expectant upon such lease, without express mention of the patent, or date. Bro. Patent, 96. 2 Rol. 190. l. 40. 191. l. 1.

So, if the date be mistaken. Bro. Patent, 96. 2 Rol. 190. l. 45.

So, though the patent does not recite the lease, but concludes, ' notwithstanding it be in lease for life, or years of record, or otherwise.' 2 Rol. 190. l. 50. R. 4 Co. 35. b.

So, if there be a grant of a reversion expectant upon a lease for life, or years. R. 4 Co. 35. b. 2 Rol. 191. l. 5.

So, if an estate comes to the king, subject to a lease for life, and also for years, and the king reciting the lease for life demises the lands after the death of the life, or when they shall come to the king's hands. Dub. For it does not appear, whether the king intended to demise the reversion or the possession. Hard. 499.

### (G 11.) The king's grant does not enure to a double intent.

So, the king's grant cannot enure to a double intent, but he shall be intended to be deceived: as, if he grant *tenere placita coram* his bailiffs, steward, or justice: if there are not such officers before the grant, it does not enure to make such officers, and likewise to give consuance or pleas to them. 2 Rol. 196. l. 42.

So, if he grant to a spiritual corporation a church *in perpetuum*, it shall not enure to a grant of the church, and likewise to make an appropriation. 2 Rol. 196. l. 45.

If he grant a copyhold for life, it does not enure to a grant and destruction of the copyhold. 2 Rol. 196. l. 50.

If he lease for years, a lease afterwards to the same lessee for more years, will be void. Lane, 22.

If the king be deceived in his grant, it will be void, though made *ex certa scientia*, &c. R. 1 Co. 49. Alt. Woods, for that does not help a falsity. Per Manw<sup>d</sup>, Sav. 5. Vide post, (G 12.)

### (G 12.) How the king's grant shall be expounded.

If the king's grant can enure to two intents, it shall be taken to the

the intent that makes most for the king's benefit. 21 Ed. 4. 48. b. 2 R. 2. 4. Co. Ent. 384. a. Vide ante, (E. 9, &c.)

And therefore it shall be construed strictly, as, if the king grant a manor purchased by him, with all franchises belonging, &c. the franchises in the hands of the feoffor do not pass: for by the purchase of the king they are re-annexed to the crown. 2 Rol. 184. l. 50. 193. l. 30.

If he grant a manor with all lands, &c. accepted or reputed as parcel; nothing passes which is not parcel in truth and of right. R. 2 Rol. 186. l. 25.

And it must have been parcel time out of mind, &c. 2 Rol. 186. l. 30.

If the king grant all the issues, fines, and amerciaments of his own tenants, the grantee shall not have the amerciaments of him, who holds of the grantee and another. 2 Rol. 193. l. ult.

If he grant a discharge from all customs, it shall not be extended to *magna et nova custuma*, though there has been an usage for discharge from them. 2 Rol. 194. l. 10.

If he grant a forfeiture for a trespass, or other offence for which a man shall lose life or member, it does not extend to a forfeiture upon an outlawry, or *præmunire*. 2 Rol. 194. l. 35. 42.

If he grant *bona et catalla sua*, it does not pass specialties. 2 Rol. 195. l. 10.

If he grant *bona et catalla felonum de hominibus suis*, it does not extend to goods of his homagers without special usage. 2 Rol. 195. l. 10.

If he grant services, and that the grantee shall be as free as the king in his crown; that does not extend to the discharge of a corody, pension, fine for alienation, &c. 2 Rol. 195. l. 40. 45.

But the king's grant shall have a reasonable construction; as, if the king grant the office, of the king's tennis plays; he shall have the office, when those of the household play, as well as the king in person. R. 8 Co. 45. b.

A commission to take singing boys out of the cathedrals for the king's chapel shall be construed of those who get a livelihood there by singing, not of the son of a gentleman who is instructed there. R. 8 Co. 46. a.

If queen Elizabeth had granted a manor, with all woods, &c. *modo vel antehac reputat. parcell.*; a wood parcel at the time of Ed. 6. passes, though not if it was of a longer time, unless *unquam antehac* was added. R. Dy. 362. a. Co. Ent. 384. a. 2 Rol. 186. l. 15.

If she had granted *totam rectoriam suam* in the singular number, though there were originally two rectories, and they were appropriated severally in the time of Ed. 3. it will be good, being reputed as one from the time of Ed. 3. R. 2 Rol. 186. l. 50.

If the king grant the rectory of M. in the county of N. with all lands, tithes, &c. *eadem rectoriæ spectan.*; tithes, &c. in the county of York belonging to it, pass. Semb. Sav. 55.

So, where the king's grant is capable of two constructions, by the one of which it will be valid, and by the other void, construction shall be made to make it valid; for that will be no more for the benefit of the

the subject and the honour of the king, which ought to be more regarded than his profit. R. 9 Co. 131 a. 10 Co. 67. b. R. 6 Co. 61.

As, if there be a grant to discharge one from the collection of tithes granted *per clericum Angliæ*; he shall be discharged if the grant be *per clericum provincie Cantuariensis*: for it is not usual to have a grant by both provinces together. R. 21 Ed. 4. 48. b. R. per all the J. 2 R. 3, 4.

If the king grant all lands, tenements, and hereditaments to a priory *pertin.*, and all piscaries, &c. *spectan.* to the said manor; a piscary, &c. in gross passes: for it was not restrained by the last, being within the first words. R. 2 Rol. 185. l. 50.

If the king grant a manor and all waifs, estrays, *bona felonum*, &c. *eidem manerio spectan.*; *bona felonum*, &c. which cannot be claimed by prescription without charter, pass, though never used with the manor. R. 2 Rol. 192. l. 45. 9 Co. 27. b.

So, if the king's grant be *ex certâ scientiâ et mero motu*, it shall be taken more strongly against the king, and beneficial for the subject: as, if the king pardon a sheriff all contempts, he shall be excused of a false return. 36 H. 6. 24. b. 37 H. 6. 21. b. Co. Ent. 384.

If he pardon A. B. all debts *ex certâ scientiâ* &c. debts as sheriff are discharged, as well as others. R. 2 R. 3. 7. a. R. 1 H. 7. 13. a. Agr. 1 Co. 49. a.

So, a grant *ex certâ scientiâ*, &c. dispenses with uncertainties. Per Manwd. Sav. 5.

But a grant *ex certâ scientiâ*, &c. shall not be expounded contrary to the proper signification of the words: as, if he grant a portion of tithes in N. where he has only tithes parcel of a rectory, it shall not be extended to them: for *portio decimarum* imports tithes in gross. R. 4 Co. 35. a.

So, a grant of all the demesnes lands of a manor shall not be extended to copyholds, though by law they are parcel of the demesnes. R. 1 Co. 46. b. (a)

### (G 13.) When a grant shall be presumed.

[Though the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. Cowp. 215.]

[Possession for 350 years was held by the court as sufficient ground of presumption, to be left to a jury. Id. 102.]

[Though the record be not produced, nor any evidence given of its being lost; yet under circumstances, it may be left to the consideration of a jury, or a court of equity, whether there be not sufficient ground to presume a charter. (b) Id. 110.]

Vide more relating to Grant, in Annuity, (A 1, &c.) — Biens, (D 2.) — Chimin, (D 3.) — Common, (O). — Condition, (A 2, 3. — D 4.) —

(a) 1. An exception in a crown grant of a rectory of "all churches and vicarages thereto belonging," does not include a perpetual curacy. 1 H. B. 418. — 2. By a grant to a ranger of a forest, of "all wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees, and wood in the said forest cut off or thrown," branches cut from trees felled for his majesty's uses do not pass. 2 Inst. 592.

(b) A grant from the crown, which it might lawfully have made, may be presumed against a stranger from 20 years uninterrupted possession. 11 East, 488.



Copyhold, (C 1, &c.) — Courts, (P 1.) — Ireland, (D). — Liberties, (B) — Market, (C 1, &c.) — Officer, (B 1, &c.) — Pardon, (A—B—G) — Prærogative, (D 24.) — Rent, (C 8.) — Toll, (G 2.)

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GREAT SEAL.

Vide PATENT, (C 2.)

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GREEN CLOTH.

Vide COURTS, (G).

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GUERNSEY, (ISLE OF.)

Vide NAVIGATION, (F 4.)

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HABEAS CORPUS.

- (A) By what court granted. *infra*.
- (B) For what cause: — Habeas corpus ad subiciendum, et recipiendum. p. [431.]
- (C) When it shall not be allowed. p. [433.]
- (D) How it shall be awarded. p. [434.]
- (E 1.) How returned. p. [434.]
- (E 2.) What shall be a good return. p. [435.]
- (E 3.) What not. p. [436.]
- (F) When the party shall be discharged, or remanded. p. [438.]
- (G 1.) Habeas corpus ad faciendum, et recipiendum. [p. 440.]
- (G 2.) When it shall not be allowed. p. [440.]
- (H 1.) Habeas corpus ad respondendum. p. [442.]
- (H 2.) To what court. p. [443.]
- (I) How an habeas corpus shall be made returnable. p. [443.]

(A) By what court granted.

An *habeas corpus* is a writ for bringing the body of him, who is imprisoned, before the court, *cum causâ detentionis*.

And it may be granted, in respect of an unlawful commitment, or in respect of a privilege, which the party claims, to be imprisoned elsewhere.

By

By the common law, the writ of *habeas corpus cum causâ detentionis* might be granted out of the chancery within the term, or vacation; for the chancery is always open. 2 Inst. 53. 4 Inst. 81. 290.

And by B. R. within term. 2 Inst. 53. 4 Inst. 81. 290.

And that, in all cases for persons privileged or not privileged, 2 Inst. 52, 53. 4 Inst. 71. 290. (a)

So, it lies out of C. B. or exchequer, for persons there privileged. 2 Inst. 53. marg. 4 Inst. 290. 2 H. Hist. P. C. 144.

So, though they are not privileged there. Vau. 154, 155, 156. 2 Jon. 13. 17. R. cont. per three J. 2 Mod. 198. Semb. 2 Mod. 306. Cont. per North, 1 Mod. 235. It shall not be granted. 2 Vent. 24. R. acc. per three J. Vaughan cont. Cart. 222.

But though an *habeas corpus* may be granted by C. B. yet it is not the proper court for it; because it cannot discharge, or intermeddle as B. R. may, if it is a criminal matter. Per Vaughan, Cart. 222.

[C. B. has a general jurisdiction to grant it in all cases whatsoever. Wood's case, H. 11 G. 3. 3 Wils. 172. 2 Bl. Rep. 745.]

By the st. 31 Car. 2. 2. an *habeas corpus* may be obtained in term out of the court of chancery or exchequer, as well as B. R. or C. B., by any prisoner.

And in vacation on complaint, &c. the chancellor or keeper, any justice of the one bench, or the other, or baron of the coif, shall on view of the copy of the commitment, or oath of denial of the copy of it, and request of the party, or some other in his behalf, in writing subscribed by two witnesses present at the delivery, award an *habeas corpus* to the officer in whose custody the party is, returnable *immediate* before himself, or some other justice, or baron, under the seal of the court whereof he is a judge, &c. on pain of 500*l.* to the party grieved.

And it may be directed and run to any county palatine, Cinque-Port, or other privileged place in England, Jersey, or Guernsey. Latch. 160.

So, to Ireland. Semb. 1 Vent. 357.

So, it lies, though a *certiorari* be taken away in such case by statute. Per Hale, 1 Mod. 102.

[*Habeas corpus ad testificandum*, lies to remove a prisoner in execution, to be a witness; yet, where it appears to be a contrivance, the court will not grant it; as, if A. convicted of bribery on the oath of B. indicts him for perjury in that very oath, they will not grant it. Rex v. Burbage, T. 3 G. 3. 3 B. M. 1440.]

[So, a *habeas corpus* lies to bring up a prisoner to give evidence. But a *habeas corpus ad testificandum* ought not to be granted to bring up a sailor on board a ship, who is not detained there as a prisoner, without an *affidavit* that he has been served with a *subpoena*, and is willing to attend. Cowp. 672.]

[Neither will it lie, to bring up a prisoner of war. Doug. 419.]

## (B) For what cause:—*Habeas corpus ad subjiendum et recipiendum.*

An *habeas corpus* ought to be granted of right. R. 2 Inst. 615. R. in Parl. 1 Rush. 513. Vide post, (G 1, 2.—H 1, 2.)

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(\*) A *habeas corpus* to bring up one in custody on criminal process, must issue on the crown side of the court, not the plea side. 3 East, 252.

And therefore, if a man be imprisoned for any cause, except upon a conviction for a crime, or in execution, he may have an *habeas corpus cum causa detentionis*, &c. 2 Inst. 52. 2 H. Hist. 143.

So, by the st. 31 Car. 2. 2. a person committed or detained for any crime, unless for treason or felony plainly expressed in the warrant, (other than persons convict, or in execution by legal process,) may in vacation complain or appeal to the chancellor, justice, or baron, &c. who shall award an *habeas corpus*, &c.

And by this statute C. B. has jurisdiction to bail, discharge, or remand. 2 H. Hist. 144.

And if the crime appears, C. B. may bail *quoad* the action, and remand *quoad* the crime. Ibid.

If he be committed by warrant of the chief justice of B. R. he ought to be brought to the court by *habeas corpus*, not by rule. 1 Sal. 349.

So, if a person be lawfully imprisoned, and afterwards unlawfully detained, he may have an *habeas corpus* for his discharge; as, if a forester take a man with the manner within a forest, or a man may be indicted for killing or hunting a deer in the forest, as he may, who afterwards offers sufficient pledges which are refused; the offender shall have an *habeas corpus*, whereupon he shall be bailed for his appearance at the next *eyre*. 4 Inst. 290.

[It will be granted for detaining a child under age from her father. 1 Bl. 386.] (a)

[If

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(b) 1. In case of a question of identity of the person of a defendant to an information, who is in prison, the court will grant a *habeas corpus* to bring him up to be present at the trial, at his own expence, and paying the costs. 1 Price, 403.—2. A *habeas corpus ad test.* lies to remove a person in execution, that he may be a witness. 3 Burr. 1440. Unless a prisoner of war. 2 Dougl. 419.—3. Where an apprentice has voluntarily enlisted as a sailor, the master is not entitled to a *habeas corpus* to bring him up. 7 T. R. 745.—4. A *habeas corpus* will not be granted to the master of an apprentice, impressed, when being of competent years of discretion, he is willing to enter the service. 5 East, 38.—5. A *habeas corpus* will not lie to discharge an apprentice, an adult from his indentures. 3 Smith, 369. 7 East, 376.—6. A woman, having the possession of a child for some time, claiming it has her own, was dispossessed of it by artifice; the court granted a *habeas corpus* for the child. 3 Smith, 577. 7 East, 579.—7. A *habeas corpus* for an illegitimate child, within the age of nurture, will be granted to its mother, from whom it has been surreptitiously taken. 7 East, 579. 3 Smith, 577.—8. By the 23d art. of war, s. 16. it is declared, that, “no officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or until such time as a court-martial can conveniently be assembled.” If this rule be transgressed, the court of K. B. have jurisdiction to grant a *habeas corpus*. They granted a rule *nisi* for a *habeas corpus*, on the application of an officer who had been under confinement for more than eight days, and whose affidavit disclosed circumstances whence it seemed probable that a court might conveniently have assembled before. But discharged the rule on an affidavit by the judge-advocate-general, satisfactorily accounting for the delay, and to whose statement, being a person in a high situation, public convenience required that credence should be given. 2 M. & S. 428.—9. A *habeas corpus* to bring up a prisoner in custody, on criminal process, that he may be charged with a civil action, will only be granted where he is in custody of an officer of the court. 9 East, 154.—10. A rule *nisi* for a *habeas corpus ad testificandum* to bring up a prisoner, (here in custody on criminal and civil process) to give evidence before a committee of the house of commons, directed to be served on the attorney general, the gaoler, and the creditors, at whose suit he was detained, was made absolute on affidavit of such service, and on no cause being shown. 4 East, 587.—11. A *habeas corpus*

[If the person confined is too weak to be brought into court, they will make a rule that certain persons shall have access to him. *Rex v. Wright*, M. 1 G. 3. 2 B. M. 1099. *Rex v. Turlington*, H. 1 G. 3. 2 B. M. 1115.]

[But will not give that liberty unless to persons who have some pretension to demand it. *Rex v. Clarke*, M. 3 Geo. 3. 3 B. M. 1362.]

### (C) When it shall not be allowed.

But by the st. 2 H. 5. 2. none shall be discharged, or bailed upon an *habeas corpus cum causa*, &c. if it be returned, that he is in prison on condemnation by judgment against him, but he shall be remanded and kept in safe custody till agreement of the party, or payment of the sum adjudged.

So, by the st. 31 Car. 2. 2. a person committed for treason or felony, plainly expressed in the warrant of commitment, or convict, or in execution by legal process, is not entitled to an *habeas corpus* in vacation by force of that act.

[To a person committed for high-treason by rule of court. *Rex v. Leonard*, H. 5 Geo. Str. 142.]

[A person committed for high-treason done in Scotland, is not within the act. *Rex v. Mackintosh*, P. 6 Geo. Str. 308.]

Nor, a person wilfully neglecting to pray an *habeas corpus* by the space of two whole terms after his imprisonment.

So, a peer, impeached by the house of commons for high treason, is not *de jure* bailable in B. R. nor shall be bailed in discretion, though he has continued two years in custody; not being within the st. 31 Car. 2. R. Ray. 381.

So, a person, committed by the house of peers, or of commons, being a member of the same house, shall not be discharged upon an *habeas corpus*. R. 1 Mod. 157, 158. Ld. Shaftsbury.

Nor, bailed during the session of parliament. R. 1 Mod. 157, 158. Per Sir W. Jones, in Parl. 30 December, 1680. [2 Bl. Rep. 754. 3 Wils. 188.]

Though the commitment be only for a misdemeanor. 1 Mod. 158.

So, a person committed by the house of commons for a breach of privilege. Per three J. Holt, cont. Sal. 503.

So, if it be used for avoiding a lawful suit, upon shewing of this at the return, the court will grant a *procedendo*. 1 Sal. 8.

[No *habeas corpus* lies for an alien enemy, a prisoner of war, however ill used or deceived. 2 Bl. 1324.]

[Nor, for a prisoner of war, the subject of a neutral power, taken in the enemy's service, into which he was forced when taken prisoner by them in an English ship. *Rex v. Schiever*, P. 32 Geo. 2. 2 B. M. 765.]

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*corpus* to bring up a native of Africa, granted on affidavit of the secretary of the African institution. 13 East, 195.—12. No *habeas corpus* lies for an alien enemy, prisoner of war, however ill used or deceived. 2 Blk. 1324. Dougl. 419.—13. One who is in custody at the suit of the plaintiff, in the Marshalsea court, cannot be removed by *habeas corpus ad respondendum*, to answer the plaintiff for the same debt, in a new action in B. R. Cowp. 116.

## (D) How it shall be awarded.

By the st. 1 & 2 Ph. & M. 13. no *habeas corpus*, &c. shall be granted to remove a prisoner, unless signed by the chief justice, or in his absence by some other justice of the court, on pain that the writer forfeit 5*l*.

By the st. 31 Car. 2. 2. an *habeas corpus* granted pursuant to that act, shall be indorsed, per st. 31 Car. 2. *regis*, and signed by the judge that awards it. And a writ of *habeas corpus* if not signed by the judge, needs not be obeyed. Cowp. 672.

If an *habeas corpus* be awarded for any one in prison for a crime, it shall not be without motion. 1 Lev. 1. 2 Mod. 306.

Otherwise, where it is for another person. 1 Lev. 1.

So, an *habeas corpus* must be directed to the officer in whose custody the prisoner remains. St. 31 Car. 2. 2.

And therefore, if it be to the sheriff or gaoler, it is bad. R. 1 Sal. 350. (c)

## (E 1.) How returned.

By the st. 31 Car. 2. 2. if an *habeas corpus* be served upon an officer who hath the custody, or left at the gaol with the underkeeper, &c. he shall in three days after delivery, (if within twenty miles, or in ten days, if above twenty and under a hundred miles, or in twenty days, if above a hundred miles,) return the writ, and bring the body, and certify the true cause of detainer, or imprisonment, according to the command of the writ, on payment of 12*d*. *per* mile, and the party's own bond to pay the charge of the return if remanded, and not to make escape by the way.

If the officer refuse to make a return, or bring the body, &c. or to give a copy of the warrant of commitment in six hours after demand, he shall for the first offence forfeit 100*l*., and for the second offence 200*l*. and be incapable of office. (d)

And a recovery or judgment by any party grieved shall be a sufficient conviction for the first offence, and any after recovery by a party grieved for any offence after the first judgment shall be a sufficient conviction to bring the party under the penalty for the second offence.

[On a *habeas corpus* granted by a judge in the vacation, returnable *immediate* before himself at his chambers, the party may be brought into court in term. *Rex v. Shebbeare*, H. 31 G. 2. 1 B. M. 460. *Rex v. Mead*, P. 31 G. 2. 1 B. M. 542.]

[Or, if on a *habeas corpus* so returnable the party is brought before him, he may, if he judges it advisable, adjourn the return, and direct

(c) 1. On a motion for a *habeas corpus* to a private person, on the application of a husband to bring up the body of his wife, the affidavit must state that she is detained against her will. 2 Smith, 617.—2. A writ of *habeas corpus*, if not signed by a judge, need not be obeyed. Cowp. 672.

(d) That the gaoler may incur the penalty for withholding a copy of the commitment, personal service, if within the prison, is necessary. 2 B. & P. 530.



him to be brought into court the first day of term. *Rex v. Clarke*, T. 31 G. 2. 1 B. M. 606.]

[A constable is an officer within the meaning of st. 31 Car. 2. c. 2. and obliged to give copy of warrant of commitment. *Hudson v. Ash*, P. 5 G. Str. 167.]

The officer must shew by his return, by whom the party was committed, and the cause of the commitment. 2 Inst. 55.

[And the return must answer to the taking, as well as to the detention. 2 Bl. 1204.]

And if he does not make a return after delivery of the writ, an attachment lies against him. 2 Jon. 178.

Though his charges are refused; for the court taxes and compels the payment of the charges, if the officer and prisoner do not agree, or he does not pay according to the agreement. R. 2 Jon. 178.

By the common law if an *habeas corpus* be not returned, and *alias* and *pluries* lie, and afterwards an attachment. 2 Lev. 129.

[The court will require a return to be made to the first writ of *habeas corpus*, without issuing an *alias* or a *pluries*; and if the first writ be not obeyed, an attachment will immediately issue. *Rex v. Winton*, M. 33 Geo. 3. 5 T. R. 89.]

[If a *habeas corpus* is not returned, attachment *nisi* shall go, without rule to return. *Rex v. Wright*, M. 5 G. 2. Str. 915.]

[The court will not grant an attachment to accompany a *habeas corpus*. *Rex v. E. Ferrers*, T. 31 G. 2. 1 B. M. 631.]

[If *habeas corpus* is not obeyed, the court will grant attachment, even against a peer; for he has no privilege against the process of Westminster-Hall to compel obedience to *habeas corpus*. *Ibid.*]

And the return ought to be made within three months. 1 Sid. 78.

[On good cause shewn, as that the person confined is a lunatic, confined by her nearest relations, who are proceeding to get a commission of lunacy, the court will enlarge the time to return. *Rex v. Clarke*, M. 3 G. 3. 3 B. M. 1362.]

But where the commitment is for treason or felony plainly expressed in the warrant, the officer is not obliged by the st. 31 Car. 2. 2. to make a return, as directed by that statute.

[The court will not receive the return, till the return-day. 2 Bl. Rep. 805.]

### (E 2.) What shall be a good return.

The return to an *habeas corpus* ought to shew the cause of commitment specially and certainly. 2 Inst. 55. R. Cro. Car. 507. R. Vau. 137. Pal. 558. Vide in Mandamus, (D 3, &c.)

And therefore, if the return be, that he was committed for a contempt in not performing an order between A. and B. made upon 3d day of M., it will be good. R. Mo. 840.

Or, for not performing an order in the star-chamber for such and such words. R. Cro. Car. 168.

Or, not performing an order of the exchequer for payment of a fine; without saying, for what cause imposed; for it is a court of justice. R. Cro. Car. 579.

Or, for suspicion of treason, without saying what species of treason. Semb. Pal. 558.

So, if the return shews a good cause of commitment, it will be good, although it wants form: as, if the return says, that it was awarded in court, *quod remaneat* in custody for a fine, without saying, *quod committitur pro fine*. R. 5 Mod. 24. 1 Sal. 348.

If it shews a judgment by the court of admiralty, &c. though the proceeding be irregular. R. 2 Rol. 157.

[That defendant was committed for back-bearing and carrying away a deer, is good after conviction, though it does not say unlawfully; but not before conviction. Rex v. Hawkins, P. 2 G. Fort. 272.]

[That before delivery of the writ he had delivered the woman to her husband, and knows not where she is. Rex v. Wright, M. 5 G. 2. Str. 915.]

[A return to a *habeas corpus* to bring up the body of Mary Wilkes, wife of John Wilkes, esq., stating that the husband had executed articles of separation, and covenanted never to disturb her or any person with whom she should live, was holden a good return; the court considering this agreement to be a formal renunciation by the husband, of his marital right to seize her, or force her back to live with him. Rex v. Mead, E. 31 G. 2. 1 Burr. 542. Semb. 5 T. R. 91.]

["That, at the coming of the writ, defendant was not in the keeper of the prison's custody." Rex v. Bethuen, M. 12 G. 2. Andr. 281.]

["That, before the coming of the writ, defendant was discharged out of his custody by an order of sessions," without saying what sessions, what order, or that he was discharged by due course of law; good for the purpose of filing the writ. Ibid.]

[To a *habeas corpus* directed to the king's messengers, to bring in the body of A. B. it seems a good return, that at the time of the coming of the writ, or at any time since, he was not in their custody. Semb. 2 Wils. 154.](e)

### (E 3.) What not.

But a return is insufficient, if it does not shew an express and certain cause of commitment. 2 Inst. 55. R. Vau. 137. (f)

[Where a man is committed for any crime, either at common law or by act of parliament, for which he is punishable by indictment, a re-

(e) 1. It is a sufficient return to a *habeas corpus* to bring up the wife of another, that they are separated; but the fact must be positively sworn to, and not denied. 5 T. R. 89. — 2. The return of a regular conviction by a magistrate is conclusive, in discharge of a *habeas corpus*, though from matter *dehors* the conviction be illegal. 7 East, 376. 3 Smith, 369.

(f) 1. Presumption and intendment ought to be against returns to writs of *habeas corpus*. Dougl. 153. — 2. On a *habeas corpus* to produce the body, with the causes of taking and detaining, the party must return an answer to the taking as well as detaining. 2 Blk. 1204. — 3. A return to a *habeas corpus*, "I had not, at the time of receiving this writ, nor have I since had the body of the within named J. S. detained in my custody, so that I could not have her," &c. is equivocal, and therefore insufficient; it does not deny having the party, but only the detaining her, a matter to be inquired into on her being brought up. 5 T. R. 89. — 4. A *habeas corpus* to bring up an apprentice is granted. The return to it is, a custom of London, authorizing the binding apprentices, who are above 14 and under 21 years, for seven years and more. The return does not aver that the party, who was bound under the custom, was above fourteen and under twenty-one when bound. Held, that the return was ill; that it could not be aided by matters *dehors*, since it cannot be left to intendment, but ought to be made the subject of distinct and positive allegation, and that it could not be amended. 2 M. & S. 226.

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turn that he was committed till discharged by due course of law, is good. But if the commitment be in pursuance of a special authority; the terms of the commitment must be special, and exactly pursue that authority; and therefore, if it do not appear, on the return, to have been according to that authority, the return will be bad. 2 Bl. 806.]

As, if a return be, that the commitment was for a contempt of the court of chancery, without shewing wherein the contempt was. Mo. 839.

Or, for giving a verdict contrary to law, to the oath, or the evidence, without saying what the evidence was. R. Vau. 137. 2 Jon. 15.

Or, for a contempt of a command. Mo. 839.

Or, a contempt contrary to an order or decree of the court. Mo. 839.

Or, contrary to an order between A. and B. Mo. 839.

Or, for refusal of an answer to articles before the high commissioners, without saying, what articles; for perhaps they were not within their jurisdiction. R. Mo. 840.

Or, for ill behaviour or words to the privy-council, without saying what words. R. Cro. Car. 133.

Or, by a precept of the secretary of state, &c. R. 2 Leo. 175.

Or, of the privy-council. 4 Leo. 21. cont. R. acc. 3 Leo. 194.

Or, by command of the commissioners in causes ecclesiastical. R. 4 Leo. 21.

So, a return, that he was committed for aiding the escape of one in custody for high treason, without saying, what species of treason, is bad. Semb. 5 Mod. 83. 85. 1 Sal. 347.

That he was committed for refusing sureties for his good behaviour, without saying in what sum. R. 2 Vent. 23.

[That the African company had retained the defendant in their service, and sent him to the Savoy till he should embark, is bad, and defendant was discharged, and an information ordered against him, the colonel, and the keeper of the Savoy. Rex v. Drew, M. 7 G. Str. 404.]

Or, for refusal to account for toll, and till he do account, without saying for what sum. R. F. g. 266.

[That defendant was committed by two justices of peace, for that he, being overseer of the poor, had not accounted as by statute directed, and had not accounted before them, bad; he might have accounted before others. Rex v. Gibson, P. 1 G. Fort. 272.]

So, if a return be, that he was committed upon complaint for such an offence, and there being cause upon examination to suspect him, without an express charge of any offence. R. 2 Vent. 23.

If a return be, that upon a plaint in an action upon the case in such a court *exitus est junctus et pendet indiscussus*, it is bad; for it ought to return the whole declaration, whereby the cause of action may appear to the court. R. Carth. 75.

And if the plaintiff has not declared at the delivery of the writ, he ought to declare immediately; that it may be returned. Carth. 75.

So, if the commitment was by warrant, the return ought to shew the warrant itself. Semb. 5 Mod. 159. 162. R. 1 Sal. 349.

If it was by the court to a proper officer present without warrant, he ought to return the whole truth of the fact. R. 1 Sal. 349.

If he was committed by a warrant upon a writ *de excommunicato capiendo*, the writ ought to be returned as well as the warrant R. 1 Sal. 350.

If a return be upon an *habeas corpus alias*, or *pluries*, it ought to say that he was not, &c. at the time of the first writ. 2 Lev. 129.

Yet the default of an averment of a fact in a return may be amended in court. Per Hale, 1 Mod. 108.

So, the omission of the words, in which the contempt consists. Cro. Car. 133.

If a return be insufficient, the officer shall be amerced. 1 Sal. 350. Vide in Retorn, (F 3.)

And an *alias habeas corpus* goes, and afterwards, if no return, or a bad one, an attachment. 1 Sal. 350. (g)

### (F) When the party shall be discharged, or remanded.

At the return of an *habeas corpus* the court, generally, ought to discharge, or remand the party. 2 Inst. 55. 2 H. Hist. 143.

And therefore, if the return shews no cause, or no sufficient cause, for the imprisonment and detainer, he shall be discharged. 2 Inst. 55. 615. R. Vau. 156.

And that always in C. B. and in the exchequer. Vau. 157.

But, if the return shews a sufficient cause, he shall be remanded. 2 Inst. 55.

So, if the cause shewn appears sufficient, though it be false. R. 9 H. 6. 44. a.

So, if the cause be sufficient, but the return be defective in form. R. 1 Sal. 348.

Yet B. R. may bail if they please, though the return be sufficient. 2 Inst. 55. Vau. 157. 1 Sid. 78.

Or, before it be determined, whether the return be sufficient, or not. 5 Mod. 23.

So, pending the debate whether it be sufficient, B. R. may remand to the same prison, or to the Marshalsea. R. 1 Vent. 330. 346.

And by the st. 31 Car. 2. 2. the chancellor, judge, or baron in two days after the party brought before him on an *habeas corpus* in vacation pursuant to that statute, shall discharge the prisoner, on a recognizance with one or more sureties to appear in B. R. next term, or at the next assises, &c. where he shall certify the said writ, return and recognizance, unless he was committed by legal process, &c. from a court that hath jurisdiction, or a warrant of a judge or justice, for an offence for which he is not bailable.

Or, if committed as accessory before to petit treason or felony, or on suspicion of it, where the petit treason or felony is specially expressed in the warrant, he shall not be bailable otherwise than as before that act.

[A person committed by secretary of state, to the custody of a messenger, on suspicion of high-treason, and kept there two years, shall be discharged without bail, unless attorney-general undertakes to prosecute directly. Rex v. Fitzgerald, M. 23 Geo. 2. 1 Wils. 254.]

[B. R. cannot remand a prisoner to the custody of a king's messenger, but must commit him to the marshal of B. R. Rex v. Shebbeare, H. 31 G. 2. 1 B. M. 460.]

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(g) If the return to the first writ of *habeas corpus* is insufficient, an attachment (without an *alias* and *pluries* writ) will be granted. 5 T. R. 89.

[Where there is a conviction the court will not discharge on the warrant of commitment, without having the conviction before them. *Rex v. Elwell*, H. 1 G. 2. Str. 794.]

[On *habeas corpus* returnable before chief justice, commitment by another judge is good without amendment of return. *Barnes*, 20.]

[A child of nine, delivered to her uncle, her testamentary guardian. *Rex v. Johnson*, H. 10 G. Str. 579.]

[*N. B.* She was taken from the guardian appointed by the spiritual court, and who was her near relation, was to have no benefit by keeping her, had taken great care of her, and with whom she was willing to go. 2 Ld. Raym. 1354.]

[If a boy of 13 is brought up by *habeas corpus* sued by his father, to have him delivered to him by his aunt, the court will deliver him from the aunt, and let him go where he pleases, for they will not determine the right of guardianship in a summary manner, and the father has other remedies to bring it in question. *Rex v. Smith*, T. 7 G. 2. Str. 982.]

[A young lady of full age decoyed from her father to be married to a mean person, brought back by the father's means to his house, an *habeas corpus* brought by one of the decoyers, the court will ask whether she desires to continue with her father, or to go elsewhere? if she answers to continue with her father, they will only say she is at liberty to go. *Rex v. Clarke*, T. 31 G. 2. 1 B. M. 606.]

[If the putative father of a bastard obtain the possession of her from her mother by fraud, the court will order her to be restored to the mother. *Rex v. Soper*, E. 33 G. 3. 5 T. R. 278.]

[If an apprentice of the age of eighteen voluntarily enter into the sea-service, his master is not entitled to sue out an *habeas corpus* to bring him up. *Rex v. Reynolds*, M. 36 Geo. 3. 6 T. R. 497.]

[If an apprentice be impressed into the sea-service, the master cannot sue out a *habeas corpus* to bring him up to be discharged, though the apprentice may. *Rex v. Edwards*, T. 38 Geo. 3. 7 T. R. 745.]

[In such cases the lord chief justice, under a statute of Henry 8. possesses the power of granting warrants to bring up apprentices in that situation, and frequently exercises the power. *Ibid.*]

[The house of lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their house, and having sentenced him to pay a fine of 100*l.*, and to be imprisoned six months, and until such fine was paid, which commitment was returned into B. R. upon a *habeas corpus* sued out by the defendant, the court refused to discharge him out of custody. *Rex v. Flower*, T. 39 Geo. 3. 8 T. R. 314.]

[On the appearance of the party, the court will only see that he is under no illegal restraint; but in the case of a young lady, the court will order the tipstaff to wait upon her home to her guardian. *Rex v. Clarkson*, T. 7 G. Str. 444.]

[A wife ill used by her husband and flown from him to mother, brought up by *habeas corpus*, on the husband's application, swears the peace against him; she shall not be delivered to him, but the court will grant her a tipstaff to secure her from insult in her return to her friends. *Gregory's case*, M. 7 G. 3. 4 B. M. 1991.]

[On a *habeas corpus* sued out by the father of a kept mistress, aged  
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eighteen,



eighteen, directed to her keeper, the court declared she might go where she pleased, and that none should meddle with her *redeundo*; but would not in this case send a tipstaff to protect her. *Rex v. Delaval*, T. 3 G. 3. 3 B. M. 1434.] 1 Bl. Rep. 410.

[If a sane person, confined in a mad-house by her husband, is brought up, and intends to demand the peace, but has not articles ready stampd, the court will permit her to go with a friend, he undertaking to produce her. *Rex v. Turlington*, H. 1 G. 3. 2 B. M. 1115.]

### (G 1.) Habeas corpus ad faciendum, et recipiendum.

So, an *habeas corpus* lies for a person, committed within an inferior jurisdiction, upon a pretence of privilege, to be sued in a superior court, Vide ante, (B). — post, (H 1, 2.)

The form of the writ is, *ad faciendum et recipiendum, &c.* 1 Mod. 235. Off. Br. 110. 112. Th. Br. 131.

And such writ goes to every inferior court.

To the Cinque-Ports. 1 Mod. 20.

To the governor of Jersey or Guernsey. 1 Sid. 386.

[An information *qui tam* on st. 8 Geo. 1. c. 7. for a fraud in weighing and packing butter, exhibited, by virtue of that statute, in the sheriff's court at York, may be removed into B. R. by *habeas corpus cum causa*. Cowp. 523.]

If an *habeas corpus* be delivered to an inferior court and the judge there proceeds afterwards; the proceeding will be erroneous and *coram non judice*, and shall be reversed for this cause. R. 2 Jon. 209. R. 1 Sal. 352.

Or, a *supersedeas* shall go. Cro. Car. 79.

So, the judge may be punished by attachment for his contempt. 3 Mod. 85.

Though the return be at a day after the end of the term. R. 1 Mod. 195.

After an *habeas corpus*, which removes the cause to B. R., &c. the plaintiff must commence *de novo*. R. 1 Sal. 352.

[C. B. cannot commit to the Fleet a prisoner on a justice's warrant, for want of sureties on indictment for bastard; nor on *excommunicato capiendo* out of chancery, returnable in B. R., nor for an extent out of the exchequer. Barnes, 223.]

[But they may on exchequer process on recognizance forfeited at sessions. Ibid.]

[If prisoner is removed by *habeas corpus* before declaration delivered, plaintiff must declare in the court whether he is removed, if, after declaration delivered, he proceeds where he declares. Barnes, 384.]

[*Habeas corpus* shall be allowed, though not delivered till after interlocutory judgment signed below, and notice of writ of inquiry given. *Cox v. Hart*, H. 32 G. 2. 2 B. M. 758.]

[It is the practice to allow it, if delivered at any time before the jury sworn, notwithstanding 21 J. 1. c. 23. Ibid.]

### (G 2.) When it shall not be allowed.

But by the st. 43 El. 5. an *habeas corpus*, &c. shall not be allowed to remove

remove a cause in an inferior court, after any of the jury sworn; but the steward, &c. may proceed.

So, by the st. 21 Jac. 23. no *habeas corpus*, *certiorari*, &c. shall be received or allowed, to remove any action, &c. depending in any inferior court of record, which hath jurisdiction, the cause of action arising within the jurisdiction, unless delivered before issue or demurrer joined, so as it be not joined within six weeks after the arrest or appearance of the defendant; but the steward, judge, &c. may proceed as if no writ delivered.

Nor, to stay or remove any action, &c. not concerning the title of land, lease, or rent, if it appears by the declaration, that the debt, damages, or demand exceed not 5*l.*

Or, any action before demanded by *procedendo*.

So, by the st. 12 Geo. 29. a judge described in the st. 21 Jac. 23. may proceed, &c. where the cause of action appears, or is laid not to exceed 5*l.*, though there be other actions of higher value against the same defendant.

Yet if the cause of action does not arise within the jurisdiction of the court, an *habeas corpus* ought to be allowed. R. Cro. Car. 79.

So, by the st. 21 Jac. 23. that act does not extend to an action wherein a foreign or other plea is pleaded, which cannot be tried or determined within the jurisdiction.

Or, if no utter-barrister of three years' standing at the bar be steward, town-clerk, judge, or recorder, or assistant to the judge of such court, and there present, and not counsel in any cause there.

[An utter-barrister of three years' standing, must at all events be present in every inferior court at the trial, either as judge or assistant, or the trial is void, and *habeas corpus* lies. Fairley v. M'Connel, H. 31 G. 2. 1 B. M. 514.]

And therefore, if an *habeas corpus* be delivered after issue, if the judge proceed, not being an utter-barrister, an attachment shall go. R. 3 Mod. 85. Cro. Car. 79.

If the steward, &c. be an utter-barrister, if he be present only by a deputy, who is not an utter-barrister. Cro. Car. 79.

So, if an utter-barrister be steward, he shall be in contempt if he does not return the writ with the special matter. R. Carth. 69.

So, upon an *habeas corpus* to remove a cause out of an inferior court, a *procedendo* shall be awarded, if it appears that the action is maintainable there only. R. Carth. 75.

[On a return of a by-law, the court will not enter into the validity of it, in order to grant *procedendo*; but plaintiff must declare here, and defendant may demur if he has objections. Ballard v. Bennet; Ballard v. Clement, P. 32 G. 2. 2 B. M. 775.]

So, if an *habeas corpus* be after an interlocutory judgment, and before final judgment, and before the return the defendant dies; for otherwise the plaintiff cannot have a *scire facias*, which is given against the executor by the st. 8 & 9 W. 3. 11. and must be out of the court where judgment is given. R. 1 Sal. 352.

[After interlocutory judgment, it is too late, and *procedendo* shall be awarded. Barnes, 221.]

[So, after issue joined. Ibid.]

A *procedendo* may be awarded after the return of an *habeas corpus* filed:  
for

for the record itself is not thereby removed, but the inferior court suspended only. R. 1 Sal. 352.

[In action against two partners, if one brings *habeas corpus* and puts in bail for himself only, plaintiff shall have *procedendo*. Fry v. Carey, T. 8 G. 1. Str. 527.]

### (H 1.) Habeas corpus ad respondendum.

So, an *habeas corpus* lies to bring up a man in prison to the bar, and to be charged at the suit of another. 1 Mod. 235. Off. Br. 110. Thes. Br. 131. Vide ante, (B—G. 1, 2.)

Or, for an husband and wife, that he alone may be charged, and the wife dismissed. 1 Lev. 1.

So, it lies, where a man has privilege in C. B. and is there sued; and if upon the return it appears, that he is committed without cause, or by a court not having jurisdiction, he shall have his privilege. 2 H. Hist. 144.

If it be doubtful, he shall be bailed to appear in B. R. Ibid.

[If it is teste'd in term, it may be returnable *immediate* before the chief justice. Bettesworth v. Bell, P. 6 G. 3. 3 B. M. 1875.]

[Plaintiff may remove defendant by this writ, after he has declared against him in custody of the sheriff. Ibid.]

[Defendant may be committed, though return-day is past. Barnes, 221.]

[If defendant is in custody at the suit of the crown, he cannot be turned over on *habeas corpus* to another prison, at the instance of a private person for debt; if he alleges a pardon by act of parliament, it must be by suggestion on the record, that the crown may traverse. Rex v. Powlett, T. 11 & 12 G. 2. Andr. 274.]

[A prisoner in the Fleet for contempt in exchequer, in not paying a debt to the crown, may be brought into B. R. by *habeas corpus*, and surrendered to the marshal in discharge of bail in another cause, and he cannot be remanded to the Fleet on motion: but a *habeas corpus* must be brought from exchequer: the marshal will return it there, and they may remand him to the Fleet.

So, in civil causes between subjects, and in criminal causes at suit of the crown. Chitty's case, T. 22 & 23 G. 2. 1 Wils. 248.]

[If defendant is to be charged in execution on several judgments, there must be a *habeas corpus* on every judgment. Barnes, 223.]

[Prisoner in the Fleet by process of C. B. may be brought up by rule, but if held by execution of another court there must be *habeas corpus*. Barnes, 385.]

[If a prisoner, who is brought up from a county gaol, to be turned over to the king's bench, will not pay the sheriff the charges of bringing him up, the court will remand him. Anon. P. 6 G. 1. Str. 308.]

[If 1s. *per* mile is tendered and refused, attachment shall be granted. Barnes, 377.]

[But the gaoler must obey the *habeas corpus*, though the prisoner refuses to pay his fees, for he has his remedy for them. Hopman v. Barber, M. 2 G. 2. Str. 814.]

[If plaintiff deliver sheriff *habeas corpus* to remove defendant in execution on a *ca. sa.* to B. R. prison, he cannot refuse to obey till his poundage

## *How an habeas corpus shall be made returnable.* [443]

poundage is paid. Semb. sed qu. For it was argued in this case, that he should carry him to a judge's chambers; and Foster J. said, if he came before him, he would not turn him over till poundage paid. *White v. Haugh*, M. 20 G. 2. Str. 1262.] (*h*)

### (H 2.) To what Court.

An *habeas corpus ad respondendum* does not lie to a county palatine. 1 Sal. 354.

A man brought by an *habeas corpus ad respondendum* to B. R. shall not by another *habeas corpus* be removed to the Fleet till he has answered in B. R. 1 Sal. 350.

So, a man in execution upon a sentence in the admiralty shall not be removed by an *habeas corpus ad respondendum*, and committed to the marshal of B. R. before an action there depending. R. 1 Sal. 351.

[If defendant is brought up by *habeas corpus* from the admiralty, there charged with embezzling goods of the ship; on affidavit, that he is indebted to the plaintiff on promissory note, he shall be turned over to the marshal of B. R. *Rutherford v. Scott*, T. 5 & 6 Geo. 2. Str. 936.]

Or, if taken up for a misdemeanor, and then charged with an extent at the suit of the king, he shall not be brought up by *habeas corpus* to be declared against in B. R. 1 Sal. 354.

## (I) How an habeas corpus shall be made returnable.

An *habeas corpus cum causâ* directed to the sheriffs of London and Middlesex may be made returnable *immediate* before the court of exchequer, or a baron in vacation. Per rule.

So, an *habeas corpus* for surrendering a man in discharge of his bail. (*i*)

But, generally, an *habeas corpus* shall be returnable at a day certain.

And therefore, an *habeas corpus ad respondendum*, or *satisfaciendum* to the warden of the Fleet, marshal of B. R., or keeper of an inferior prison, shall be returned into court at a day certain.

If upon an *habeas corpus* the prisoner be returned to be charged with process out of B. R. or C. B., he shall be committed with those causes, though the process in B. R. or C. B. was returnable at a future day.

Bail in an *habeas corpus*. Vide Bail, (I).

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(*h*) The 43 G. 3. c. 140. provides that it shall be lawful for any judge of the courts of K. B. or C. B., or for any baron of the court of exchequer of the degree of the coif, at his discretion, to award a writ of *habeas corpus* for bringing any prisoner detained in any gaol or prison in England, before any court martial or before any commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any commission or warrant from the king, for trial, or to be examined touching any matter depending before such courts martial or commissioners; and the like proceedings shall be had upon such writs, as upon writs of *habeas corpus* for bringing persons detained in gaol before magistrates or courts of record, for such purposes. And by the 44 G. 3. c. 102. it shall be lawful for any judge of the court of K. B. or C. B., or any baron of the exchequer of the degree of the coif, or any justice of *oyer and terminer* or gaol delivery, being such judge or baron as aforesaid, at his discretion to award a writ of *habeas corpus* for bringing any prisoner detained in any gaol or prison before any of the said courts, or any sitting of *nisi prius*, or before any other court of record, to be examined as a witness before such courts, or any grand, petit, or other jury, in any cause or matter civil or criminal. And by s. 2. every justice of great session in Wales, and in the county palatine of Chester, shall have the like authority.

(*i*) A *habeas corpus ad satis. et recip.* may be returnable immediately and before a judge. 2 Burr. 1875.

HABENDUM.

## HABENDUM.

Vide FAIT, (E 9, 10.)

## HABERE FACIAS POSSESSIONEM.

Vide EXECUTION, (A 5.)

## HABERE FACIAS SEISINAM.

Vide EXECUTION, (A 2, 3.)

## HAMLET.

Vide PARISH.

## HARES.

Vide JUSTICES of PEACE, (B 49.)

## HAVEN.

Vide NAVIGATION, (D).

## HAWKING.

Vide CHASE, (H 1. &c.) — JUSTICES of PEACE, (B 45.)

## HAY.

Vide DISMES, (H 2.)

## HEARING.

Vide CHANCERY, (M—S—T 1. &c. — Y 5.)

## HEIR.

### (A) Heir.

When, and who shall take by descent, and who shall be heir, who not. Vide in Discent, (A — B — C 1, &c.)

When he shall be bound to the debt of his ancestor, vide Assets, (A — B), — Covenant, (C 2.) — Chancery, (2 G 1, &c. — 3 P 1, &c.) — Pleader, (2 E 1, &c.)

If the person of the ancestor be bound in respect of his land, which descends to the heir, he shall be charged: as if, by a subsidy to be assessed



assessed upon every one having 20s. per annum, A. be charged and die; his heir shall pay it, for it runs with the land. R. Mo. 17.

Heir is *nomen collectivum*; and therefore, if a condition be, that if his heir does not pay such a rent charge, the estate shall go to B., if the heir of the heir does not pay, the condition is broken. R. 2 Cro. 145. (a)

What goods and chattels go to the heir. Vide Biens, (B).

Vide more concerning Heir in Abatement, (F 9.) — Copyhold, (D 2.) — Covenant, (B 2.) — Devise, (N 22.) — Dett, (G 5.) — Escheat, (A 1.) — Estates, (B 8.) — Gardian, per totum. — Idiot, (D 5.) — Parceners, (A 3.) — Pleader, (3 L 13.)

## HEMP.

Vide DISMES, (H 1. 10. 13.)

## HERALD.

Vide COURTS, (E 3.) — NORROY, (A — B.)

## HEREDITAMENT.

Vide GRANT, (E 1.)

## HERESY.

(A) ~~What~~ shall be. p. [446.]

(B) ~~How~~ punished.

(B 1.) Who have conusance of heresy : — Convocation. p. [446.]

(B 2.) Archbishop. p. [447.]

(B 3.) Other ordinary. p. [447.]

(B 4.) Temporal judge. p. [448.]

(B 5.) Who have not conusance. p. [448.]

(B 6.) What penalty shall be inflicted. p. [448.]

(a) 1. The words "heirs male" admit of four different constructions: 1°. If the king by patent grant to a man and his heirs male, the latter words convey no interest. 2°. If any other by deed grant to A. and his heirs male, A. takes a fee, because against the grantor the word "male" is rejected. 3°. A devise to A. and his heirs male passes an estate tail, to effectuate the devisors intention. 4°. If an estate of freehold be limited to A., remainder to his heirs male, the latter words enlarge A.'s estate to a fee; secus, where only a term is given to A., when the latter words are words of purchase, 5 T. R. 358.—2. A younger brother claiming by descent, must prove not only the death of his elder brother, but that there are no lawful issue. 15 East, 294.—3. Where the plaintiff claims as the collateral heir, it is by no means a settled point, whether evidence of a reputed relationship, without any actual proof thereof, will not be sufficient, when the claimant and person last seised are many descents from their common ancestor. 2 Blk. 1099.

(A) ~~What~~

## (A) What shall be.

By the st. 1 El. 1. no determination, &c. for any matter of religion, or cause ecclesiastical, made by authority of that present parliament, shall be deemed, or adjudged heresy, schism, or schismatical opinion.

And persons, to whom the queen, her heirs or successors, shall by letters patent, &c. give authority to correct, &c. errors, heresies, &c. shall not have authority to determine or adjudge any matter heresy, but such as heretofore hath been adjudged heresy by the authority of the canonical scriptures, or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy by the express and plain words of the canonical scriptures, or such as shall hereafter be adjudged heresy by parliament with assent of the clergy in convocation.

But no statute determines what shall be heresy. H. P. C. 3.

The st. 2 H. 4. 15. (which is now repealed) calls opinions contrary to the catholic faith, and determination of holy church, heretical opinions.

The st. 31 H. 8. 14. enacts, that a maintainer of an opinion against the first of the six articles shall be adjudged an heretic; and the st. 34 H. 1. if he maintain any thing against the instructions or determinations of the king made or to be made, for the third offence. — But these are now repealed.

By the canon law he was held an heretic, *qui docet aut sentit de articulis fidei aut sacrament. aliter quam sancta ecclesia*. Lind. 299. V. Declarentur.

*Vel per quosdam, contra doctrinam ecclesiæ licet non in articulis fidei*. Lind. 292, 293.

*Per alios, qui errat in expositione sacræ scripturæ, aut contemnit servare quod ecclesia statuit*. Lind. 292.

By the divines, heresy is nothing else but a doctrine repugnant to some article of the christian faith, and such is plain and formal heresy. Chillingworth, 199.

By the common law, heresy is, *malvies et faux crime ou error en droit foy christian*. Mir. 22.

## (B) How punished.

(B 1.) Who have conusance of heresy: — Convocation.

By the common law, a conviction for heresy was before the archbishops and bishops in a general synod. H. P. C. 5.

And therefore, the archbishop and his province in convocation may and use to convict for heresy by the common law. F. N. B. 269. D. Bro. Heresy, 1. 12 Co. 56.

And the conviction was by the archbishop *de consensu et assensu ac consilio episcoporum, et confratrum suffragantium suorum, necnon totius cleri provincie suæ in concilio suo provinciali congregat*. Vide Breve de Hæret. Comb. F. N. B. 269. C.

And therefore, the convocation has jurisdiction of heresy. 4 Inst. 322.

And may issue a citation against the offender. Keil. 182. b.

In

In a cause of heresy, the convocation proceeds *juxta legem divinam et canones sanctæ ecclesiæ*. 4 Inst. 322.

(B 2.) Archbishop.

So, the archbishop, as ordinary, has jurisdiction of heresy.

So, where, upon default or assent of the ordinary, the cause is transmitted to the archbishop pursuant to the st. 23 H. 8. 9. H. P. C. 5.

(B 3.) Other ordinary.

So, by the common law, the ordinary may proceed against an heretic within his diocese *pro salute animæ*. 12 Co. 57. H. P. C. 5.

So, by the st. 2 H. 4. 15. the ordinary in his own diocese might cause any suspected of heresy to be arrested and detained in custody till he had purged himself or recanted; and by himself or commissaries might proceed judicially against him, and in three months after arrest determine the same according to the order of the canon law.

By the st. 2 H. 5. 7. persons indicted for heresy before justices of B. R., of assise, or peace, and thereon taken by *capias*, shall be delivered to the ordinary of the place, or their commissaries by indictment in ten days after arrest, to be by them acquitted, or convicted of the said heresies according to the laws of holy church. Provided such indictment be not taken in evidence but only for information by the judges spiritual, and that the ordinary shall begin his process in the same manner, as if no such indictment were.

By the st. 31 H. 8. 14. commissioners shall be awarded to the bishop of the diocese, his chancellor and commissary, &c. to inquire of the heresy mentioned in that act.

And by the st. 32 H. 8. 15. such commissions shall comprehend archdeacons and their officials by their names of office and dignity, and not by their christian and surnames.

By the st. 35 H. 8. 5. none shall be tried for heresy, &c. by the six articles in st. 31 H. 8. 14. but on accusation by the oath of twelve men, or indictment before commissioners.

By the st. 25 H. 8. 14. (which repeals the st. 2 H. 4. 15.) a person indicted for heresy, or accused by two witnesses, may be cited and committed by the ordinary to answer in open court, &c.

But by the st. 1 E. 6. 12. the statutes 2 H. 5. 7. and 31 H. 8. 14. are repealed by express words, and by the general words 'all acts of parliament concerning religion or opinions,' the statutes 2 H. 4. 15. and 32 H. 8. 15. are repealed also. — So, by the express words, the statutes after mentioned: 5 R. 2. 5. 25 H. 8. 14. 34 H. 8. 1. and 35 H. 8. 5. are now repealed. 12 Co. 57. Vide post, (B 6.)

By the st. 13 Car. 2. 12. (which repeals the whole st. 16 Car. 1. 11. except so much as relates to the high commission court, (the archbishop, bishop, &c. may determine, exercise, &c. all ecclesiastical jurisdiction, and all censures, coercions, &c. belonging to the same before the st. 16 Car. 1. and in all causes, &c. according to the king's ecclesiastical laws.

And by the st. 29 Car. 2. 9. (which takes away the writ *de hæretico comburendo*) nothing in that act shall extend to take away or abridge the

the jurisdiction of the protestant archbishops, bishops, &c. in cases of atheism, blasphemy, heresy, or schism, &c. but that they may proceed to punish the same according to the king's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death, in such sort, and other, as they might have done before the said act.

#### (B 4.) Temporal judge.

By the st. 2 H. 5. 7. (which is now repealed) the justices of B. R. assise, or of the peace, might inquire of all heresies, &c. and on indictment for such offence might award a *capias*, and, when the party was taken, deliver him to the ordinary, &c.

By the st. 31 H. 8. 14. commissioners were to be awarded to justices of peace, stewards of leets, under-stewards, &c. to inquire of all heresies, felonies, &c. by that act; but this also is now repealed.

By the st. 25 H. 8. 14. sheriffs in turns, and stewards in leets, might inquire of heretics, and the presentment in the turn or leet was to be certified to the ordinary. But this act also is now repealed.

So, by the st. 1 El. 1. the queen by letters patent might authorise such persons being natural-born subjects, as he should think fit, &c. to redress, &c. all such errors, heresies, &c. as by any ecclesiastical authority, &c. might be lawfully reformed.

And thereupon the commissioners had conusance of heresy.

But now, by the st. 16 Car. 1. 11. this clause of the st. 1 El. &c. shall be repealed.

#### (B 5.) Who have not conusance.

But, generally, heresy could not be tried by the temporal judge, by indictment, or otherwise. H. P. C. 4. 27 H. 8. 14. b.

For by the st. *circ. agatis*, 13 Ed. 1. court christian is allowed conusance *de his quæ sunt mere spiritualia*, which are, heresy, schism, &c. 2 Inst. 488.

Yet, the temporal judge may take conusance, what offence is not heresy, and shall adjudge thereon, whether it be heresy or not. H. P. C. 4. 1 Rol. 110.

So, if an indictment be found for heresy, the judge may certify to the ordinary, and the indictment shall be evidence against the indictee. 27 H. 8. 14. b.

#### (B 6.) What penalty shall be inflicted.

By the common law, the punishment of heresy before the ordinary was only by ecclesiastical censures. 12 Co. 57.

And no forfeiture was incurred thereby; for the prosecution was intended only *pro salute animæ*. H. P. C. 5.

And the writ *de hæretico comburendo* does not lie upon it; for the law does not allow the destruction of the life of a man upon a conviction before a single judge. Semb. cont. F. N. B. 269. C. acc. 12 Co. 57. Cert. cont. by some judges, but said, that it was clearly acc. 12 Co. 93. Bract. lib. 3. c. 9. fo. 123, 124.

Mir. 22. only says, that an heretic is removable from the community

nity of the holy people of God; and Britt. c. 9. says, that miscreants are burnt, but does not say how convicted. And the writ *de hæretico comb.* speaks only of an heretick convicted by the archbishop in convocation; with which Fitzh. agrees. F. N. B. 269. C. D.

But by the st. 5 R. 2. 5. commissions might be directed to sheriffs, &c. to imprison such whom the ordinary should certify to be heretics, till they justified themselves according to the laws of holy church. — But to this statute the commons never assented. 12 Co. 57, 58.

So, by the common law, a man convicted of heresy by the archbishop in his provincial synod, or convocation, might be burnt by the writ *de hæretico comburendo*, if he had abjured before, and was then relapsed. F. N. B. 269. B. C. D.

So, upon the first conviction, if he refuse abjuration; otherwise, if he will abjure. Fitz. says, he ought to be first convicted and abjured. F. N. B. 269. B. But per Bro. it is sufficient that he refuse abjuration. Bro. Heresy, 1. There is a *qu.* in the margin. Vide the st. 2 H. 4. 15. *Qu.* 12 Co. 58.

Yet, Sawtre seems to be the first man burnt for heresy in England, and the writ *de hæret. comburendo* formed in his case. Fox's Martyr, 502. (8th edition 675.) F. N. B. 269. C.

By the st. 2 H. 4. 15. the ordinary might keep a convict in any of his own prisons as long as he thought fit, and might fine, &c.; or, if he refuse to abjure, or after abjuration relapse, (in which case by the canon law he ought to be left to the secular power,) the sheriff, mayor, &c. who should be present, if required, with the ordinary, or his commissary, at giving sentence, should take the convict, and cause him to be openly burned. Vide the st. printed, Fox, M. 507. (8th edition 682.)

By this statute, if the sheriff was present, he might burn him without the writ *de hæretico comburendo*. R. Bro. Heresy, 1. 12 Co. 56. F. N. B. 269. D.

Otherwise, if the sheriff, &c. was absent at the sentence. Bro. Heresy, 1. 12 Co. 56.

And by the st. 25 H. 8. 14. (which repeals the st. 2 H. 4. 15.) upon a conviction before the ordinary, there must be the writ *de hæretico comburendo*. F. N. B. 269. D. 12 Co. 57.

By the st. 2 H. 5. 7. a convict of heresy was to forfeit his lands in fee, and all his goods and chattels. Vide Fox, M. 549. (8th edition 742.)

By the st. 34 H. 8. 1. he was to forfeit his goods and chattels for heresy by that act.

By the st. 25 H. 8. 14. a convict, if he refuse to abjure, or after relapse, was to be burnt: and this statute repeals the 2 H. 4. 15.

Then, by the express words of the st. 1 Ed. 6. 12. the statutes 5 R. 2. 5. 2 H. 5. 7. 25 H. 8. 14. 31 H. 8. 14. 34 H. 8. 1. and 35 H. 8. 5. are repealed; and by the general words, *all statutes concerning religion or opinions*, the st. 2 H. 4. 15. (which was revived by the repeal of the st. 25 H. 8. 14.) and the st. 32 H. 8. 10. 15. are also repealed. But by the st. 1 & 2 Ph. & M. 6. the statutes 5 R. 2. 5., 2 H. 4. 15. and 2 H. 5. 7. were revived; and afterwards repealed by the st. 1 El. 1. 12 Co. 57.

And so the writ *de hæretico comburendo* did not lie upon a conviction before



before the ordinary, but only upon a conviction before the archbishop in his provincial synod, or convocation. 12 Co. 57.

Or, upon a conviction before high commissioners. 12 Co. 58.

But now, by the st. 29 Car. 2. 9. the writ *de hæretico comburendo*, with all process thereon in order to execute such writ, and all punishment by death in pursuance of any ecclesiastical censure, shall be utterly abolished.

And before the st. 2 H. 4. 15. if an heretic condemned was left to the secular power, the king might pardon him if he pleased. F. N. B. 269. b.

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## HERIOT.

Vide COPYHOLD, (K 18, &c.)

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## HIGH CHAMBERLAIN.

Vide OFFICER, (E 7.)

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## HIGH CHANCELLOR.

Vide CHANCERY, (B 1.) — JUSTICES, (K 8.)

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## HIGH CONSTABLE.

Vide OFFICER, (E 2.)

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## HIGH STEWARD.

Vide OFFICER, (E 4, &c.)

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## HIGH TREASON.

Vide FORFEITURE, (B 1, 2.) — JUSTICES, (K 1, &c. — X 1. — Y 3.)  
UTLAGARY, (D 1.)

HIGH

## HIGH TREASURER.

Vide OFFICER, (E 1.) — JUSTICES, (K 8.)

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## HIGH-WAY.

Vide CHIMIN, (A 1, &c. — B 1, &c. — C 1, &c.)

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## HOLY ORDERS.

Vide PARSON, (B 1.)

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## HOMAGE.

(A) By what tenures land is holden. p. [452.]

(B) What are taken away. p. 449.

(C 1.) Homage, what. p. 449.

(C 2.) Homage ancestrel. p. 450.

(D) Fealty. p. 450.

(E) Escuage. p. 450.

(F) Grand serjeanty. p. 451.

(G 1.) Knight's service. p. 451.

(G 2.) What incidents belong to it. p. 452.

(G 3.) Remedy for these incidents. p. 455.

(G 4.) Who is compellable to be a knight. p. 456.

(H) Socage. p. 456.

## (A) By what tenures land is holden.

All lands in England are holden mediately or immediately (a) of the king by some tenure, or service. Co. L. 1. 2 Inst. 501. Vide Tenure, (A) (b)

Every tenure is (c) spiritual; as, by frankalmoigne.

Or

(a) Tenants that hold immediately from the king, in right of his crown and dignity, are called his tenants *in capita*, or in chief, which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did. 2 Blk. Com. 60.

(b) 1. 24 Ed. 3. 65. — 2. The introduction of the feudal tenures into England, has been ascribed to William the Conqueror and his Norman barons. 2 Blk. Com. 48. — 3. This point has been ably disputed; and one of the latest writers of authority, Gilbert Stuart, asserts that they were familiar to the Anglo-Saxons. His reasoning is very powerful: It cannot be true, says he, that the Saxons, who settled in England, were strangers to fiefs. For, in this case, they must have renounced the manners to which they had been accustomed in Germany. They must have yielded to views different from all the other Gothic tribes who made conquests. They must have adopted new and peculiar customs. And history has not remarked these deviations and this dissimilarity. It cannot be true, that William the Norman introduced fiefs into England. The introduction of a system so repugnant to all the institutions which usually govern man; which was to force into an uncommon direction both government and property; which was to hold out new maxims in public and private life; which was to affect, in a particular manner, inheritances and estates; to give a peculiar form to justice and courts; to change the royal palace, and the households of gentlemen; to overturn whatever was fixed and established in customs and usages; to innovate all the natural modes of thinking and of acting; could not possibly be the operation of one man, and of one reign. The hereditary grant, as well as the grant in all its preceding fluctuations, was known to our Saxon ancestors. Of this, the conformity of manners which must necessarily have prevailed between the Saxons, and all the other conquering tribes of the barbarians, is a most powerful and a satisfactory argument. Nor it is single and unsupported. History and law come in aid of analogy; and these things are proved by the spirit and text of the Anglo-Saxon laws, and by actual grants of hereditary estates under military service. View of Society in Europe, 93. — 4. It is, he continues, at the same time; not less true, that the state of fiefs in England, under William the Norman, differed most essentially from their condition among the Anglo-Saxons. The writers, therefore, who contend that they existed in the ages previous to Duke William, in the same form in which they appeared after his advancement to the crown, are mistaken. For, under the Anglo-Saxon princes, no mention is made of those feudal severities, which were to shake the throne under William and his successors. Yet fiefs, under the Anglo-Saxons, in every step of their progression, must have been connected with those feudal incidents which were the sources of those severities. Id. 94.

(c) 1. There seems, says Sir William Blackstone, to have existed among our ancestors, four principal species of lay tenures, to which all others may be reduced; the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. 2 Com. 60. — 2. The services in respect of their quality, were either free or base services; in respect of their quantity and the time of exacting them, were either certain or uncertain. Ibid. — 3. Free services were such as were not unbecoming the character of a soldier, or a freeman, to perform; as to serve under his lord in the wars, to pay a sum of money, or the like. Base services were such as were fit only for peasants, or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. Id. 61. — 4. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated

Or temporal; as homage, fealty, escuage, grand or petit serjeanty, knight's service, and socage. Co. L. 64.

To which may be added, tenures in burgage, and villenage. Co. L. 64.

### (B) What are taken away.

But by the st. 12 Car. 2. 24. all tenures by homage, escuage, voyages royal, and charges incident to the same, by knight's service of the king or a common person, by knight's service or socage *in capite*, and all wardships, liveries, *primer seisins*, *ouster-le-mains*, values and forfeitures of marriage, mean rates, fines for alienation, pardons and seizures for alienation, *aide pur faire fitz chivaler, et file marier*, and all charges incident to or arising from any of them be taken away: and all tenures turned into free and common socage.

And all tenures created by the king for the future shall be common socage, notwithstanding any reservation, &c.

### (C 1.) Homage, what.

Homage is the most honourable and humble service that a freeholder can do to his lord. Litt. S. 85.

If a layman does homage, he being ungirt and uncovered shall kneel before his lord, when sitting, and shall hold his hands between the hands of the lord, and shall say, I become your man of life and limb, and will be faithful and loyal to you for the tenements which I claim to hold of you, saving the faith which I owe to our lord the king; and then the lord so sitting shall kiss him. Lit. S. 85.

If an abbot or other man of religion, or a *fême sole* does homage, they do not say, I become your man or woman, &c. but I do homage to you, and will be faithful, &c. Lit. S. 86, 87.

If a woman who holds by homage, takes husband, before issue the husband and wife shall do homage, and the husband shall say, We do homage to you, and will be faithful, &c. Lit. S. 88. C. L. 66. a.

After issue the husband alone in the life of his wife shall do homage. Lit. S. 90.

If there are co-heirs, who hold of the king and are of full age, each of them shall do homage. Co. L. 67. a.

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stated annual rent, or to plough such a field for three days. Ibid. — 5. The uncertain depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villen service. Ibid. — 6. From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the last century, and three of which subsist to this day. The first kind was, where the service was free but uncertain, as military service with homage; that tenure was called the tenure in chivalry, *per servicium militie*, or by knight-service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c. that tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements; the others were villenous, or servile: as, thirdly, where the service was base in its nature, but uncertain, as to time and quantity, the tenure was *patrum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the certainty of its services) but degraded by their baseness into the inferior title of *villanum socagium*, villen socage. Id. 61, 62.

If they are within age, or hold of a common person, the eldest shall do homage for herself and her sisters. Co. L. 67. a.

### (C 2.) Homage ancestrel.

If a tenant and his ancestors time out of mind, &c. have held their tenements by homage of the lord and his ancestors, and have done homage, it shall be called, homage ancestrel. Lit. S. 143.

### (D) Fealty.

Fealty is a service, which every tenant ought to pay to his lord, except tenant in frankalmoigne. Co. L. 67. b. 95. b.

Though he be only tenant for life, or years. Lit. S. 93. Co. L. 67. b.

Though he be tenant in frankmarriage. Lit. S. 138.

So, if tenant in frankalmoigne alien to a secular man, he shall do fealty. Lit. S. 139.

A freeholder, when he does fealty, swears to be faithful and loyal to his lord for the tenements which he claims to hold of him, and to do the customs and services which he ought to do at the terms assigned. Lit. S. 91.

A villein swears, that he will be faithful and loyal, &c. and will be justified by him in body and goods. Co. L. 68. a.

And fealty may be done to the steward or bailiff, as well as to the lord himself. Lit. S. 92.

But fealty must be done in person, and not by attorney. Co. L. 68.

### (E) Escuage.

He that holds his land by escuage, holds by knight's service. Lit. S. 95. (d)

### (F) Grand

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(d) 1. The services, both of chivalry proper, and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination of money: and, in like manner, it was called, in our Norman French, escuage; being indeed a pecuniary, instead of a military service. 2 Com. 74. — 2. The first time this appears to have been taken was in the 5 Hen. 2., on account of his expedition to Toulouse; but it soon came to be universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period when our kings went to war, they levied *scutages* on their tenants, that is, on all the landholders in the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry 2., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent by his Magna Charta, that no *scutage* should be imposed without consent of parliament. But this clause was omitted in his son Henry 3.'s charter; where we only find, that *scutages* or *escuage* should be taken as they were used to be taken in the time of Henry 2.; that is in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. 1. c. 5 & 6. and many subsequent statutes it enacted, that the king should take no aids or tasks but by the common assent of the realm. Hence it is held in our old books, that *escuage* or *scutage* could not be levied but by consent of parliament; such *scutages* being indeed the groundwork of all suc-  
ceeding



## (F) Grand serjeanty.

Grand serjeanty is, when a man holds lands to do a special service in his person to the king: as, to carry the king's banner, lance, &c. Lit. S. 153.

Or, to be his marshal, or conductor of his army. Lit. S. 153.

To be sewer, carver, butler, &c. to the king at his coronation. Lit. S. 153.

To carry his sword before him at his coronation. Lit. S. 153.

To be chamberlain of the receipt of the king's exchequer. Lit. S. 153.

Or to be chamberlain, steward, constable, &c. of England. Co. L. 106. Dy. 285. b. (e)

## (G 1.) Knight's service.

The service of chivalry (*f*) is, (*g*) when land is given to another *tenendum per servitium unius militis*, or without rendering other service; for then the tenure shall be of the king by knight's service *in capite*. Wri. Int. 140.

And if the tenure be by homage, fealty, and escuage, that is a tenure by knight's service. Lit. S. 103. (*h*)

### (G 2.) What

ceeding subsidies, and the land-tax of later times. 2 Com. 75. — 3. Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight service: that is, that this tenure (being subservient to the military policy of the nation) was respected as a tenure in chivalry. But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure instead of knight-service would then have been of another kind, called socage. Ibid.

(*e*) To wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects. 2 Com. 74. Lit. s. 156.

(*f*) *Servitium militare*, in Latin; chivalry, *service de chevalier*, in law French, answering to the *fief d'haubert* of the Normans. 2 Com. 62.

(*g*) 1. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the value of which, not only in the reign of Edward 2., but also of Henry 2., and therefore probably at its original, in the reign of the Conqueror, was stated at 20*l.* per annum; and a certain number of these knight's fees were requisite to make up a barony. 2 Com. 62. — 2. He who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars, for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. Ibid.

(*h*) 1. The description here given is that of knight-service proper; which was to attend the king in his wars. 2 Com. 73. — 2. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by grand serjeanty, per *magnum servitium*, whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like, or to be his butler, champion, or other officer, at his coronation. Ibid. — 3. It was in most other respects like knight-service; only he was not bound to pay aid, or escuage; and when tenant by knight-service paid five pounds for a relief on every

## (G 2.) What incidents belong to it.

Tenure in chivalry draws to it ward, marriage, and relief. (i) Lit. S. 103.

So homage, fealty, and escuage are incident to such a tenure. Co. L. 76. a.

So aid (k) to the king *pur faire fitz chivaler, or file marrier.* (l)

For

knight's fee, tenant, by grand serjeanty paid one year's value of his land, were it much or little. 2 Com. 74. — 4. So tenure by cornage, which was, to sound a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty. Ibid.

(i) 1. Relief, *relevium*, was by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. 2 Com. 65. — 2. But, though reliefs had their original while feuds were only life estates, yet they continued after feuds became hereditary, and were therefore looked upon, very justly, as one of the greatest grievances of tenure; especially when, at the first, they were merely arbitrary, and at the will of the lord; so that if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir. Ibid. Wryght, 99. — 3. The English ill brooked this consequence of their new adopted policy; and, therefore, William the Conqueror by his laws ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war should be paid by the earls, barons, and vavasours respectively; and, if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal law; thereby, in effect, obliging every heir to new purchase, or redeem his lands; but his brother, Henry I., by his charter, restored his father's law, and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption. But, afterwards, when by an ordinance in 27 H. 2., called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm: and it thereby became impracticable to pay those acknowledgments in arms, according to the laws of the Conqueror, the composition was universally accepted of 100s. for every knight's fee; as we find it ever after established. 2 Com. 66. — 4. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one-and-twenty years. Ibid.

(k) 1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; but in process of time they grew to be considered as a matter of right, and not of discretion. 2 Com. 63. — 2. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity; insomuch, that the neglect of doing it, wherever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate. Ibid. Feud. l. 2. t. 24. — 3. Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms; the intention of it being to breed up the eldest son and heir apparent of the seignior, to deeds of arms and chivalry, for the better defence of the nation. 2 Com. 63. 2 Inst. 233. — 4. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion. 2 Com. 63. — 5. But, besides these ancient feudal aids, the tyranny of lords by degrees enacted more and more; as, aids to pay the lords' debts, and aids to enable him to pay aids or reliefs to his superior lord; from which last, indeed, the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. 2 Com. 64. — 6. To prevent this abuse, King John's magna charta ordained, that no aids be taken by the king without consent parliament, nor in any wise by inferior lords, save only the three ancient ones abovementioned. Ibid. — 7. This provision, however, was omitted in Henry 3.'s charter, and the same oppressions were continued till the 25 Ed. 1., when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the antient aids should be taken. Ibid. — 8. But though the species of aids were thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter, indeed, ordered, that all aids taken by inferior lords should be reasonable; and that the aids taken by the king of his tenants *in capite* should be settled by parliament. But they were never completely ascertained and adjusted till the stat. Westm. 1., 3 Edw. 1. c. 36., which fixed the aids of inferior lords

at

For if tenant by chivalry dies, his heir male within age, his lord shall have the ward (*m*) of the heir till his age of twenty-one years (*n*):  
and

at 20s., or the supposed twentieth part of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the king's tenants *in capite* by st. 25 Edw. 3. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained. 2 Com. 65.

(*l*) 1. *Primer seisin*, another incident, was incident only to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. 2 Com. 66. — 2. It was a right which the knight had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life. Ibid. — 3. This seems to be little more than an additional relief; but grounded upon the feudal reason, that by the antient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; and for the time the lord so held it, he was entitled to take the profits; and unless the heir claimed within a year and a day, it was by the strict law a forfeiture. This practice, however, seems not to have long obtained in England, if ever, with regard to tenures under inferior lords; but as to the king's tenures *in capite*, this *prima seisin* was expressly declared, under Henry 3. and Edw. 2., to belong to the king by prerogative, in contradistinction to other lands. And the king was entitled to enter and receive the whole profits of the land, till livery was sued; which suit, being commonly within a year and day next after the death of the tenant, therefore the king used to take at an average the first-fruits, that is to say, one year's profits of the land. And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiæ*, or first-fruits. 2 Com. 67. — 4. Another incident of knight-service, was that of *finés of alienation*, due to the lord whenever the tenant had occasion to make over his land to another. Ibid. — 5. This depended on the nature of the feudal connection; it not being reasonable nor allowed, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord; and, as the feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an attornment. 2 Com. 72. — 6. With us in England, these *finés* seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence; but, as to common persons, they were at liberty by Magna Charta, and the statute of *quia emptores*, if not earlier, to aliene the whole of their estate, to be holden of the same lord, as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence; for if they did, it was in antient strictness an absolute forfeiture of the land, though some have imagined otherwise. But this severity was mitigated by the stat. 1 Edw. 3. c. 12., which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation; but, if the tenant presumed to aliene without a licence, a full year's value should be paid. 2 Com. 72. — 7. The last incident to tenure in chivalry was *escheat*, which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee; that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it. 2 Com. 73.

(*m*) This wardship consisted in having the custody of the body and lands of such heir,

and if the heir be female he shall have the ward of her till her age of fourteen. (o) And by the st. W. 1. 22. till her age of sixteen years (p); and if such heir be not married, the lord shall have the marriage (q) also of such heir male or female. Lit. S. 103.

If

heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. 2 Com. 67.

(n) For until that age, the heir-male was supposed to be unable to perform knight service. 2 Com. 67.

(o) Who was supposed capable at fourteen to marry, and then her husband might perform the service. 2 Com. 67.

(p) 1. When the male-heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *ouster-le-main*; that is, the delivery of their lands out of their guardians' hands. 2 Com. 68. Co. Litt. 76. — 2. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to Magna Charta. 2 Com. 68. — 3. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins. Id. Co. Litt. 77. — 4. In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came, in process of time, to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry 7., that by colour of false inquisition, they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto. 2 Com. 69. 4 Inst. 198. — 4. And, afterwards, a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner. 2 Com. 69. St. 32 H. 8. c. 46.

(q) 1. Marriage (*maritagium*, as contradistinguished from *matrimonium*) in its feudal sense, signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or inequality; which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian; that is, so much as a jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance; and if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*. 2 Com. 70. — 2. This seems to have been one of the greatest hardships of our ancient tenures. There are, indeed, substantial reasons why the lord should have the restraint and controul of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy. But no tolerable pretence can be assigned why the lord should have the sale or value of the marriage. 2 Com. 7. Bract. l. 2. c. 37. s. 6. — 3. Nor, indeed, is the claim of strictly feudal original; the most probable account of it seeming to be this; that, by the custom of Normandy, the lord's consent was necessary to the marriage of his female ward; which was introduced into England, together with the rest of the Norman doctrine of feuds; and it is likely that the lords usually took money for such their consent, since, in the charter of Henry 1st., he engages for the future to take nothing for his consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate suâ*. But these provisions in behalf of the relations were omitted in the charter of Henry 3., wherein the clause stands merely thus, *hæredes maritentur absque disparagatione*; meaning, certainly, by *hæredes*, heirs-female, as there are no traces before this to be found of the lord's claiming the marriage of heirs-male; and, as Glanville expressly confines it, to heirs-female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, *sive sit masculus sive femina*, as Bracton,

more



If the heir male be of full age, or the female of the age of fourteen, at the death of the ancestor, they shall not be in ward, but shall pay relief to the lord. Lit. S. 103.

By the st. 32 H. 8. 1. and 34 H. 8. 5. He which holdeth lands by knight's service may, by act executed in his life-time, or by his last will in writing, dispose of two parts thereof. But the lord's wardship of the third part is saved. (Vide Co. L. 76. a.)

By the st. of Marl. 6. If a father enfeoff his son, the lord shall not lose his wardship. 2 Inst. 109.

So, if the grandfather, after the death of the father, enfeoff his son, or any descendant in a right line. 2 Cro. 157.

Or, if the father was alive, but dies in the life of the grandfather. 2 Cro. 157.

So, if there be a term for years to pay the debts of the father, and he grants the reversion to a stranger. R. 2 Cro. 157.

Otherwise, if the father survive the grandfather, for then he was not heir. 2 Cro. 157.

### (G 3.) Remedy for these incidents.

After the death of the king's tenant, who holds *in capite* by knight's service or socage, or who holds of a bishop by knight's service, when the temporalities are in the king's hands, &c. The escheator *ex officio*, or upon a writ of *diem clausit extremum*, within the year, or upon a writ of *mandamus* afterwards, may inquire what lands the tenant had at his death, and of what value, who was his heir, and of what age. F. N. B. 252, 253. Ley, Livery, 20. Vide Guardian, (H. 1. &c.)

An inquisition *ex officio* if it be uncertain, shall be void; if taken upon the writ of *diem clausit extremum*, and it is defective, there shall be a *melius inquirendum*. F. N. B. 255.

If any lands are omitted, there shall be a writ of *quæ plura*. F. N. B. 255. Ley, Livery, 20.

So the heir upon the death of his ancestor may sue a special commission to inquire *ut supra*, which shall be of the same effect as an inquisition upon a writ of *diem clausit extremum*. F. N. B. 253. D.

If the escheator die, or be removed after the writ of *diem clausit extremum* before inquisition taken, there shall be another writ of the same nature called, *datum est nobis intelligi*. F. N. B. 253.

If after inquisition and before return, it shall be transmitted by *certiorari*. F. N. B. 253.

If the heir be found by the office, within age, he ought to have an *ætate probanda* before livery. Ley, Livery, 21. F. N. B. 253. 254.

If he be of full age, and so found, he may sue livery without the writ of *ætate probanda*. Ley, Livery, 20.

Otherwise, if found within age, though in truth he was of full age. Ley, Wards and Liveries, 27.

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more than once expresses it; and also, as nothing but disparagement was restrained by Magna Charta, they thought themselves at liberty to make all other advantages that they could. And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton. 8 Com. 71.



## (G 4.) Who is compellable to be a knight.

The king could compel a man that had an inheritance of 40*l.* per annum, to be a knight, or that he should be fined. 2 Rol. 167. l. 20. 45.

So every one, who had 20*l.* per annum, or *integrum feodum militis valens* 20*l.* per annum. 2 Rol. 167. l. 50. 168. l. 37.

Though it was land of socage tenure. 2 Rol. 168. l. 35.

And if he would be not a knight, the king could command the sheriff to distrain for the fine. 2 Rol. 167. l. 41. 46.

But by the st. 1 Ed. 2. a man, who had 20*l.* per annum in antient demesne as sokeman, was not distrainable to be a knight. 2 Rol. 168. l. 27.

And now, by the st. 16 Car. 1. 20. no person shall be destrained, or compelled, &c. to take on him the order of knighthood, or suffer any fine, trouble, &c. And all process, &c. for that intent shall be void.

## (H) Socage.

Tenure by socage (*r*) is, (*s*) where a man holds lands by fealty and rent, or any other service, not being knight's service, for all manner of services. Lit. S. 117.

Or, by homage, fealty, and rent; for homage by itself does not make knight's service. Lit. S. 117.

(*r*) 1. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. 2 Com. 79. — 2. And, in this sense, it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Ibid. — 3. Thus Bracton, if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service, or escuage to any, the smallest, amount, "*illud dici poterit feodum militare*." L. 2. c. 16. s. 9. 2 Com. 79. — 4. So to the author of Fleta; "*ex donationibus, servitia militaria vel magnæ serjantie non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." L. 3. c. 14. s. 9. 2 Com. 79. — 5. Littleton also defined it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. S. 117. 2 Com. 79. — 6. And, therefore, afterwards he tells us, that whatsoever is not tenure in chivalry, is tenure in socage. c. 118. — 7. In like manner, as it is defined by Finch, a tenure to be done out of war. L. 147. — 8. The service must therefore be certain, in order to denominate it socage; as to hold by fealty, and 20*s.* rent; or, by homage, fealty, and 20*s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land, and for three days; or, by fealty only without any other service: for all these are tenures in socage. Litt. s. 117, 118, 119.

(*s*) 1. Socage is of two sorts: free-socage, where the services are not only certain, but honourable; and villein-socage, where the services, though certain, are of a baser nature. 2 Com. 79. — 2. Such as hold by the former tenure, are called in Glanvil, and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Ibid. — 3. And this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And, therefore, Sir William Blackstone assents to Mr. Sommer's etymology of the word; who derives it from the Saxon appellation, *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called socage, in Latin *socagium*; signifying thereby a free or privileged tenure. And he adds, that this etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service. But that this by no means agrees with what Littleton himself tells us, that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly

plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage itself, which while it remained 'uncertain, was equivalent to knight-service) the instant they were reduced to a certainty, changed both their name and nature, and were called socage. It was the certainty, therefore, that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore, also Britton, who describes socage tenure under the nature of *fraunke ferme*, tells us, that they are "lands and tenements, whereof the nature of the fee is changed by feoffment, out of chivalry for certain yearly services, and, in respect whereof, neither homage, ward, marriage, nor relief can be demanded." Which leads also to another observation, that if socage tenure were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edw. 1. and Cha. 2., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunke ferme*, or tenure by socage. We may, therefore, he concludes, fairly side in favour of Sommer's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself. 2 Com. 80, 81. — 4. It seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman Conqueror, is a fact universally known. And those who thus preserved their liberties were said to hold in free and common socage. 2 Com. 81. — 5. As, therefore, the grand criterion and distinguishing mark of this species of tenure, are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties; and, in particular, petit serjeanty, tenure in burgage, and gavelkind. 2 Com. 81. — 6. By the stat. 12 Car. 2., grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services, (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation,) are still reserved. Now, petit serjeanty bears a great resemblance to grand serjeanty; for as one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton, consists in holding lands of the king, by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says, is but socage in effect; for it is no personal service, but a certain rent; and, we may add, it is clearly no predial service, or service of the plough, but, in all respects, *liberum et commune socagium*; only, being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And Magna Charta respects it in this light, when it enacts, that no wardship of the lands or body shall be claimed by the king in virtue of a tenure by petit serjeanty. 2 Com. 82. — 7. However this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure, with those of tenure in chivalry; remarking their agreement or difference as we go along. 2 Com. 16. — 8. 1°. In the first place, then, both were held of the superior lords; of the king, as lord paramount, and sometimes of a subject of mesne lord between the king and the tenant. Ibid. — 9. 2°. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though, perhaps, nothing more than bare fealty,) and so continues to this day. Ibid. — 10. 3°. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton, that if it be neglected, it will, by long continuance of time, grow out of memory (as, doubtless, it frequently has) whether the land be holden of the lord or not; and so he may lose his seignior, and the profit which may accrue to him by escheats and other contingencies. Ibid. — 11. 4°. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter; which were fixed by the statute Westm. 1. c. 36. at 20s. for every 20l. per annum so held, as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right, but were all abolished

abolished by the statute 12 Car. 2. 2 Com. 87. — 12. 5°. Relief is due upon socage tenure, as well as upon tenure in chivalry; but the manner of taking it is very different. The relief of a knight fee was 5*l.*, or one quarter of the supposed value of the land; but a socage of relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small; and, therefore, Bracton will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini*. So too the stat. 28 Edw. 1. c. 1. declares, that a free sokeman shall give no relief; but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due, even though the heir was under age, because the lord has no wardship over him. The statute of Charles 2. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of the tenant. Ibid. — 13. 6°. *Primer seisin* was incident to the king's socage tenants *in capite*, as well as to those by knight-service. But tenancy *in capite* as well as *primer seisin*, are also, among the other feudal burthens, entirely abolished by the statute. Ibid. — 14. 7°. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor never did, belong to the lord of the fee; because, in this tenure no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant: but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries. At fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits: for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of render or service, that the socage tenures, had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty-one, they might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same stat. 12 Car. 2. c. 24. enacted, that it should be in the power of any father by will, to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin. 2 Com. 88. — 15. 8°. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage. For the law, in favour of infants, is always jealous of guardians, and therefore in this case it made them account, not only for what they did, but also for what they might, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but, the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of Edward's laws that were restored by Henry the first's charter, as might alone convince us that socage was of a higher original than the Norman conquest. 2 Com. 89. — 16. 9°. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them, speak generally of all tenants *in capite*, without making any distinction: though now all fines for alienation are demolished by the statute of Car. 2. Ibid. — 17. 10°. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are escheats for want of heirs. Ibid. — 18. Under these two grand species of tenure, almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage.

## HOMICIDE.

Vide APPEAL, (A 1.)—JUSTICES, (M 1, &c. 14. 18. &c. 20.)

## HOMINE REPLEGIANDO.

Vide IMPRISONMENT, (L 4.)

## HONOUR.

## (A) Honour, what shall be.

An honour (a) ought to consist of lands, liberties, and franchises.  
1 Bul. 197. 2 Rol. 72. l. 48.

And it is the most noble seigniory. Co. L. 108. a.

So one or more manors may be parcel of an honour. 2 Rol. 72.  
l. 45. Vide Grant, (E 4.)

So a forest may be appendant to it. 2 Rol. 73. l. 3.

An honour originally shall be created by the king. Co. L. 108. a.

Every honour must be holden of the king. R. 1 Bul. 195.

And if it be assigned, or granted over to another, it shall not be  
holden of a subject. R. 1 Bul. 195.

For it may be granted by the king to a subject. Co. L. 108. a.

A man may claim an honour by grant, or by prescription. R. 1 Bul.  
195.

But the king at this day cannot make an honour by grant, without  
an act of parliament. R. 1 Bul. 196. Co. L. 108. a.

There are within the realm eighty honours, viz. the honour of Aquila,  
Arundel, Abergavenny, Boloine, Berkhamsted, Beaulieu, Barnard's  
Castle, Bullingbroke, Barstable, Bononia, Brecknock, Brember, Bed-  
ford, Clare, Croveure, Clun, Christchurch, Cockermouth, Cormayls,  
Candicut, Carisbrook, Clifford-castle, Chester, Carmarthen, and Car-  
digan, Dudley, and Dover-castle, Eye, and Egremond.

The honour of East and West Greenwich, Gloucester, Grentmesnil,  
Gower, Haganet, Huntingdon, Heveningham, Hawenden-castle, Hert-  
ford, and Halton, Lancaster, Lincoln, Leicester, Lovetot, Hinckly,  
and Kington, and Folkingham.

The honour of Montgomery, Mowbray, Middleham, and Maidstone,  
Nottingham, Newelhn, Oakhampton, and Oxford.

The honour of Plimpton, Peverel, Pickering, Raleigh, Richard's  
Castle, Skipton, Stafford, Strigal, Tickhil, Tremanton, Totness, Theony,  
Tamworth.

The honour of Wigmore, Wallingford, Windsor, Wormgay,

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(a) In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be held of themselves; which do therefore now continue to be held under a superior lord, who is called, in such cases the lord paramount over all these manors; and his seigniory is frequently termed an *honour* not a *manor*, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 Com. 91.

Whirwelton, Werk, Whitchurch, and Warwick, Webley, and Tutbury. (b)

So, by the st. 33 H. 8. 37, 38. Ampthill, and Grafton.

By the st. 37 H. 8. 18. Westminster, Kingston on Hull, St. Osyth, and Donnington Castle.

Vide Dignity — Prærogative, (D 31.)

## HOSPITAL.

(A) Hospitals. *infra*.

(B) What are dissolved, and given to the king. p. 462.

(C) What not. p. 462.

### (A) Hospitals.

Hospitals (*a*) are aggregate, in which the master, or warden and his brethren have the estate of inheritance; or sole, in which the master, &c. only has the estate in him, and the brethren, or sisters, having college, and common seal in them, must consent, (*b*) or the master alone has the estate not having college, or common seal. Co. L. 343. a. (*c*)

So hospitals are eligible, donative, or presentative. Co. L. 342. a.

The master of an hospital, who has college, and common seal, may have a writ of right; for the right, and inheritance is in him. Co. L. 341. b.

(b) By the st. 31 H. 8. 5. Hampton Court.

(a) Lay corporations are divided into two classes; eleemosynary and civil: eleemosynary corporations are such as are constituted for the perpetual distribution of the free alma, or bounty of the founder of them, to such persons as he has directed. These are of two general descriptions: *hospitals* for the maintenance and relief of poor and impotent persons; and *colleges* for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. 1 Kyd. 26. 1 Blk. Com. 471. — 2.

(b) Between such hospitals as these, and colleges, either in the universities or out of them, there is no difference in legal consideration; the difference is only in degree; for where in an hospital, the master and poor are incorporated, it is a college, having a common seal by which it acts, although it have not the name of a college. Skin. 484. 2 T. R. 353.

(c) 1. Which, however, cannot properly be considered as corporations, the master or warden being merely a trustee for the house. 1 Kyd. 26. — 2. There are other hospitals, where the poor who are the objects of the founder's bounty, are not themselves incorporated, but the corporate succession is vested in trustees under various denominations, who, of course, have no beneficial interest, but are only employed as instruments to effectuate the purposes of the institution; of this description is Sutton's hospital, and most other hospitals of modern creation; but these, says lord Coke, are not legal hospitals. 10 Rep. 1. 31. 35. 1 Kyd. 27. — 3. There are also many other corporations, resembling hospitals of this last description, which are neither colleges nor hospitals, but which may be classed under the head of eleemosynary corporations, as their object is, by means of trustees incorporated, to carry into execution some public charity; such as the corporation of queen Anne's bounty; and such are many corporations of trustees for the education of children at free schools, and many others for various purposes. 1 Kyd. 27.



If he has no college, or common seal, he may have a *juris utrum*.  
Co. L. 342. a. (d)

(B) What

(d) 1. In consequence of the dissolution of the monasteries and other religious houses, the poor, who had derived a very considerable part of their subsistence from them, became a burthen to the public, and the legislature found it necessary to encourage such as should be charitably disposed, to appropriate part of their wealth to charitable purposes, and in the 35th of Elizabeth it was enacted, that it should be lawful for every person; for and during the space of twenty years then next ensuing, to make feoffments, grants, or any other assurances, or by last will in writing, to give and bequeath in fee-simple, as well to the use of the poor, as for the provision, sustentation, or maintenance of any house of correction, or abiding houses, or of any stocks or stores, all or any part of such of his lands, tenements, and hereditaments, and in such manner and form as he might have done by a former statute of 22 H. 8. c. 12. revived by the present, 35 Eliz. c. 7. s. 27. 1 Kyd. 57. — 2. But the charges of incorporation, and of the licence of mortmain, which was necessary to carry into effect the purposes of this act, having, by some means or other, become so great as to discourage many from undertaking these pious and charitable works, it was thought necessary, by an act of parliament, to dispense, in certain cases, with the licence of incorporation and mortmain, and to enable the founder to do the whole by his own act, without the immediate assent of the king to every particular foundation; and it was therefore enacted, that all and every person or persons, seised of an estate in fee-simple, their heirs, executors, and assigns, at his or their will and pleasure, shall have full power, strength, licence, and lawful authority, at any time during the space of twenty years then next ensuing, by deed enrolled in the high court of chancery, to erect, found, and establish, one or more hospitals, *maisons de Dieu*, abiding places, or houses of correction, at his or their will and pleasure, as well as for the finding sustentation, and relief of the maimed, poor, needy, or impotent people, as to set the poor to work, to have continuance for ever, and from time to time to place therein such head and members, and such number of poor, as to him, his heirs and assigns should seem convenient; and that the same hospitals or houses so founded, should be incorporated, and have perpetual succession for ever, in fact, deed, and name; and of such head, members, and numbers of poor, needy, maimed, or impotent people as should be appointed, assigned limited, or named by the founder or founders, his or their heirs, executors, or assigns, by any such deed inrolled; and that such hospital, &c., and the persons therein placed, should be incorporated, named, and called by such name as the said founder, &c., should so limit, &c., and that the same hospital, &c., so incorporated and named, should be a body politic and corporate, and should by that name of incorporation have full power, authority, and lawful capacity, and ability to purchase, take, hold, receive, enjoy, and have, to them and to their successors for ever, as well goods and chattels, as manors, lands, tenements, and hereditaments, being freehold, of any person or persons whatsoever, so that the same should not exceed the yearly value of 200*l.*, above all charges and reprises, to any one such hospital, &c. without licence or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding; and that the same hospital, &c., and the persons so incorporated, &c., should have full power and lawful authority, by its true name of incorporation, to sue and be sued, implead and be impleaded, to answer and be answered, in all courts of the realm, as well temporal as spiritual, in all manner of suits whatever; and that the same hospital, &c. should have and enjoy for ever such a common seal or seals as by the said founder, &c. should be, in writing, under his or their hand and seal assigned, &c. whereby the same corporation should or might seal any manner of instrument touching the same incorporation, and the lands, tenements, hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. 39 Eliz. c. 5. s. 1. — 3. Provided that no person within age, or of non-sane memory, or women covert without their husbands, should have power by this act to make any such corporation or to endow the same. s. 3. — 4. And provided, that no such hospital, &c. should be erected, &c. by force of this act, unless, on the foundation or erection thereof, the same were endowed for ever with lands, tenements, or hereditaments, of the clear yearly value of ten pounds. s. 4. — 5. Which act is made perpetual by 21 Jac. 1. c. 1. — 6. In construction of this act, the words ‘all and every person and persons,’ are held to extend to such bodies politic and corporate, as may alienate, such as mayor and commonalty, bailiffs and burgesses, and the like; but not to those whose power of alienation is restrained by act of parliament. 2 Inst. 722. — 7. And

**(B) What are dissolved and given to the King.**

By the st. 27 H. 8. 28. The king shall have and enjoy to him and his heirs for ever all monasteries, priories, and other religious houses, not having in lands, &c. above the clear yearly value of 200*l*. and all manors, granges, meases, &c. belonging to them; and also all monasteries, abbeys, and priories, which within one year before were granted to him, or otherwise suppressed and dissolved, and all manors, &c. belonging to them.

By the st. 31 H. 8. 13. The king shall have and enjoy to him, his heirs and successors all monasteries, &c. hospitals, &c. and other religious and ecclesiastical houses before dissolved, or given up, or thereafter to be dissolved, or given up.

**(C) What not.**

But no lay hospital was given to the king by these statutes, but religious and ecclesiastical hospitals only. Co. L. 342. a.

Though after foundation, or when founded, it was ordained that a priest should be maintained to celebrate divine service, or to pray for the soul of the founder or others, and the poor of the hospital to join with him. Co. L. 342. a.

So, by the st. 37 H. 8. 4. No hospital was given to the king, except where the donor, &c. had expelled the priests, wardens, &c. be-

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7. And the manors, lands, tenements, or hereditaments of which the endowment is made, must be of an estate in fee-simple, either absolute, conditional, or qualified; they must be freehold; of the clear yearly value of 10*l*. or more; but not exceeding the yearly value of 200*l*. above all charges and reprises; though if the first endowment be of the yearly value of 10*l*. or more, and under the yearly value of 200*l*. they may purchase, or take by gift from others, without licence of mortmain, any manors, lands, tenements, or hereditaments, of such value as together with their first endowment, will amount to the yearly value of 200*l*. above all charges and reprises. 2 Inst. 722. — 8. And if at the time of the foundation or endowment, they be of the yearly value of 200*l*. or under, and afterwards they become of greater value, by good husbandry or other causes, they shall continue to be enjoyed by the hospital, though they be above the yearly value of 200*l*.; for that must be reckoned as it was at the time of the endowment made. Ibid. — 9. Goods and chattels, whether real or personal, they may take to any value whatever. Ibid. — 10. The hospital, &c. can be erected by no other instrument, conveyance, or assurance, than a deed enrolled in chancery, according to the provisions of the act; but it is not necessary that it should be enrolled within six months after the date; nor need it be indented; and the deed may be in paper, though the enrolments must be in parchment. 2 Inst. 723. — 11. Although at common law, the incorporation may be of certain persons to be governors of the hospital, which at the time of the incorporation may be only in contemplation, and not of the persons placed in it; yet the safest and surest way on this statute is, for the founder first to prepare the hospital, and place the poor in it, and then to incorporate them, or rather to give them their name of incorporation; for it is the parliament which incorporates them, and the founder only gives them their name. 2 Inst. 723. 724. — 12. After the incorporation, the next thing to be done is to convey the lands, tenements, and hereditaments to the persons incorporated, which may be done safely with greater facility and less charge, by bargain and sale, by deed indented and enrolled, according to the statute 27 H. 8. c. 16. between the founder or founders on the one part, and the master and brethren on the other, in consideration of five shillings in hand paid by the master of the hospital for himself and for his brethren, and of other five shillings in hand paid by the master and brethren. 2 Inst. 725. — 13. Of which, says Sir Edward Coke, you may have a precedent, in the tenth book of my Reports, in the case of Sutton's Hospital. Ibid. 10 Rep. 17. b.

tween 4 Feb. 27 H. 8. and 25 Dec. 37 H. 8. or where king H. 8. by commission, &c. had seised it. Co. L. 342. a.

So, by the st. 1 Ed. 6. 14. No hospital was given to the king, lay, or religious. Co. L. 342.

## HOSTLER, OR INN-KEEPER.

Vide ACTION UPON THE CASE for Negligence, (B 1. &c.) — PLEADER, (2 Q.)

## HOTCH-POT.

Vide GUARDIAN, (G 2.) — PARCENERS, (C 4.)

## HOUSE OF CORRECTION.

Vide JUSTICES OF PEACE, (B 82. 83.) — USES, (N. 6.)

## HOUSEHOLD OFFICERS.

Vide OFFICER, (F).

## HUE AND CRY.

Vide HUNDRED, (C 1., &c.) — PLEADER, (2 S. 1., &c.)

## HUNDRED.

(A) Hundred, to whom it belongs. *infra*.

(B) Hundred court. p. 465.

(C) Hue and cry.

(C 1.) How made. p. 465.

(C 2.) When it lies. p. 467.

(C 3.) By whom. p. 469.

(C 4.) When it does not lie. p. 469.

(C 5.) How the charge upon the hundred shall be levied. p. 475.

(A) Hundred, to whom it belongs.

King Alfred (*a*) divided his realm into counties or shires, (*b*) and the county into hundreds. Ray. 363. (*c*)

Every

(*a*) 1. The subdivision of hundreds into *tithings* seems to be most peculiarly the invention of Alfred. 1 Com. 115. — 2. But the institution of *hundreds* themselves he rather introduced than invented. Ibid. — 3. For they seem to have obtained in Denmark. Ibid. Seld. tit. of Honour. 2. 5. 3. — 4. And we find that in France a regu-

Every hundred originally was parcel of the possessions of the king, and belonged to the king. 1 Vent. 403. 2 Rol. 73. B. 11 H. 4. 89. b.

And the king had granted it to others in fee, for life, or in farm. Per Hale, 1 Vent. 404. 2 Rol. 73. l. 32.

And when granted to a subject, it is a franchise, or liberty. 4 Mod. 343. 1 Vent. 405.

So a subject may have it by grant, or prescription. 2 Rol. 73. l. 35. 1 H. 4. 89. b.

Or, by disseisin. 2 Rol. 73. l. 40.

Or, as appurtenant to his manor. 2 Rol. 73. l. 50.

But by the st. 2 Ed. 3. 12. Hundreds and Wapentakes (*d*) let to ferm by K. Ed. 3. for term of life or otherwise, which were sometimes annexed to the farms of the counties, shall be adjoined again to the counties, and from henceforth shall not be severed from them.

And by the st. 14 Ed. 3. 9. All wapentakes and hundreds, which be severed from the counties, shall be rejoined to them, as before this time hath been established by another statute; and that the sheriffs hold the same in their own hands, &c.

And therefore, since these statutes, the bailiwick of the hundred belongs to the sheriff. R. Ray. 364, 365.

And it cannot be severed from the county by a grant of the king. 1 Vent. 411. R. Skin. 41. 2 Jon. 194.

Vide Justices of Peace, (B 67.)

a regulation of this sort was made above two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions were, in that country, as well military as civil; and each contained a hundred freemen, who were subject to an officer, called the *centenarius*; a number of which *centenarii* were themselves subject to a superior officer, called the count or *comes*. Ibid. 1 Com. 115. Montesq. Sp. L. 30. 17.—5. And, indeed, something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks, who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est.*" Tacit. de Morib. German. 6. 1 Com. 116.

(*b*) 1. An indefinite number of hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. 1 Blk. Com. 116.—2. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds a piece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Ibid.—3. Where a county is divided into three of these intermediate jurisdictions, they are called tithings, which were anciently governed by a tithing-reeve. Ibid.—4. These tithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the North, the East, and the West Ridings. Ibid.

(*c*) As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. 1 Blk. Com. 115.

(*d*) In some of the more northern counties, hundreds are called wapentakes. 1 Blk. Com. 115.

(B) Hun.

## (B) Hundred Court.

The hundred court (*e*) was derived out of the county court (*f*), and is of the same nature with the county court, or court baron. 2 Inst. 71. 4 Inst. 267. (*g*)

By the king's grant, 18 H. 3., where it was held from fortnight to fortnight, it shall be now held (*h*) from three weeks to three weeks. Brady's Appendix to Hist. of England, No. 234. (*i*)

Vide County, (C 1, &c.)—Dismes, (M. 5.)

## (C) Hue and cry.

## (C. 2.) How made.

By the st. (*k*) Wint. 13 Ed. 1. 1. 2. *Crie (l) serra (m) fait (n) en county,*

(*e*) 1. A hundred court is only a larger court baron, being held for all the inhabitants of a particular hundred instead of a manor. 1 Blk. Com. 34.—2. The free suitors are here also the judges, and the steward the registrar, as in the case of a court baron. Ibid.—3. And the suitors are the judges, notwithstanding the stile of the court is *curia E. C. militis hundredi sui de B. in com. Buck. tent. &c., coram A. B. seneschallo ibidem*. 4 Inst. 267.—4. And where in an hundred court, the plea was laid to be *coram seneschallo et sectatoribus*, and exception was taken, that it should have been laid to be held *coram seneschallo per sectatores*; three judges thought it well enough; but the chief justice *contra*, who cited 4 Rep. 47 2 Bac. Abr. 532.

(*f*) Its institution, however, was probably coeval with that of hundreds themselves, introduced by Alfred. 3 Blk. Com. 34.

(*g*) 1. It is no court of record; resembling the court baron in all points, except that in point of territory it is of a greater jurisdiction. 3 Blk. Com. 34. Finch, L. 248. 3 Inst. 267.—2. It cannot hold plea of debt or trespass, where the debt or damages amount to 40s. Co. Litt. 118.—3. Nor of trespass *vi et armis*. Ibid.

(*h*) The hundred court is now fallen into disuse with regard to the trial of actions.

(*i*) 1. The true process of this court at common law is a *distringas*, but by custom the process may be a *levari facias*; and it is said, that most hundred courts have this custom. Salk. 201.—2. An execution may be in the hundred court by *levari facias*; and therefore, where the books speak of a *distringas*, they must be intended of a *levari*; for a distress infinite would be endless in an execution. 2 Lev. 81. 2 Keb. 117. 126. Vide Carth. 54.—3. See, for the manner of setting forth a judgment in this court, Carth. 53, 54. 2 Lutw. 1369. 3 Lev. 403.—4. If a jury in an hundred court will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the steward may, from time to time, adjourn the court till they do agree. Salk. 201.

(*k*) 1. By Westm. 1. c. 9., all are enjoined to be ready and apparelled at the summons of the sheriff and a cry *de pais*, to pursue and arrest felons, as well within franchises as without; and if they do not, and be thereof attaint *le roy prendre a eux grevement*, they are to be indicted and fined for the neglect.—2. And though some have imagined, that hue and cry was grounded on this statute, yet lord Coke says, that it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. 2 Inst. 171.—3. By the st. 4 E. 1., *de officio coronatoris*, "hue and cry shall be levied for all murders, burglaries, men slain or in peril to be slain, as otherwise is used in England; and all shall follow the hue and steps as near as they can; and he that doth not, and is convict thereof, shall be attached to be before the justices in eyre."

(*l*) 1. Hue and cry is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 Inst. 116. 117. 2 Inst. 172. Dalt. Inst. c. 28. 109. Fitz. Coron. 395.—2. Which duty is imposed by common law. Ibid. 2 Hal. P. C. 98.—3. And, therefore, Bracton



county, hundred, &c. *Et chescun pais serra issint garde, que maintenant apres robbery ou felony fait, fresh suit serra (o) de vill en vill (p), et de pais en pais, &c. (q)*

*Et*

says, *quod omnes tam militis quam alii qui sunt quindecim annorum et amplius, juvare debent quod utlagatos, murtherores, robbatores, et burglatores, non receptabunt, nec iis consentirent, nec eorum receptatoribus, et si quos tales noverint eos attachiari facient, et hoc vicecomiti et ballivis suis monstrabent, et si hutesium vel clamorem de talibus audiverint, statim audito clamore sequentur cum familia et hominibus de terra sua.* Brac. lib. 3. c. 1.

(m) 1. A private person who has been robbed, or who knows that a felony has been committed, is not only authorised to levy hue and cry, but is also bound to do it under pain of fine and imprisonment. 2 Inst. 172. 3 Inst. 116. Hal. P. C. 464. — 2. Whence it follows that there is no absolute necessity for a justice's warrant to raise it; though lord Hale considers such to be a good course. 2 Hale P. C. 99. — 3. And though it is especially incumbent upon constables to pursue hue and cry when called upon, and they are severely punishable if they neglect it; yet upon a robbery or other felony committed, hue and cry may be raised by the country, in the absence of the constable. 2 Hale P. C. 99, 100.

(n) It may be made by a horn, or by the voice. 2 Inst. 172.

(o) The regular method of levying hue and cry is, for the party to go to the constable of the next town and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition, to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found. 3 Inst. 116. Dalt. Inst. c. 28. Crompt. 178. 2 Hawk. c. 75. 2 Hale's P. C. 100.

(p) The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen, until the offender be taken. 2 Hale's P. C. 101.

(q) 1. With respect to what acts are justifiable in those who pursue hue and cry: when once raised and levied upon supposal of a felony committed, though in truth there was none; yet the pursuers may arrest and proceed the same, as if it had been. 2 Hal. P. C. 101. — 2. Hence the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon hue and cry levied, extremely differ, in that in the former case a felony must be averred to have been done. 5 H. 7. 5. a. 21 H. 7. 28. a. 2 E. 4. 8 & 9. 29 E. 3. 39. 2 Inst. 173. 2 Hal. P. C. 102. — 3. And the reasons why the actual perpetration of a felony is not requisite to justify under a hue and cry, are, because, 1°. The constable cannot examine the truth or falsehood of the suggestion of him who first levied it, for he cannot administer him an oath, and the necessity for immediate pursuit leaves him no time to examine into particulars. 2°. By several acts of parliament, he is compellable to pursue hue and cry, and is punishable, as those of the vill, if he do not. 3°. The person who giveth the false information is punishable himself. Ibid. — 4. If hue and cry be raised against a person certain for felony, though possibly he be innocent, yet the constables and those that follow the hue and cry may arrest and imprison him in the common gaol, or carry him to a justice of the peace. 2 Hale's P. C. 102. — 5. If the person pursued by hue and cry be in a house, and the doors are shut and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; which he may do in any case where he may arrest, though it be only on suspicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case; the same law too holds upon a dangerous wound given, and a hue and cry levied upon the offender. 7 E. 3. 16. b. 2 Hale's P. C. 102. 5 Rep. 92. — 6. And it seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 2 Hale's P. C. 102. — 7. Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. Dalt. c. 28. 2 E. 4. 8. b. Crompt. De Pace, 178. 2 Hale's P. C. 103. — 8. But though he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person

*Et pais n' avera plus long-temps que 40 jours (r), deisique face gree de la robbery, ou del misfait, ou respondra corps des misfeasors.*

By the st. (s) 8 Geo. 2. 16. Every constable, to whom notice is given or left at his house of a robbery, &c. and every constable of the hundred, or constable, &c. in any town, parish, &c. within the hundred, on notice from the party robbed or otherwise, shall with all expedition make hue and cry after the felon, &c. on pain of 5*l.* for neglect, a moiety to the king, a moiety to him that sues in six months, to be recovered with full costs.

(C 2.) Action against the hundred upon the st. of Wint. 13 Ed. 1. — When it lies (*t*).

By construction upon the st. (*u*) Wint. (*x*) 13 Ed. 1. (*y*) If the country

person against whom the hue and cry is levied, be there, when he may; therefore in case of such search, the breaking open the door is at his peril, viz. justifiable if he be there; but upon every occasion of breaking open a door there must be first a notice given to them within, of the nature of the business, and a demand made of entrance, with a refusal, before the doors can be broken. 2 Hale's P. C. 103. — 9. If the hue and cry be not against a person certain, but by description of his state, person, cloaths, horse, &c. the hue and cry doth justify the constable, or other person, following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows (not usual in other cases), viz. to arrest a person by description. 2 Hale's P. C. 103. — 10. But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed; but the person that did the fact is neither known nor describable by person, cloaths, or the like; yet such a hue and cry is good, and must be pursued without any particular description. Ibid. — 11. And therefore, in this case all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect; as, for example, such as are vagrants, that cannot give an account where they live, whence they are; or such suspicious persons as come late into their inn or lodging, and give no reasonable account where they had been, and the like. 2 E. 4. 8. b. 2 Hale's P. C. 103. — 12. And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1°. In respect that it is upon hue and cry, there needs no averment that the felony was done; yet it must be averred, that an information was given that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry, or if the arrest were made by that constable, or those vills, to whom the hue and cry came at second-hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done; but 2°. also inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill; he that arrests any person upon such general hue and cry, must aver that he suspected, and shew a reasonable cause of suspicion. 2 Hale's P. C. 104. — 13. Though now the constable, and all coming in his aid, may by st. 7 Jac. 1. c. 5., plead the general issue.

(*r*) 1. Lord Coke says, that this statute expressly gives half a year, and not forty days, as mentioned in an edition of the statutes then lately published; but that the forty days are given by the statute 28 E. 3. c. 11. 2 Inst. 569. — 2. But it has been elsewhere laid down, that, upon search of the parliament-roll, it appears, that the statute of Winton gives only forty days to the country, and that the statute 28 E. 3. is but a confirmation thereof. 3 Lev. 320. — 3. And so it was adjudged, where the plaintiff brought an action upon the statute of Winton, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the precedents agree, as Rast. Ent. 406. Co. Ent. 351. Herne, 215. The. Brev. 141. 2 Saund. 376.

(*s*) 1. There can be no doubt that, at common law, a neglect to raise hue and cry is punishable by indictment, fine, and imprisonment. 2 Hale's P. C. 4. — 2. And it is one of those offences which may be enquired of and punished in the sheriffs' torn or leet. Dalt. Sheriff, 394. 2 Hawk. P. C. 67.

(*t*) See Russell, 357. in notis.

(*u*) Though at common law there was an obligation on the hundred to keep watch and

country does not apprehend the felons with forty days, an action (z) lies against the inhabitants of the hundred, where the robbery was committed, for the money or goods whereof the party was robbed. (a)

If the robbery was in the division of several hundreds, the action shall be against the inhabitants of both hundreds. Vide st. Wint. 2.

So, if the robbery was in the half hundred of W. it may be against the inhabitants *in hundredo vocato* the half hundred of W., for that is an hundred of itself. 1 Brownl. 156.

Or, if it be against the inhabitants *in dimid' hundred' de W.* it will be well. R. 1 Brownl. 156. (b)

If a man be assaulted in the hundred of A. and flies into the hundred of B. and there is robbed, the action shall be against the hundred of B. alone. R. Hutt. 125.

But if he be seised by a robber in the hundred of A. and carried to the hundred of B. and there robbed, it shall be against the hundred of A. Dict. 1 Sid. 367. R. cont. for it shall be against the hundred where he was robbed. Sal. 614. (c)

An action lies against the hundred, though no hue and cry was levied; for that is the part of the hundred. Adm. cont. Bend. pl. 157. Semb. acc. 2 Leo. 82. 174. 7 Co. 6. a. 1 And. 159.

So it lies, if a waggon be driven out of the highway by day, though it be not robbed till night. 1 Sid. 263.

So, if a robbery be after sun-set, if the robber can be known and distinguished. 7 Co. 6. a. R. 1 And. 159. Sti. 233.

And it is not a cause for a new trial, that the verdict was for the plaintiff; when it is dubious, whether it was day or night. 1 Sid. 263.

So it lies, if the robbery be upon the dawning of the day, when it is convenient for travelling. R. Cro. El. 270. R. 2 Cro. 106.

If notice of the robbery was given in another hundred adjoining; for he being a stranger does not know the limits of the hundred. R. Noy, 155. R. 1 And. 159. (d)

If

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and ward; yet not being a corporation, it seems that they were not liable to an action by any individual who had suffered from their neglecting this duty. 1 T. R. 71.

(x) The statute of Winton is a remedial law, and to be construed liberally. Andr. 118. Cowp. 487.

(y) This statute not being a penal law, so that the statutes of jeofails extend to actions brought thereon. Cro. Jac. 496. 12 Mod. 242.

(z) It is the statute of Winton only which gives the action against the hundred, though other statutes have made alterations and additions thereto; and therefore the declaration against the hundred should conclude *contra formam statuti*. Cro. Jac. 117, 118. Yelv. 116. Noy, 125. Show. 94. Andr. 115, 117. Comb. 160, 161.

(a) In an action against the hundred of Gravesend for a robbery on Gad's Hill; it seemed hard, says the book, to the inhabitants, that they should answer for robberies committed on Gad's Hill, because they are there so frequent, that if the inhabitants should answer for all of them, they would be utterly undone: and Harris, serjeant, was of counsel for the hundred, and pleaded, that, time out of mind, &c. felons had used to rob on Gad's Hill, and so prescribed to be discharged; but the plea was over-ruled and the inhabitants held liable. 2 Leon. 12.

(b) 1. Hob. 245. — 2. The declaration was against the inhabitants of the half hundred of Waltham, and after a verdict for the plaintiff, the defendant moved in arrest of judgment, that the whole of the hundred were not, as they ought to have been charged. But the objection was over-ruled, for the court said, that they might well intend it to be a whole hundred, though called only a half hundred, particularly as it had a hundred court to itself; but at all events, the verdict had cured the defect if any. Ibid.

(c) Ld. Raym. 826.

(d) 1. Cro. Jac. 379. — 2. The declaration stated that the robbery was stated to be committed

If he says, that he was robbed, to one who inquires, what is the matter, it is sufficient notice. R. Noy, 155.

Though he refuses his horse for pursuit of the robbers. R. Noy, 155. Mar. pl. 28.

Though the notice was five miles from the place of the robbery: R. Mar. pl. 28. (d)

So an action lies against the hundred, though the felony be not committed in the highway. R. 1 Mod. 221. Per Cur. cont. Sho. 60. (e)

### (C 3.) By whom.

The action regularly shall be by the owner of the goods. (f)

If a servant be robbed, the master may maintain the action. R. Cro. Car. 38. Adm. 3 Mod. 287. D. Lat. 127. Sti. 156. 4 Mod. 305.

Or the servant may maintain the action, though robbed of the money of another. Adm. 2 Leo. 82. R. 1 Brownl. 155. R. 4 Mod. 305. Sal. 613, 614. (g)

So, if the servant deliver money of his master to A. and the servant and A. are both robbed together; the servant may maintain the action for the whole. 3 Mod. 288, 289.

By the st. 8 Geo. 2. 16. process against the hundred shall be served only on the high constable of the hundred, who shall give public notice of it in some market town of the hundred the next market day, or if no market in the hundred, in some parish church after divine service, and enter an appearance, and defend the suit for the hundred.

### (C 4.) When it does not lie.

But an action does not lie against the hundred for a robbery (h) within

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committed in the division of the hundreds of Dacorum and Cashio in the county of Herts, and that the plaintiff gave notice of the robbery at South Mims in the county of Middlesex, near the said hundreds, and shewed a conformity in all things to the statute. After verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was bad, in that the notice of the robbery was given in a different county from that in which the robbery was committed. But the court held the notice to be good, for it was impossible for a stranger to know the division of the counties; and the statute only orders the notice to be given to a village or hamlet near the place where the robbery was committed, without any notice of county. Cro. Car. 41.—3. If the party is robbed in the division of two hundreds, it has been held sufficient for him to give notice to the inhabitants of either. Cro. Jac. 675.—4. Which distinction, however, is now said to be useless, since notice to a village, in any hundred is sufficient. Esp. P. A. 187.

(d) It has been queried if the party did not proceed straight forward on the road. Noy, 52. B. N. P. 185. Esp. P. A. 187.

(e) Vide infra.

(f) If two persons are robbed of their joint property, both will join in suing the hundred. Dyer, 370. Com. Rep. 327.

(g) 1. Style. 156.—2. The master being absent. Ibid.—3. Vide Carth 146, 147.

(h) 1. The statute gives the remedy to a party who has been *robbed*, that is, whose property has been taken from him by open violence. No robbery, therefore, will make the hundred liable but that which is so done, that is, openly and with force and violence; and therefore the privately stealing any thing from the person of the party, does not come within the statute, so as to subject the hundred; for the hundred are made liable, not because they did not prevent the robbery, but because they did not apprehend the robbers who committed it, which in felonies committed privately, of which they had no notice, it would be difficult, if not impossible to do. 7 Rep. 6, 7. 2 Salk. 614. pl. 7. B. N. P. 184. 3 Bac. Abr. 66.—2. Hence, where a carrier's son and servant conspired to rob him, the hundred were held not liable. Sty. 427.—3. And the reason of the rule is this, that as the person whose property is so taken privately, does not himself know of it at the time of his loss, and can give no notice in reasonable time,



within an house; for every one ought to defend his house at his peril. R. 7 Co. 6. a. R. Cro. El. 753. R. Mo. 620. R. 3 Leo. 262. (i)

Though taken in the highway, and afterwards carried into an house, and there robbed. Semb. Sal. 615. (k)

Nor, for a robbery (l) in the night; for that is not convenient for travelling. R. 7 Co. 6. a, Mo. 620. 1 Leo. 57. 1 And. 159.

Nor, in the morning, *ante lucem*. R. 7 Co. 6. b. Sav. 83. Sti. 233.

Though taken in the day, and afterwards robbed in the night. Semb. Sal. 615.

So, though it lies, without notice of the robbery by the party to the hundred since the st. of Winton. 7 Co. 6. 2 Leo. 174.

Yet, by the st. (m) 27 El. 13. the action does not lie, unless the party, (n) with as much convenient speed as may be, make known the robbery to some near town, village or hamlet. (o)

And

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so as to enable the hundred to apprehend the persons who have robbed him, and which would exempt them if they were taken; such a taking of property shall not subject the hundred to the loss. Esp. Pen. St. 172.

(i) 1. Cro. Jac. 496. Bulst. 146. 2 Inst. 569. 2 Salk. 614. — 2. The statute of Winton extends only to robberies done to the person, and was principally made for the safeguard of travellers; but every one ought to keep his house at his peril, for it is his castle, and no other ought to meddle there; and therefore it is unreasonable that any one should be charged for a robbery therein. Ibid. — 2. So if beasts are stolen out of a close, and hue and cry made, yet the hundred is not liable, for the owner could not know when they were taken, they being taken in his absence; and the hundred shall be charged only where the party robbed gives notice in convenient time after the robbery committed, which could not, in this case, be ascertained, as the owner could not know when they were taken. Ibid.

(k) 1. Ld. Rd. 828. — 2. This, however, has been questioned; since the violence was first offered to the person, not in a house, and the taking of the property seems to be a continuation of it only. 3 Bac. Abr. 67.

(l) 1. To make the hundred liable for a loss by robbery, the party must be robbed on a week-day, or day properly devoted to business, and not on a Sunday. — 2. For though formerly the rule was, that where a person was robbed on a Sunday, the hundred should be liable, upon the ground that many persons were under the necessity of travelling on a Sunday, as physicians, surgeons, and the like, and that therefore they should be protected in their property; and besides, the pursuing of felons, if done on that day, was a work of charity and justice. Cro. Jac. 496. — 2. Yet now the st. 29 Car. 2. c. 7. s. 5. has enacted, that if any person or persons whatever, who shall travel on the Lord's-day, shall be then robbed, no hundred, nor the inhabitants thereof, shall be charged with, or answerable for any robbery so committed; but the person or persons so robbed, shall be barred from bringing any action for the said robbery. Nevertheless, the hundred, after notice of such robbery, are bound to make fresh suit after the offenders, under penalty of forfeiture to the king, of as much money as could have been recovered, by the party robbed, against the hundred, as if no such law had been made. — 4. This statute, it is observable, prevents persons, travelling on a Sunday, who have been robbed, from recovering against the hundred; which seems to prohibit those only who are so employing themselves in the way of business, or pleasure, on a day devoted to rest and devotion. Esp. P. A. 175. — 5. And, therefore, where the plaintiff, who lived a mile from the church, was going there with his wife, in his coach, on a Sunday, and was robbed, and he brought his action against the hundred; it was ruled by King C. J. that the statute extends only to travelling, which this was not; but that had he been going to pay visits, it had been otherwise. 1 Str. 406. — 6. And upon the same principle, it seems not to extend to physicians or surgeons, or persons so travelling on a Sunday, on works of charity or necessity. Comyn's Rep. 345. Esp. P. A. 177.

(m) The statutes of 27 Eliz. and 8 Geo. 2. are in ease of the hundred, and not in favour of the person robbed. Yelv. 116. Cro. Jac. 187. Andr. 115. C. T. H. 409. 2 Saund. 377. n.

(n) 1. If several persons are robbed in company, it is said, that notice by one is sufficient. Show. 94. — 2. But the oath must be made by each person robbed, or the amount of the property taken from him cannot be recovered. Salk. 613. 1 Show. 94. 241.

(o) 1. The



And he ought to give notice as soon as he can. R. Noy, 155.

Nor, by the st. 8 Geo. 2. 16. unless (*p*) with as much convenient speed as may be, he give notice (*q*) to the constable of the hundred, or some constable of parish, &c. near the place of robbery, (*r*) or leave notice at his dwelling-house in writing, describing the felon, time, and place of the robbery, and in twenty days after the robbery give notice in the London Gazette, (*s*) describing the felon, (*t*) time, and place of robbery, goods and effects, (*u*) of which he was robbed. (*x*)

But

(*o*) 1. The object of which is to raise the hue and cry, so that the robber may not have time to escape. — 2. But the party robbed having done so, thereby lays the foundation for his action so far, that he himself is not bound to join in immediate and urgent pursuit; for though he be somewhat remiss, as where he refused to lend his horse, the hundred are notwithstanding liable. 2 Leon. 82. March. 11.

(*p*) Over and besides the notice required by the 27 Eliz. c. 13.

(*q*) 1. There seems to be no determination as to the notice to be left for the constable describing the circumstances of the robbery, or the persons of those who committed it; but it should seem that it must be as accurate as possible; for as a similar notice is required to be given in the Gazette, and great accuracy is required in it, the rule seems to be the same for both. Esp. P. A. 190. — 2. Lord Hale, speaking of the notice to the constable, in order to raise the hue and cry, says, the party ought, if he knows it, to tell his name, describe his person, habit, horse, and such other circumstances that he knows, which may conduce to his discovery. 2 Hale's P. C. 100.

(*r*) 1. The rules with respect to giving notice to the inhabitants of adjoining villages or hamlets, seem to apply to the cases of giving notice to the constable, namely, that the notice need not be given to the nearest constable or peace officer; that a reasonable time be allowed for doing it; and that the party robbed is not bound to give it to one particular officer more than to another. Esp. P. A. 188. — 2. For where, in a case made at the assizes, it was found, that some time after six o'clock in the morning, the plaintiff was robbed within two miles and a half of Northampton; that the highwayman cut his bridle and stirrups, and threw them into a ditch, and turned his horse loose; that the plaintiff recovered them, remounted, rode through a village called Cotton, where he gave no notice, met three men on the road whom he informed of the robbery, and arrived at Northampton, about seven o'clock, and gave notice to an innkeeper there, from whence he went to Rotherthorp, three miles off, where he gave notice to the high constable, who lived there, between eight and nine o'clock; and the question was, whether this was sufficient notice within the statute. It was objected, that he should have given notice to the constable at Northampton, who was the constable to whom it might be given with most convenient speed, being nearer than Rotherthorp, and that the statute so required the notice to be given. But the court held it to be sufficient; for the high constable is the properest person to go to, and the statute does not require him to go to the next constable; it is in the alternative, to the constable of the hundred, or of the town, parish, &c. The court, further, were of opinion, that the plaintiff had lost no time, considering the circumstances which he was in, and Rotherthorp was not at such a distance, but that it might come within the meaning of the term *near*. 2 Str. 1170. B. N. P. 185. — 3. And as in cases on the 27 Eliz., allowances are made for a stranger who happens to be robbed being ignorant of the county; the same indulgence is allowed in giving notice to the constable. Esp. P. A. 189. — 4. Hence an action against the hundred passed without objection, although the party robbed, after the robbery, passed through a place where there were two constables, without giving any notice. 2 Wils. 105. 109.

(*s*) The object of which is, by giving publicity to the transaction, to facilitate the apprehension of the robbers.

(*t*) Where in the description given, immediately after the robbery, to the constable, the plaintiff described the persons of the robbers, and their dress, and stated of one of them, that he had particularly large red eye brows; the omission of this part of the description in the Gazette, was held fatal. 2 Wils. 105. 109.

(*u*) 1. Where the plaintiff had mentioned, both in his notice to the constable and in the Gazette, that he had been robbed of 82*l.* 12*s.* 9*d.*, but, at the trial, it appeared, that he had been robbed of more money, and discovered it before the

But it is sufficient to give notice to the next town in the high road, though a town on the side be nearer. Noy, 52. 1 And. 158. 1 Leo. 57.

Though the town to which notice is given is out of the hundred. Noy, 52. 1 And. 159. 1 Leo. 57.

So, by the st. of Wint. the country has 40 days to answer for the bodies of the malefactors; and therefore it is bad, if the original be tested within forty days after the robbery committed. (y)

So, by the st. 27 El. 13. the action does not lie against the hundred, if it be not prosecuted within a year after the robbery committed. (z)

And the year shall be taken, inclusive of the day of the robbery. R. per 2 J. Warb. cont. Hob. 139. 2 Rol. 520. l. 47. R. 1 Brownl. 156. Vide Temps, (A.) (a)

So it does not lie, if the robbery be not in the highway. R. Sho. 60. R. cont. 1 Mod. 221. Vide ante, (C 2.) (b)

So,

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notice in the Gazette; it was held fatal. 2 Wils. 105. — 2. So where the plaintiff was robbed, *inter alia*, of 15 bank bills, and he knew the value of each bill, and the dates and numbers of nine, but not knowing the dates and numbers of the other six, he inserted in his advertisement only the value, and not the dates or numbers of any; upon a case reserved on these facts, for the opinion of the court of C. B., whether he ought to recover for that which was well described, namely, his watch, money, and the six bills of which the dates and numbers were not known, and of course were as well described as circumstances would admit, the court were divided. Barnes, 458. B.N.P. 186.

(x) 1. It is enacted by st. 22 G. 2. c. 24. that no person shall recover against the hundred more than the value of 200*l.* unless the person or persons so robbed shall, at the time of such robbery, be together in company, and be in number two at the least, to attest the truth of the robbery. — 2. The case of Chandler, an attorney, who sued the hundred of Sunning, in Berks, in 1748, which was attended with many suspicious circumstances, and for a very large sum of money, occasioned this act. 3 Bac Abr. 524. — 3. And by st. 30 G. 2. c. 3. s. 116., no receiver-general of the land tax, or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company at the least.

(y) 1. Formerly the doctrine was, that the hundred could not be sued until the expiration of six months from the robbery; in that half a year is allowed to the hundred to take the robbers, or make recompense to the party. 2 Leon. 12. — 2. But afterwards it was decided, that the original may be sued out forty days after, though not before; for the statute of Winton does not give the hundred six months, but forty days only. 3 Lev. 320. — 3. The decision in 2 Leonard went upon the opinion, (also of Lord Coke,) that the statute of Winton gives half a year to the inhabitants of the hundred to take the robber; but in the case in Levinz, the court ordered the parliament-roll to be searched, when it appeared that the statute of Winton itself gives only forty days to the country, and the 28 E. 3. c. 11., is but a confirmation of it; and with this the precedents agree. Rast. 406. Co. Ent. 351. Herne, 214. Thea. Brev. 141. Rob. Ent. 328. 331. 2 Saund. 375, 376.

(z) This time is further limited to six months by st. 8 G. 2. c. 16. s. 14.

(a) Although a suit has been commenced in time, yet if that suit has been discontinued, a new action cannot be commenced, unless the usual matters required by the statute have been performed within the time limited. Sid. 109. Hob. 495.

(b) 1. It is said, that it is not necessary that the robbery should be in the highway, to charge the hundred. 7 Mod. 159. Salk. 614. — 2. And where it was in a private way, they were held liable. Far. 160. B.N.P. 184. — 3. Where the plaintiff declared, *quod quædam personæ ignotæ, &c. apud quendam locum ex australi parte cujusdam januæ vocatæ Fair-mile Gate, infra parochiam, &c. vi et armis* assaulted him, and robbed him of so much money; and there being a verdict for the plaintiff, it was moved in arrest of judgment, that *apud quendam locum* might be meant of a robbery committed in a house, garden, or wood, for which the hundred is not liable, being only obliged to guard the highways; it was held, that the declaration was good, especially after verdict, because it must be intended that this was given in evidence, otherwise the plaintiff would have been nonsuited; and the court also held that even without the aid

So, though upon the st. of Wint. the action lay, if all the robbers were not taken. D. 7 Co. 7. a. R. 1 Sid. 11. Per 2 J. Dy. 370. a. in margin.

Yet, by the st. 27 El. 13. no hundred shall be chargeable, if any of the robbers be taken. (c)

If any be taken before the action commenced, though he be taken after the forty days after the robbery. Co. Ent. 348, 349. The pleading is, *hucusque non ceperunt*. Semb. 1 Sid. 11.

So, if any be taken, though he be not taken upon the hue and cry, but in any other part of the county. Per Hale, 1 Vent. 119.

If the robber be charged with the robbery in the presence of a justice of peace, it shall be a taking, although no one lays his hand upon him. R. 1 Vent. 118. 235. 2 Keb. 760. 2 Lev. 4.

So, if he be found in gaol for another offence, and is indicted for that robbery.

But a taking upon suspicion, if he be acquitted, is not sufficient. Per Periam, Dy. 370. a. in marg.

So, by the st. 27 El. 13. No hundred shall be charged, unless the party make (d) oath (e) within twenty days before the action brought, that he knows not (f) the robbers, or any of them, before some justice of the peace (g) of the hundred, or near it.

If the action be discontinued, and a new one commenced, there ought to be such oath within twenty days before the new action. R. 1 Sid. 139. 1 Keb. 495. (h)

aid of a verdict it would have been good, nor was it necessary for the plaintiff to allege, that the robbery was committed on the highway, any more than that it was committed by day and not by night. Carth. 71. 3 Mod. 258. Show. 60. Comb. 150. Wil. 412. 437. Ld. Rd. 828. 11 Mod. 8. 2 Str. 1011.

(c) By 8 G. 2. c. 16. s. 3., no hundred shall be chargeable, if one or more of the felons be apprehended within the space of forty days next after public notice of the robbery given in the London Gazette.

(d) 1. The form of the oath may be seen in Thes. Brev. 141. — 2. The reason why an oath is enjoined by the statute appears to be, that the person robbed should enter into a recognizance to prosecute the robbers, if he knew them, or any of them, and that the hundred might be excused on the conviction of such persons, and also to prevent a robbery by fraud and collusion. 3 Mod. 288. 3 Wms. Saund. 376. n.

(e) In an action by the master for the robbery of two of his servants, the jury found that one of the servants was a quaker, and would not take the oath required by the statute; and it was held, that the master could not recover against the hundred as to the property taken from that servant; for the statute of Elizabeth was made in favour of the hundred, to prevent confederacy and combination between the thieves and the party robbed, and it was the master's folly to employ such a servant. Salk. 618. March, 11.

(f) Though the person robbed knows the offenders, or any of them, he may nevertheless bring an action against the hundred; only he must first enter into a recognizance to prosecute the offenders. Noy. 150.

(g) 1. It is sufficient for the plaintiff to prove that the person who took the affidavit acted as a justice of peace; and it is sufficient to entitle the plaintiff to have it read, that it was delivered to the witness who produced it, by the justice's clerk, nor is it necessary that his handwriting should be proved. B. N. P. 186. — 2. And where the affidavit was alleged to be taken before a justice of peace for the north riding of Yorkshire; it was held to be sufficient, though objected, that the statute was not conformed to by taking the oath before such justice, the statute having directed the oath to be taken before a justice of the county; for there are distinct commissions for each riding of Yorkshire. 2 Sid. 44.

(h) Where the party made one oath of the robbery the day after it took place, and another twenty days before action brought, it was held good. 2 Sid. 44.

And

And an oath, that he does not know the robbers, is not sufficient, without saying, or any of them. Semb. Noy, 21. (i)

The party robbed must make the oath.

If the action be by the master, where his servant was robbed, the servant must swear, and not the master. R. Cro. El. 142. 1 Leo. 323. R. Cro. Car. 38. 336. Adm. 3 Mod. 288. Sal. 613. (k)

If the master brings the action upon a robbery of two servants, both must make oath. 3 Mod. 288. R. inter Ashcomb and hundred of Eltham, B. R. 2 W. & M. Sho. 94. 241. (l)

If the servant delivers part of the money to another who travels with him, and they are both robbed together, both must make oath. R. inter Ashcomb and hund. of Eltham. 3 Mod. 288.

Though one be a quaker, and refuse the oath. 3 Mod. 288. Sal. 613.

But if the master brings an action upon the robbery of two servants, and one only swears, he shall recover for so much as was in his possession. 3 Mod. 289. Sal. 613. Carth. 146.

If the master delivers part of his money to his servant, and they are robbed together, and the master brings the action, it is sufficient if the master alone swears; for the money delivered to the servant remains in the possession of the master, if he be robbed in the presence of the master. R. inter Jones and Hundred of Rumley, 1658. 3 Mod. 288. Sal. 613. Carth. 146.

So, if the servant delivers part of the money to A. and they are robbed together, and afterwards the servant brings an action for the whole; it is sufficient if the servant alone makes oath; for the whole was in his possession. Carth. 146.

And if the servant be robbed of money in the presence of the master, and the master alone swears, and brings an action, it is sufficient, though the servant knows some of the robbers, and informs his master of it. R. 3 Mod. 288. Carth. 146.

So an action lies, though the party after the oath detect the robbers R. Mar. pl. 28.

So, if the oath be taken by a justice of peace out of the county it is sufficient; for it is a ministerial act. R. Jon. 239. Cro. Car. 211.

If a justice of peace refuses an examination, (m) an action upon the case lies against him; for he is only ministerial. Semb. 1 Leo. 323.

If the oath be taken by a justice of peace within the county, although it be not within the hundred, it is sufficient. R. Sal. 614. (n)

So,

(i) 1. 3 Lev. 328. — 2. So it should seem, that, stating in the oath, that he *suspected* certain persons, would not be sufficient, as was held in an action upon a statute similarly worded. 2 Str. 1048. Esp. P. A. 191.

(k) Carth. 146. Ld. Raym. 829.

(l) Or he can recover only so much as the one servant who makes the oath was robbed of. Salk. 618. March, 11.

(m) 1. The justice need not take the examination in writing; for if he appears at the trial, and gives evidence of what was stated by the plaintiff to him, to the substance of the usual affidavit, that is, as to his knowing the persons who robbed him, or any of them, &c., it is sufficient. B. N. P. 186. — 2. But where the justice has taken the examination and usual affidavit in writing, and it is produced at the trial, itself alone can be used in evidence. Ibid.

(n) 1. That is, he need not be inhabiting within the hundred. Ibid. — 2. And by directing the oath to be taken before a justice of peace, *near* the hundred in which the robbery was committed, the statute does not mean, as of course, the next adjoining justice

So, by the st. 8 Geo. 2. 16. no action shall be brought, unless before commencement the party before the chief clerk, or secondary, (o) or filazer of the county, or clerk of the pleas of the court where the action is brought, or sheriff of the county, give bond of 100*l.* penalty with two sureties to the high constable (p) of the hundred, with condition to pay costs if the plaintiff be nonsuit, discontinue, have a verdict or judgment on demurrer against him.

Which bond shall be certified by such chief clerk, &c. to the chief clerk or secondary in B. R. or filazer of the county in C. B. or to the clerk of the pleas or his deputy in the exchequer, before process shall issue in such suit.

None shall take for such bond more than 5*s.* besides stamp-duties, nor more than 2*s.* 6*d.* for making such certificate, and 2*s.* 6*d.* for filing it; and the chief clerk, &c. upon request shall deliver it over to the high constable gratis.

So, though it lies since the st. of Winton, though the robbery was on a Sunday. R. 1 Brownl. 156. Per 3 J. Mont. cont. 2 Rol. 59. 2 Cro. 496.

Yet, by the st. 29 Car. 2. 7. if any, who shall travel on the Lord's day, shall be then robbed, no hundred shall be answerable for it, but the person robbed shall be barred from bringing any action for the said robbery.

But if a man be robbed in going in his coach to church he shall have an action against the hundred; for that is not travelling within the intent of the st. 29 Car. 2. R. in C. B. (7 Geo. inter Tashmaker and Hundred of Edmonton. Comyns's Rep. 345.)

As to the proceeding, declaration, plea, &c. in an action upon the st. of Winton, vide in Pleader, (2 S 1, &c.)

#### (C 5.) How the charge upon the hundred shall be levied.

If there be judgment against the hundred, it may be levied against the inhabitants of the same hundred by *feri facias*.

So it may be levied upon any one, who has lands in his possession within the hundred, though he has no house, nor lodging there; for he is an inhabitant. R. 2 Sand. 423.

Upon a lessee, or purchaser after the robbery committed. R. Noy, 155.

So it may be levied upon one or two of the inhabitants.

But if a man come to inhabit in an hundred after a robbery done, he shall not be charged. R. Hutt. 125. Cont. per Barckley, Mar. pl. 28.

So, if the whole debt be levied upon one or two of the hundred, by the st. 27 El. 13. on complaint to two justices of peace of the county

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justice of peace, or annex any 'precise meaning as to distance. Esp. P. A. 193. — 3. For where the robbery was committed twenty miles from the place where the justice lived, and it was proved, that there were many justices of peace lived nearer; Abney J. held it to be sufficient, saying, that the act in that respect was merely directory. B. N. P. 186.

(o) Where the bond was set out, as given before J. S. secondary to G. W., chief clerk to enroll pleas, it was held to be a good bond within the statute, though the word 'secondary' only be used therein. Andr. 115. C. T. H. 409.

(p) It is sufficient to say, that the bond was given to J. H. high constable, without averring that there was but one. Andr. 115. C. T. H. 409.

(*quorum*



(*quorum unus*) in or near the hundred, they may assess rateably all the towns, &c. within the same hundred, or in the liberties within the same, for the relief of him against whom the plaintiff took execution; and the constable of each town, &c. may rateably assess the said sum on every inhabitant, and if he refuse to pay, levy by it distress and sale, &c.

And by the same stat. the hundred, where default of fresh suit on hue and cry was made, shall answer half the damages recovered against the hundred in which the robbery was committed, to be recovered by debt, &c. at the suit of the clerk of the peace.

By the st. 8 Geo. 2. 16. after judgment against the hundred, no process shall be served on the high constable or any inhabitant, but the sheriff (*q*) on receipt of the writ of execution (*r*) shall shew it gratis to two justices of the peace, in or near the hundred, who shall speedily cause an assessment to be levied (*s*) pursuant to the st. 27 El. 13. and also for the necessary expenses of the high constable above the costs and damages recovered, of which, on notice from the two justices, he shall give an account, and proof on oath to their satisfaction, having first caused his attorney's bill to be taxed.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not to be called upon for a return till sixty days after. (*t*)

And the like assessment shall be in case the plaintiff be nonsuit, discontinue, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties, he cannot be reimbursed on the bond of 100%. penalty; and the money levied shall be paid to the justices for the high constable in ten days after it is levied. (*u*)

And the justices may limit a time not exceeding thirty days for levy-

(*q*) After the sheriff has handed over the writ of execution, under the statute of hue and cry, 8 G. 2. c. 16. or 19 G. 2. c. 34., he has no farther duty to perform, except to return what he has done. 13 East. 544.

(*r*) Though damages recovered against the hundred, under the riot act, are to be levied, not by a writ of execution, but by an order of justices; it seems that the writ should still issue as a foundation for the order. 5 T. R. 341.

(*s*) 1. An order of justices to levy damages recovered on the riot act against the hundred, directing them to be paid to a banker, subject to their farther order, instead of the plaintiff, pursuant to the statute, is bad. 5 T. R. 341. — 2. It seems that an order directing damages recovered under the riot act against the hundred, to be levied on the inhabitants of 'districts and parishes,' instead of 'towns, parishes, villages, and hamlets,' is bad. 5 T. R. 341.

(*t*) By st. 22 G. 2 c. 46. s. 4. No writ of execution against the inhabitants of any hundred, on any judgment obtained by virtue of any act of parliament, shall be levied on any particular inhabitant of such hundred; but the sheriff shall, on receipt of any such writ, cause the same to be produced to two justices of the peace as is directed by 8 G. 2. c. 16. s. 4., and thereupon the said justices shall, as is directed by the said act, cause a taxation to made and collected for paying the costs and damages recovered by the plaintiff, and all such necessary expenses as any inhabitant of such hundred shall have been at, in defending such action; the same being first proved on oath, and the attorney's bill being first taxed, and the sum so collected shall, within the time by the said act limited, be paid to the sheriff, and by him paid over to the persons entitled to the same, without deduction or fee.

(*u*) As the statute of Winton incorporates the hundred so as to subject them to be sued, it, by consequence, gives them the capacities attaching upon the character of defendants; and they may, therefore, sue the plaintiff for the costs of a nonsuit; may bring a *scire facias*, on action of debt upon the judgment; or may proceed against the sheriff for an escape. Fitzgib. 296.

ing such assessment; and the officer appointed refusing or neglecting to levy and pay the money, &c. in such time forfeits double the sum. (x)

(x) 1. By 1 G. 1. st. 2. c. 5. s. 4. commonly called the *riot act*, it is enacted, that if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship certified and registered according to the statute 1 W. & M. Sess. 1. c. 18. or any dwelling house, barn, stable, or other outhouse, that then every such demolishing, or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy. — 2. And by s. 6. it is enacted, that if any such church or chapel, or any such building for religious worship, or any such dwelling-house, barn, or other outhouse, shall be demolished or pulled down wholly, or in part, by any persons so unlawfully, riotously and tumultuously assembled, that then, in case such church, chapel, building for religious worship, dwelling house, barn, stable, or outhouse, shall be out of any city or town, that is either a county of itself, or is not within any hundred, that then the inhabitants of the hundred in which such damage shall be done, shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down wholly or in part; and such damages shall and may be recovered by action to be brought in any of his majesty's courts of record at Westminster, by the person or persons damnified thereby, against any two or more of the inhabitants of such hundred, such action for damages to any church or chapel to be brought in the name of the rector, vicar, or curate of such church or chapel that shall be so damnified, in trust for applying the damages to be recovered in rebuilding and repairing such church or chapel; and that judgment being given for the plaintiff in such action, the damages so to be recovered shall be raised and levied on the inhabitants of such hundred, and paid to such plaintiff in such manner and form, and by such ways and means, as are provided by the st. 27 Eliz. for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed, shall be levied: and in case any such church, chapel, building for religious worship, dwelling house, barn, stable, or outhouse so damnified, shall be in any city or town, that is either a county of itself, or is not within any hundred, then the action is to be brought against two or more inhabitants of such city or town. — 3. This statute, so far as it respects the action against the hundred by the party injured, is held to be a remedial law, and ought to receive a liberal construction; and, therefore, although the words of the statute are 'any dwelling-house, barn, stable, or other outhouse,' if the persons riotously assembled, demolish, and pull down a dwelling-house, and at the same time destroy the goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable to yield damages for the destruction of the furniture, as well as of the house; for the destruction of the furniture and the demolition of the dwelling-house is one and the same act committed at one and the same time. Indeed if the destruction of the furniture be a separate act, it is not a felony, and the hundred is not liable, but where it is part of the same transaction, the hundred is chargeable to yield damages for the destruction of both house and furniture. At the common law, antecedent to this statute, to demolish a house and furniture was a mere civil trespass, for which the owner might bring an action of trespass against the wrong-doers, and recover damages against them for the whole loss he sustained, as well by the destruction of the furniture, as of the house; but this statute has turned the trespass into a felony; and it being merged in the felony, the party injured was of course deprived of his civil remedy against the trespassers until their conviction or acquittal, and therefore the statute has substituted the action against the hundred in lieu of it, and put the party injured in the same state as he was before. Cowp. 485. Dougl. 699. 2 Saund. 577. n. — 4. To support this action, it is not necessary to prove, that twelve rioters were assembled at the time of the demolition of a dwelling-house, &c., for though in the first and third sections of the act, the number twelve is particularly mentioned as descriptive of the offence thereby created; yet it is omitted in the fourth section which makes it felony riotously to demolish any dwelling house, &c.; and also in the sixth section, which gives the remedy against the hundred; which latter section being also a remedial law, makes the consideration of the numbers assembled less important. 5 T. R. 14. — 5. The action may be brought by a trustee in whom the legal estate is vested for existing purposes. Ibid. — 6. And even as it seems, by a bare trustee. Ibid. — 7. The demolishing

molishing and pulling down of a dwelling house, &c., or a part of it must amount to a felony within this act, in order to make the hundred liable to an action at the suit of the party injured for the damage done to his house. Therefore where a large mob collected in a town, where there was a general illumination, broke the windows of the plaintiffs' house with stones, &c. and also the stanchions of the windows, the uprights of the sashes, and also the window shutters on the inside; it was held, that the hundred was not liable to an action for this damage done to the house; because it was not a beginning to demolish or pull down within the meaning of the fourth section of the act; and the action is not maintainable against the hundred unless the rioters are guilty of felony. 7 T. R. 496.—8. But where upwards of an hundred persons assembled together, came to the plaintiffs' house, who was a baker, and asked if he had any flour, and being answered in the affirmative, they said that they would have it at 2s. a stone, it being then worth about 5s.; the plaintiff said that he could not afford to sell it at that price; but they insisted upon having it; and he, not able to resist, began to measure it out in small quantities; whereupon the rioters began to break the windows of the bake-house, and the dwelling-house adjoining thereto, and broke the glass of three windows, and also the shutters; besides which, they broke open a warehouse belonging to the plaintiff, situate lower down in the same street on the opposite side of the way, in which there was flour; there however they only burst open the lock, and threw about three bags of flour worth 15s. into the street, from whence it was carried away by some of the mob; and they took about ten stone out of the bake-house, which was sold at the price named by themselves; they also took away some malt, and other things: The learned judge told the jury, that there was no doubt of the unlawfulness of the assembly; and as to their beginning to demolish or pull down the dwelling-house, that the glasses of the windows, and the shutters, if fixed, were part of the dwelling-house; nevertheless if they were satisfied that the mob meant to stop there and proceed no further, it might be too much to say, that it was a beginning to demolish, &c. within the riot act; but if they thought, that the mob came with an intention to proceed to further acts of demolition, if they could not otherwise effect their purpose, then it was a beginning to demolish; whereupon the jury found for the plaintiff to the amount of all the damage proved. On a motion for a new trial the court of K. B. held, that the damage done to the warehouse on the opposite side of the street was an entire distinct act, not consequential to bursting open the lock; and it would be carrying the construction of the statute too far to say, that a bursting open of a lock upon such an occasion, was a beginning to demolish the house; that in the case cited, the damage to the garden was immediately consequential to pulling down part of the house, and happened in the act of pulling it down. With respect to the dwelling-house and bakehouse adjoining, the case was properly left to the jury to consider, *quo animo* the windows and shutters were broken; but that the flour taken out of the bakehouse, which was compelled by the mob to be sold, was not a damage which could be recovered by the plaintiff against the hundred. Upon which the plaintiff consented to take his verdict only for the damages done to the house by breaking the windows. 1 East, 615. 2 Saund. 378. n.—9. So where a mob consisting of more than two hundred persons came in the morning to the plaintiff's house at S., who was a flour seller and grocer; and after beating him, and threatening to break the windows, and pull the house down, they actually broke the windows of the house and kitchen, cut the iron and stanchions, and broke the window-shutters; they also pulled down a lean-to, or little out-house, and tore off the roof of it; the latter was so placed, that when pulled down there was left an opening outwards from the upper chamber of the house, which had communicated as a door-way into the upper part of the lean-to; out of the lumber-room with which this was connected, the mob took a quantity of flour; some of it they sold one amongst another, against the plaintiff's consent, at their own price (scarcely half the value), which they paid to the plaintiff; some was stolen; and some was thrown about and wasted; in all more than two hundred stone: it was objected that the plaintiff was not entitled to recover for any part of the flour which was taken and sold by the mob, but only for the damage done to the house and lean-to, and the flour spoiled in so doing: the jury, however, under the judge's direction, found a verdict for the plaintiff for the several amounts of the damages sustained by him in each respect: but the court of K. B. was of opinion, that the hundred were only liable for the damage done to the house and lean-to, and for such of the flour as was spoiled or destroyed in doing that damage; but that as to the flour stolen, or, which in effect was the same thing, taken away and sold without the consent of the plaintiff, that being a distinct felony in the offenders, an offence which existed before the passing of the riot act, and not an injury done to the party by beginning to demolish or pull down the house, it was not within the fourth clause of the act, and consequently not within the

clause giving damages against the hundred. 1 East, 636. 2 Saund. 378. n. — 10. The breaking of inside window shutters, a window sill, and the wood of the fanlight, has been held sufficient evidence of a beginning to pull down, if the mob are interrupted and dispersed, while committing these acts of violence, by an alarm of the approach of the military. 4 Camp. 221. — 11. And it was held, that in order to render the hundred liable for partial damage done to a house, the rioters must have begun to demolish it with the intention of actually demolishing it, if not interrupted. 4 Camp. 377. — 12. And in an action against the hundred, for demolishing and taking goods, it was held, that the plaintiff might recover the value of the goods, as guns, gunstocks, &c. used and destroyed in the very act of demolition, but not of such as are feloniously carried away at the time, for that is a distinct felony. 1 B. & A. 487. — 13. But by a recent statute, 57 G. 3. c. 19. s. 38., it is enacted, that in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged, or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever which shall be therein, shall be destroyed, taken away, or damaged, by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in, or making part of such riotous or tumultuous assembly, the inhabitants of the city, &c. in which such house, &c. shall be situate, if such city, &c. be a county of itself, or is not within any hundred, or otherwise, the inhabitants of the hundred, in which such damage shall be done, shall yield a compensation to the person damnified, to be recovered by the same means, and under the same provisions, as are provided by 1 G. 1. c. 5. with respect to persons injured and damnified by the demolishing or pulling down of any dwelling-house, by persons unlawfully, riotously, and tumultuously assembled. — 14. The plaintiff is entitled to his costs in this action, as well as in the action against the hundred, on the statute of hue and cry. 2 Wils. 91. Cowp. 485. — 15. As to the time within which the action is to be brought; there is no case wherein this point has been decided; but it should seem that the eighth section of the act, which limits criminal prosecutions for the felony created by it to be commenced within twelve months after the offence committed, would be held to extend also to actions brought upon it. 2 Saund. 378. n.

1. By the statute 9 G. 1. c. 22. s. 1. commonly called the *black act*, it is enacted, that if any person or persons shall unlawfully and maliciously kill, maim or wound any cattle, or cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, or shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, every person so offending shall be adjudged guilty of felony without benefit of clergy. — 2. And by the seventh section of the same act, it is enacted, that the inhabitants of every hundred shall make full satisfaction and amends to all and every the person and persons, their executors and administrators, for the damages they shall have sustained, or suffered by the killing or maiming of any cattle, cutting down, or destroying any trees, or setting fire to any house, barn, or outhouse, or hovel, cock, mow, or stack of corn, straw, hay, or wood, which shall be committed or done by any offender or offenders against this act; and that every person and persons who shall sustain damages by any of the offences last mentioned, shall be and are hereby enabled to sue for and recover such his or their damages, the sum to be recovered not exceeding the sum of 200*l.* against the inhabitants of the said hundred, who by this act shall be made liable to answer all or any part thereof; and that if such person or persons shall recover in such action, and sue execution against any of such inhabitants, all other the inhabitants of the hundred who by this act shall be made liable to all or any part of the said damage, shall be rateably and proportionably taxed for and towards an equal contribution for the relief of such inhabitants against whom such execution shall be had and levied, which tax shall be made, levied and raised, by such ways and means, and in such manner and form, as is prescribed by the 27 Eliz. 3. And by s. 8. provided nevertheless, that no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they by themselves or their servants, within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice of such offence done and committed unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such fact shall be committed, and shall within four days after such notice give in his, her, or their examination on oath, or the examination upon oath of his, her, or their servant or servants, that had the care of his or their houses, outhouses, corn, hay, straw or wood, before any justice of the peace of the county, liberty, or division where such fact shall be committed, inhabiting within the said hundred where the said fact shall happen to be committed, or near unto the same, whether he or they do know the person or persons that committed such fact, or  
any



any of them ; and if upon such examination it be confessed, that he or they do know the person or persons that committed the said fact, or any of them, that he then or they so confessing shall be bound by recognizance to prosecute such offender or offenders by indictment or otherwise according to the laws of this realm. — 4. The oath must be positive whether the plaintiff knew the persons who committed the offence or not. As where in an action on this statute the oath proved was, that the plaintiff had good reasons to suspect the fact was done by R. G. & W. L. both of such a parish ; the court of K. B. held, that the examination did not maintain the action ; the oath required is a condition precedent, and for the sake of the hundred, and to prevent screening the offenders ; there is a great deal of difference between suspecting and knowing a man ; who knows the offender may purposely stop at the word ‘suspect’ to avoid being bound to prosecute ; and though it would be equivocating, yet it would hardly be a perjury assignable ; it being only suppression of part of the truth ; he should have said, ‘I suspect them to be the men, but I do not know it ;’ it will be dangerous to go out of the words of the act. 2 Str. 1247. — 5. So it was held to be a condition precedent, that the party grieved should within the time limited give in his examination on oath before a magistrate, whether or not he knew the offender or offenders, or any of them ; and therefore an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, was adjudged to be not sufficient within the statute, and still less in support of an averment in the declaration, that he gave such examination, &c. in and by which it appeared that the plaintiff did not know the person or persons who committed the fact ; for *non constat* by the terms of such examination, that the plaintiff did not know some of the offenders, if there were several. 3 East, 400. — 6. And by s. 9. Provided also, that where any offence shall be committed against this act, and any of the said offenders shall be apprehended, and lawfully convicted of such offence within the space of six months after such offence committed, no hundred or any inhabitants thereof, shall in any wise be subject or liable to make any satisfaction to the party injured, for the damages he shall have sustained. — 7. And by s. 10. the party sustaining any damage by reason of any offence committed contrary to this act, shall commence his action or suit within one year next after such offence shall be committed. — 8. The action being given by this statute against the inhabitants of the hundred, the plaintiff can only proceed against them by original as he must on the statute of 13 Edw. 1. of hue and cry. — 9. But the action, both upon this act and the before mentioned one of 1 G. 1. must be brought in the name of the party grieved only, and ought not to be a *qui tam* action ; for the inhabitants are not guilty of any contempt of the king in either of those cases, as they are for neglecting to pursue and apprehend the robbers as required by the statute of Edward the first. 2 Saund. 378. n. — 10. In this case, too, no action will lie against the hundred at the suit of the party injured, unless the act which occasioned the damage amounts to a felony within this statute. Ibid. — 11. Although the words of the first section of the statute are, ‘unlawfully and maliciously,’ yet it is not necessary to use those precise words in the declaration ; therefore where the action was for the damages the plaintiff had sustained, by setting fire to two stacks of oats, which in the declaration was laid to have been feloniously done by some person or persons unknown ; after verdict for the plaintiff it was moved in arrest of judgment, that the declaration was bad, because it was not alleged that the setting fire to the stacks was done unlawfully and maliciously according to the words of the statute : but the court were unanimously of opinion that it was not necessary ; for though the burning must be unlawful and malicious to constitute the offence, yet the statute does not make use of any technical words that are absolutely necessary to be inserted in the declaration, but leaves the plaintiff to allege and prove *quo animo* the stacks of oats were set on fire, here he has alleged, that the same was committed feloniously ; and it must be presumed after verdict, that it was done maliciously and unlawfully. 3 Wils. 318. 2 Blk. 842. 2 Saund. 378. n. — 12. The declaration, after setting out the offence ought to shew, that the plaintiff gave notice of it within two days, and, within four days after, gave in his examination upon oath before a justice of peace, and that six months have elapsed, and the offender not taken ; or if the plaintiff knew the offender, he should state, that he entered into a recognizance to prosecute him, and that six months are elapsed, but the offender not taken. 2 Saund. 378. n. — 13. It should seem that the two days to give notice to the inhabitants, and the four days to give in his examination, are to be reckoned both inclusive. Ibid. Hob. 139. — 14. Where the notice of the fact was given within two days to the inhabitants of the parish (instead of the town, village, or hamlet) near the place, &c. ; yet as the law *prima facie* intends every parish to be a vill unless the contrary be shewn, it has been holden, that this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial, that the parish consisted of several villa, and that the notice had been given to one vill more



## HUNTING.

Vide CHASE, (H 1. &c.) — JUSTICES, (S 7.) — JUSTICES OF THE PEACE, (B 47. 49.)

## HUSBAND AND WIFE.

Vide BARON AND FEME — CHANCERY, (2 M 1. &c.)

## HUSTINGS.

Vide COURTS, (O 1.)

## IDEMPTITATE NOMINIS. (a)

## (A) When it lies.

The writ of *idemptitate nominis* lies, when a man is taken or molested by process against another of the same name. F. N. B. 268.

And it shall be directed to the escheator, or to the sheriff, if a man or his goods are taken by process against another directed to them. F. N. B. 268.

If he be taken by process against an accountant out of the exchequer, it shall be directed to the treasurer and barons of the exchequer. F. N. B. 268. A.

If by process after outlawry in B. R. or C. B. it shall be directed to the justices of the same court. F. N. B. 268. B.

So, it shall be directed to the justices of gaol-delivery, or of the peace, if he be molested by process upon indictment before them. F. N. B. 268. C.

So it lies after judgment and execution sued. R. 2 Cro. 623. Semb. cont. Hob. 330.

distant than another, the defendants would have been entitled to a verdict. 8 East, 173. — 15. If the plaintiff recovers, he is entitled to his costs, though by that means the damages and costs should exceed 200l. 1 T. R. 71. — 16. And if the plaintiff be nonsuited, or there is a verdict for the defendants, they will have their costs. 3 Bur. 1723.

1. There are other statutes which make the hundred liable to the action of the party injured, such as 8 G. 2. c. 20. for destroying turnpikes, or works on navigable rivers; 10 G. 2. c. 32. for cutting hop-binds; 11 G. 2. c. 22. for destroying corn to prevent exportation; 19 G. 2. c. 34. for wounding officers of the customs; and 29 G. 2. c. 36. 2 Saund. 378. n. — 2. In the case of the demolition of the works of mills, the determining whether the works destroyed belonged to the mill, or were independent of it, forms a question for the jury, whose finding will be conclusive of that fact. 1 Price, 343.

(a) It is now obsolete.

This writ directed to the justices seems to be only a commission to them to make inquiry of the truth, upon which they award a writ of inquiry to the sheriff. F. N. B. 268. B.

And thereupon, the attorney-general may plead, *quod est eadem persona*; which shall be tried by a jury, and judgment according to the verdict. Hob. 330.

But a man taken by a *capias utlagatum* may come into C. B. and pray a writ of inquiry whether he be the same person, without suing an *idemptitate nominis*. F. N. B. 268. B.

So upon an *exigent* a man of the same name may offer himself to answer; and if the plaintiff says, that he is not the same person, he shall put the difference of the names, and according to such difference, the *exigent* shall be awarded. F. N. B. 268. B.

But where a man appears by *supersedeas* upon an *exigent* returned outlawed, the plaintiff cannot say that he is not the same person, and so defeat the outlawry, without a writ of *idemptitate nominis*. F. N. B. 268. B.

So upon an *exigent* on an indictment, a man cannot say, that he is of the same name, and pray that the attorney-general may put a difference of names, for it would be changing the indictment; but the party, if he be aggrieved, must have an *idemptitate nominis*. F. N. B. 268. C.

## IDIOT.

(A) Idiot, who shall be, infra.

(B) Lunatic, &c. p. 483.

(C) The king shall have the custody of them:—~~that~~ what interest the king has. p. 483.

(D) Acts by a non-compos.

(D 1.) What are void. p. [461.]

(D 2.) What only voidable. p. [462.]

(D 3.) What he may do, if he becomes sane. p. [462.]

(D 4.) How avoided:—By the king upon office. p. [462.]

(D 5.) By the heir. p. [463.]

(D 6.) When they shall not be avoided. p. [463.]

(D 7.) What acts he may do. p. [464.]

### (A) Idiot, who shall be.

Persons who are *non compotes mentis* are idiots, or of non-sane memory.

Idiots are *fatui naturales*, which were of non-sane memory *à nativitate*. Co. L. 247. a. Staundford's Præ. R. 34. b.

And it is sufficient to find him so, if he has not any use of reason: as, if he cannot count 20d. F. N. B. 233.

Has no understanding to tell his age; who is his father or mother, &c. F. N. B. 233. B.

What will be for his profit or loss. F. N. B. 233. B.

But a man shall not be called an idiot, if he has the understanding to learn, or know letters. F. N. B. 233. B.

To read by the instruction, or information, of another. F. N. B. 233. B.

### (B) Lunatic, &c.

So, if any person be by sickness or other accident deprived of the use of his reason, he shall be esteemed *non compos mentis*. Co. L. 247. a.

Though he be a lunatic, and have lucid intervals. Co. L. 247. a.

[If a man loses his speech by an apoplectic fit, though he shews some signs of sense, a commission may be granted against him. Pitt's Case, T. 7 G. 2. B. R. H. 52.]

### (C) The king shall have the custody of them:—What interest the king has.

The king, of right, has the protection and defence of all his subjects, their lands and goods. F. N. B. 232. A.

And therefore by the st. Prærog. Reg. 17 Ed. 2. 9. *rex habebit custodiam terrarum fatuorum naturalium, capiendo exitus earum sine vasto, et inveniet eis necessaria, de cujuscunque feodo, et post mortem eorum reddit hæredibus, ita quod nullatenus per eosdem fatuos alienentur, &c.*

And by the same st. 17 Ed. 2. 10. *rex providebit, si quis, qui prius habuit intellectum, fuerit non compos mentis, ut quidam sunt per lucida intervalla, quod terræ custodiantur sine vasto, et ipse et familia inde sustineantur competenter, et residuum custodiatur ad opus ipsorum, ita quod prædictæ terræ infra prædictum tempus nullatenus alienentur, nec rex aliquid de exitibus recipiat ad opus suum.*

[This stat. is not introductive of any new right in the crown. Oxenden v. Compton, 2 Ves. jun. 71.]

[The words thereof, "waste, and destruction," used in the ordinary, not the technical sense. Ibid.]

[Under this stat. the crown commits the care of lunatics to some great officer, not of necessity the chancellor. The warrant confers no jurisdiction, but only a power of administration. The appeal is to the king in council. Ibid.]

This prærogative seems to have commenced *tempore* Ed. 1. St. Præer. R. 33. b.

And therefore, the king himself shall have the custody of an idiot, his lands and goods. 4 Co. 126.

And shall have them during the life of the idiot. St. Præer. R. 34. a. 4 Co. 126. a. Dy. 26. in marg.

The king may take the profits of an idiot's estate to his use, allowing necessities to him and his family. St. Præer. R. 35. a. Mo. 4 Dy. 26. a.

So, he may demise his lands, rendering rent. St. Præer. 35. a.

So, the king may grant the custody of an idiot, his lands, and goods, to another, 2 Ca. Ch. 70. 1 And. 23.

So, he may grant them to another, without security to account. 3 Mod. 43.

And such grant extends to the executor or administrator of the grantee. 3 Mod. 44. Skin. 139. 177.

So, he may commit the care of a *non compos* to another, so that his family be maintained, and nothing wasted. 4 Co. 127. b.

But the king is not seised of the lands of an idiot; for he remains seised of the freehold. 4 Co. 126. a. St. Præer. R. 35. b.

So, the king, out of the profits must allow necessaries for him and his family. St. Præer. R. 35. a.

Must make reparations. St. Præer. R. 35. a.

So, a grant of the custody to another and his executors will not be good to the executor. Qu. 2 Ca. Ch. 70. 1 Ver. 9. 137. Skin. 4.

So, the king shall not have a copyhold, which belongs to an idiot. 4 Co. 26. b.

Nor, a right, or title of entry, or action. St. Præer. R. 35. b.

So, after the death of an idiot, the king, upon an *ouster-le-mains*, shall restore the land to the heir. St. Præer. R. 35. a.

So, the king has no interest in the person of a lunatick, &c. as of an idiot. 4 Co. 127. a.

Nor, can he grant the custody of him and his lands, to the use of the grantee. 4 Co. 127. b. R. Mo. 4. 1 And. 23. Bend. 17. Dy. 25. b.

Or, without security to account to him, if he becomes *compos*; otherwise, to his executor or administrator. 3 Mod. 43. Qu. Dy. 26. a.

[The king's grant of a lunatick's estate, without account, is void; but the king, or lord chancellor, by authority of the sign manual, may allow such a yearly maintenance to the committee, as amounts to the yearly value of the lunatick's estate. *Sheldon v. Fortescue*, A. P. 1731, 3 P. W. 104.]

[If custody of lunatick is granted to husband and wife, (she being next of kin,) it determines on her death. *Ex parte Lyne*, M. 9 Geo. 2. C. T. T. 143.]

Yet, he shall present to a church for a lunatick. Win. Ent. 629. (663.)

How a commission for an idiot, lunatick, &c. shall be granted, vide in Chancery, (3 Q.)

If the king be informed, that such a one is an idiot, or non-sane, he may bring him before his chancellor to be examined, and afterwards an inquisition may be awarded to inquire, whether he be an idiot, non-sane, &c. St. Præer. Reg. 34.

Before the chancellor, or any other whom the king shall appoint. St. Præer. Reg. 34. b.

So, the king may award a writ to the escheator or sheriff, *quod in propria personâ ad ipsum accedat et ipsum viis et modis, &c. examinet, et nihilominus per sacramentum, &c. inquiret si idiota sit, necne; et si sit, utrum à nativitate, aut ab alio et quo tempore, et si lucidis gaudeat intervallis, &c.* F. N. B. 283.

And if he be found an idiot by office, and die; the king may afterwards seize his lands; for he must restore them to his heir. St. Præer. R. 35. b.

So, if he be found an idiot for 8 years, these words, 8 years, shall be rejected,

rejected, for finding, that he is an idiot, generally, is sufficient, and the addition will be surplusage. R. 3 Mod. 43.

If he be found an idiot and that he aliened, without saying, how, or for what estate, it is sufficient to give the custody of him and all his lands to the king. R. Ley. 25.

But before office the king cannot seize the lands of an idiot, or non-sane person. 4 Co. 127. a.

And no office can be found after his death. 4 Co. 127. a.

So, a man, who takes upon him the care of a lunatick, &c. of his own head, shall be accountable as bailiff to him, his executors, or administrators. 4 Co. 127. b. Vide Accompt, (A 3.)

[The committee of a lunatick cannot make a lease of the lunatick's lands by law. *Knipe v. Palmer*, T. 33 & 34 Geo. 2. 2 Wils. 130.]

And if he invests the personal estate of the lunatick in the purchase of land, it shall be distributed as personal estate, and not go to the heir. R. 2 Ver. 192.

But if a man be found an idiot, &c. or non-sane, by inquisition and examination before the escheator, or sheriff, he may in person, or by his friends, come before the chancellor and king's counsel, and pray to be examined there. F. N. B. 233. St. Prær. R. 36. a.

And he may have a writ to bring him before the king's counsel. F. N. B. 233. St. Prær. R. 36. a.

And if he be found no idiot, the first inquisition before the sheriff, &c. though it be returned, shall be void without a traverse. F. N. B. 233. St. Prær. R. 36. a.

[By stat. 17 Geo. 2. c. 5. ss. 20. & 21. two justices may order a lunatick to be confined in any place in the county, if his settlement is in the county, if not, to send him to his settlement; the expences to be raised by warrant of two justices, by sale of his goods, or rents of his lands; and if he has not an estate to pay it, above what is sufficient to maintain his family, then by his parish: but this is not to abridge the king, chancellor, &c. nor the friends or relations.]

[By st. 14 Geo. 3. c. 49. mad-houses are regulated. None may keep more than one lunatick (except committed by chancellor) on pain of 500*l.* without annual licence from commissioners appointed by college of physicians, for seven miles round London, and by quarter sessions elsewhere.]

[No person to keep two houses; commissioners to visit houses once a year, or when required by chancellor or either chief justice, or when they think fit, and examine persons confined. Commissioner may, on application, inform a person applying of the name of a person confined, and where, and by whom. Keeper receiving a patient without order from physician, surgeon, or apothecary, or not sending notice to the secretary of the commissioners, in three days near London, or fourteen days elsewhere, forfeits 100*l.* This act gives no new justification, but all must be justified at common law.]

## (D) Acts by a non-compos.

### (D 1.) What are void.

All acts, which an idiot, or *non-compos*, can do, concern his life, his lands, or his goods. 4 Co. 124. a.



By the civil law, all acts of a *non-compos* are void, without the assent of his tutor. 4 Co. 125. b.

By the common law, every disposition by will by a *non-compos* is void. Vide Devise, (H 1.)

So, a deed by a *non-compos* is void. Ca. Parl. 154. (a)

As, if a *non-compos* by deed surrender his estate for life, it will be void. R. Ca. Parl. 153. R. in B. R. and afterwards affirmed in parliament. 3 Mod. 310. Sal. 427. Comb. 438. 468. Ld. Raym. 813. p. c.

So, a grant of a rent-charge by a *non-compos* will be void. Ca. Parl. 153.

So, if a *non-compos* make a feoffment by letter of attorney, it will be void, as to all except himself. 4 Co. 125. a. (b)

Although it be reasonable, and for the benefit of his family. 2 Ver. 414.

[By st. 15 Geo. 2. c. 30. if lunatick under a commission, or whose person and estate by act of parliament is committed to the care of trustees, shall marry before declared of sane mind by the lord chancellor, &c. or such trustees respectively, such marriage is void to all intents. This act was supposed, at the time, to be made on occasion of Mr. Newport, natural son to the late earl of Bradford, who had left him a very great fortune, with remainder to another person.]

#### (D 2.) What only voidable.

But a feoffment by a *non-compos* in person is only voidable. 4 Co. 125. a.

#### (D 3.) What he may do if he becomes sane.

If a lunatick becomes of sane memory, he may afterwards make a feoffment, &c.

But if found a lunatick by commission, the chancery will direct, that in order to make a settlement he shall levy a fine in C. B. and it shall be tried upon issue there, whether he be *compos*. 1 Ver. 155.

Vide Chancery, (3 Q).

#### (D 4.) How avoided: (c) — By the king upon office.

If an idiot make a feoffment or other conveyance of his lands and tenements, after office found, the king shall avoid them. St. Præ. R. 34. b. 35. b. 4 Co. 127. a.

So, if a lunatick, or other *non-compos*, make a feoffment, &c. upon office found it shall be avoided. 4 Co. 127. a. 1 Ca. Ch. 113.

And upon office it shall be avoided, as to the idiot or *non-compos* himself. Co. L. 247. a.

For after office upon a *scire facias* against the alien, the land shall be seised into the king's hands. 4 Co. 126. b.

And by such seizure the freehold is revested in the *non-compos*. 4 Co. 126. b.

(a) Ld. Raym. 313.

(b) If he makes livery personally, only voidable. Ld. Raym. 313.

(c) A man who has been *non-compos*, cannot avoid any act done during his insanity, which was only voidable. Ld. Raym. 315, 316.

Or, it may be avoided upon an information by the attorney-general; as well as by *scire facias*. 1 Ca. Ch. 113. 153.

So, by office, his grant of a copyhold shall be avoided, though it cannot be seized by the king. 4 Co. 126. b.

So, after office, all gifts by him of his goods are avoided. 4 Co. 126. b.

And all bonds. 4 Co. 126. b.

Or, other debts. 4 Co. 126. b.

And if he be afterwards sued upon such a bond or deed, so long as the office is in force, a *supersedeas* reciting the office may be sent to the justices. 4 Co. 126. b.

An office found as to an idiot relates to his nativity, and avoids all acts from that time. 4 Co. 126. b.

As to a lunatick, &c. it relates to the time when he is found to be *non-compos*. 1 Ca. Ch. 113.

Yet, where the office has a retrospect, a purchaser shall be allowed to traverse. R. 1 Ca. Ch. 113.

### (D 5.) By the heir.

So, if there be an alienation by a *non-compos* in fee, in tail, for life, or years, his heir may avoid it by entry, if his entry be congeable. F. N. B. 202. F.

Or, if it be not congeable, by a writ of *dum non fuit compos mentis*. F. N. B. 202. F. Vide *Dum fuit infra Ætatem* (B).

The process in a *dum non fuit compos mentis* is the same as in a *præcipe quod reddat*, viz. summons, grand cape, and petit cape. F. N. B. 208. D.

So, the heir may avoid the alienation of his ancestor being *non compos*, by plea, as well as by entry, and writ of *dum non fuit compos*. Co. L. 247. b.

### (D 6.) When they shall not be avoided.

But an idiot, or person non-sane, cannot himself have a *dum non fuit compos*; for he cannot stultify himself. Cont. F. N. B. 202. C. D. R. acc. 4 Co. 123. b. Semb. cont. Ca. Parl. 153.

And therefore, a feoffment, release, or grant, cannot be avoided by a *non-compos* himself; for he cannot by plea disable himself. R. 4 Co. 123. b. Co. L. 247. a. b.

Though the feoffment was by attorney. 4 Co. 125. a.

So, to a bond by himself, he cannot plead, *quod non fuit compos*. R. 4 Co. 123. b. R. Cro. El. 398.

So, a *non-compos* shall not be aided by a court of equity, against an alienation which he himself cannot avoid by law. R. 4 Co. 124. a.

So, a feoffment, &c. by a *non-compos* shall never be avoided by a privy in estate, or tenure: and therefore, if a *non-compos* make a feoffment, and die without heir, the lord by escheat shall not avoid it. 4 Co. 124. a.

So, if a donee in tail make a feoffment, and die without issue, it shall not be avoided by him in reversion or remainder. 4 Co. 124. a.

So, by the st. 4 Geo. 2. 10. idiot, lunatick, or *non-compos*, being a trustee

trustee or mortgagee, may, or his committee in his name by direction of lord chancellor, &c. on petition may convey lands, &c. as directed.

So, if a *non-compos* alien by matter of record, it shall never be avoided by him or his heirs: as, if he levy a fine, or suffer a recovery, 4 Co. 124. a. Co. L. 247. a.

So, every act, which he does in a court of record, binds him and all other persons for ever. 4 Co. 124. a.

As, a judgment, statute, recognizance, &c. 4 Co. 124. a. 125. a.

(D 7.) What acts he may do.

So, a *non-compos* may maintain, or defend an action. Poph. 141.

If an idiot sue, he must appear in person, and any one who prays to be admitted as his friend may sue for him. Semb. 2 Saund. 335.

So, if an action be against an idiot, he must appear in his proper person, and any one who can make a better defence shall be admitted to defend for him. St. Præ. R. 36. 4 Co. 124. b.

But another *non-compos* must appear by guardian, if he be within age, and by attorney, if he be of full age. 4 Co. 124. b.

And if an action be by the committee of a lunatick and not by himself, it will be bad. R. 1 Brownl. 197. Poph. 141.

So, a *non-compos* shall not be punished for murder, or felony. 4 Co. 124.

But a *non-compos* shall be punished for high treason. 4 Co. 124. b.

So, the laches of a *non-compos* prejudices him as to a title of entry: as, if a *non-compos* be disseised, and the disseisor die seised, &c. the descent tolls his entry. 4 Co. 125. b.

But laches in a *non-compos* does not bar him of his right: as, if the disseisor levy a fine, non-claim for a year and a day at the common law does not bar him. 4 Co. 125.

So, the heir shall not be barred of his entry by the laches of a *non-compos*, though he himself be. 4 Co. 125. b.

[By the st. 4 Geo. 2. c. 20. Idiots, lunaticks, &c. or their committees, by direction of the lord chancellor, may assign trusts and mortgages, and be ordered to make such conveyances, in like manner as trustees and mortgagees of sane mind.]

Vide Capacity, (D 5.) — [Chancery, (32.)]

JEOFAILE.

Vide AMENDMENT, per totum. — PLEADER, (E 39.)

JERSEY, (ISLE OF.)

Vide NAVIGATION, (F 3.)

JETSAN.

Vide WRECK, (A).

## IMPARLANCE.

Vide ABATEMENT, (I 19, 20.) — INFORMATION, (D 5.) — PLEADER, (D 1, &c.)

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## IMPEACHMENT.

Vide PARLIAMENT, (L 18, &c.)

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## IMPLICATION.

Vide DEVISE, (N 12, 13.)

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## IMPORTATION.

Vide TRADE, (A 4.—C 2.)

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## IMPOSITIONS.

Vide PRÆROGATIVE, (D 48.)

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## IMPRESS.

[The power of impressing seamen, seafaring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, is founded upon immemorial usage; and there may be a legal exemption upon the same foundation. Cowp. 512.]

[A freeholder is not, as such, privileged from being impressed. 5 East, 477. 2 Smith, 47.]

[The right of impress extends to all sea-faring persons, except a ferryman, unless exempted by statute; therefore a headborough is not exempt as such. 5 T. R. 276.]

[It seems that the freemen and liverymen of London as such are not privileged from being impressed. 9 Inst. 466.]

[The master of a ship employed in the coal trade is not entitled, under st. 6 & 7 W. 3. c. 18. s. 19. to have two of his seamen free from impress, unless they have been previously nominated as required by the statute. 5 T. R. 417.]

[The carpenter of a vessel in the coal and coasting trade is not exempt from impress. 13 East, 549.]

[An apprentice in the Greenland fishery trade is not protected from being impressed beyond three years, though if he be bound for a longer time, the master is bound to keep him in his service, under a penalty of 50*l.* by 9 Geo. 3. c. 5. s. 5. 2 Smith, 335. East, 238.]

[The exemption from impress in st. 13 Geo. 2. c. 17. s. 2. extends to such only who, when they entered the sea-service, were not liable to be impressed, from their requiring instruction to fit them for the service;

vice; not, therefore, to a keelman navigating down the Tyne to Shields. 1 East, 466.]

[The exemption in st. 50 Geo. 3. c. 108. s. 2. extends to persons employed in the lobster fishery carried on upon the coast of Heligoland. 1 M. & S. 223.]

[An impress-protection granted by the admiralty, though for a specified time, may be withdrawn at pleasure, and by an impress warrant of a prior date. 16 East, 165.]

[A mariner is entitled to be discharged, though by accident he had not his protection on board at the time of impressment. 16 East, 167.]

[A bargeman protected by the navy-board while carrying timber to the King's Docks cannot be impressed by virtue of any warrant from the admiralty, 2 Blk. 1207.]

[An impress protection granted under st. 50 Geo. 3. c. 108. s. 2. is not invalidated by the master receiving additional mariners on board. 16 East, 167.]

[To compel obedience to a writ of *habeas corpus* to bring up an impressed man, the party must first search at the crown-office for the return, and if not found, apply, upon affidavit thereof, for an attachment. 2 Smith, 408.]

[The st. 6 & 7 W. 3. c. 18. s. 19. by which the master of every ship employed in the coal trade is entitled to have two of his seamen protected from being impressed, is still in force. 5 T. R. 417.]

[Since from the st. 5 W. & M. c. 20. having expired, the requisitions of the 19th sect. 6 & 7 W. & M. c. 18., can no longer be complied with, that section is no longer in force. 7 T. R. 673.]

[The st. 13 Geo. 2. c. 18. s. 5. has been impliedly repealed by st. 26 Geo. 3. c. 41. s. 17., since that has introduced a new law upon the subject. 9 East, 44.]

[The expression in the st. 19 Geo. 2. c. 30. "or any other persons whatsoever," means not the party by whom, but the party to whom the power of impressing is given. 1 T. R. 141.]

[The expression in the st. 19 Geo. 2. c. 30. "from such ship of war," is not confined to the particular ship to which the party impressing belongs, but means any ship of war whatever. 1 T. R. 141.]

[If an application for the discharge of an impressed seaman, made within the time of protection allowed by st. 13 Geo. 2. c. 17. s. 2. fail from a defect in the affidavit, a renewed application will be granted, though the period has then expired. 8 East, 27.]

## IMPRESSION.

Vide MONEY, (B 3.)

## IMPRISONMENT.

(A) What shall be a prison. p. [467.]

(B) Common goal. p. [468.]

(C) Mar:



(C) Marshalsea [and King's Bench] prison. p. [468.]

(D) Fleet. p. [469.]

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(F) Gaoler, who shall be. p. [470.]

(G) Imprisonment, what shall be. p. [470.]

(H) What is a cause for imprisonment.

(H 1.) Lawful process; — Process founded upon a record. p. [470.]

(H 2.) Founded upon a suggestion. p. [471.]

(H 3.) Process out of a lawful court. p. [471.]

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(H 5.) What not. p. [472.]

(H 6.) Lawful warrant. p. [473.]

(H 7.) What shall be a lawful warrant. p. [478.]

(H 8.) What will be a justification to an officer, though not duly awarded. p. [475.]

(H 9.) What not. p. [476.]

(I) How a prisoner shall be used. p. [478.]

(K) What is not a good cause for imprisonment. p. [479.]

(L) Remedy for false imprisonment.

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(L 2.) By action. p. [480.]

(L 3.) By writ *de odio et atia*. p. [480.]

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(L 5.) By discharge for want of prosecution. p. [481.]

(M 1.) When delivered out of prison. p. [482.]

(M 2.) By consent of the party. p. [482.]

(M 3.) By breaking prison. p. [482.]

(A) What shall be a prison.

All prisons are the king's prisons. (a) 2 Inst. 100. 589.

And a subject shall not have a prison of his own. 2 Inst. 100.

By the st. Mert. 20 H. 3. 11. *magnates petierunt propriam prisonam de illis quos caperent in parcis et vivariis suis quod rex contradixit.* 2 Inst. 100.

And therefore, where the lord of a franchise has the custody of a prison, it is the king's prison. 2 Inst. 589.

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(a) 1. All prisons in the kingdom are the king's prisons, though not under the control of the sheriff. 8 T. R. 172.

2. A house of correction is a gaol to which a prisoner charged with high treason may be committed. 8 T. R. 172.

And none can claim the custody of a prison as a franchise unless he has also gaol-delivery. 1 Sal. 343.

A prison cannot be newly erected, except by act of parliament. 2 Inst. 705.

By the st. 23 H. 8. 2. justices of peace in Essex, &c. may within a year erect a new gaol in their county, and assess for it, &c.

And by the st. 5 Eliz. 24. they may do it within ten years afterwards.

And by the st. 13 El. 25. within ten years after the former ten years.

By the st. 11 & 12 W. 3. 19. justices upon presentment of grand jury at assises may build or repair gaols in their county as the quarter sessions think fit, and assess in equal proportion, &c. for ten years.

Which was continued by the st. 10 Ann. 14. for seven years; and by the 6 Geo. 19. made perpetual. (b)

### (B) Common gaol.

A commitment upon a conviction before justices of oyer and terminer to the gaol, without saying, 'to the sheriff,' is bad. R. 1 Sal. 348.

So, a commitment by a court in London ought regularly to be to the sheriff. R. 1 Sal. 349.

But a commitment by another till he be carried to the gaol, is well; as, a commitment to a messenger, by the secretary; for it shall be intended to be for such purpose. R. 1 Sal. 347.

So, if a commitment be not to the common gaol, the warrant is not therefore void. 1 Sal. 347.

And by the st. 6 Geo. 19. justices of peace may commit vagrants and criminals for small offences to the common gaol, or house of correction.

### (C) Marshalsea [and King's Bench] Prison.

The prison of the marshalsea shall be within such limits as B. R. by rule appoints. 1 Rol. 810. l. 50.

And B. R. by rule may appoint it in any place in England. R. 1 Rol. 810. l. 50. Cro. Car. 210. 466.

By the st. 19 H. 7. 10. the sheriff of Surry, or any other sheriff, shall not have the custody of the gaols of King's Bench, or Marshalsea, or either of them, but the patentees of the crown.

But the marshal cannot, for any necessity, as by reason of a plague, &c. keep his prisoners in any but the ancient place, without a rule of court. 4 Rol. 810. l. 45. Cro. Car. 466.

And if a new place be appointed by the court, he must keep them there safely. 1 Rol. 810. l. 50.

[The court will not enlarge the rules while the prison is repairing, till the proprietors undertake by rule to repair it. N. B. They are obliged to repair, on pain of forfeiture. Case of King's Bench Prison, H. 12 Geo. Str. 678.]

[The court will not grant the benefit of the rules to any one in exe-

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(b) Though the lord of a franchise may be bound by immemorial custom to repair the gaols within it, yet there is no obligation imposed upon him by common law. 6 T. R. 373.

cution for an offence, even on affidavit of sickness. *Rex v. Kinnersley*, T. 5 G. Str. 193. *Hay's Case*, T. 3. G. 2. Str. 817. 843.]

[A prisoner for a contempt cannot have the benefit of the rules, *Jones's Case*, M. 2 Geo. 2. Str. 817.]

A lease of the office of marshal to A. for years, if he so long live, will be good. *Mod. Ca.* 57. [By the st. 8 & 9 W. 3. 26. it is sufficient to detain prisoners in the prison of the King's Bench, or rules of the same.

[By stat. 27 G. 2. c. 17. the power of appointing the marshal (which office had been granted in fee by James 1st) is revested in the king, (satisfaction being made for a debt secured thereon,) and various regulations made relating to the officers and prison.]

[It doth not appear the high-bar money (money paid into the box of the court of B. R. on motions and affidavits made in court) was ever paid to the prisoners on the common side; but is paid by the secondary into the hands of the clerk of the junior judge of B. R., to be paid over in equal shares to the judges of B. R., to be disposed of for such charitable purposes as they think proper. *Prisoners' Case*, T. 32 & 33 G. 2. 2 B. M. 867.] (c)

### (D) Fleet.

The prison of the fleet is proper for the Chancery, C. B. and Exchequer. *Vide Chancery*, (B 8.)

The limits of the prison are the walls; for houses within the liberty of the Fleet are no part of the prison. *R. 2 Mod.* 221.

(c) 1. The clerk of the papers within the K. B. prison, must reside within the prison, since it is incident to every public office that the party holding it should be in a situation to discharge the duties of it. Moreover, he cannot act by deputy. 4 T. R. 716.

2. Under sect. 8. of st. 27 Geo. 2. c. 17. the court may remove the clerk of the papers, and clerk of the day-rules in the K. B. prison, from his office for non-residence within the prison. 5 T. R. 509.

3. Rules of K. B. limiting the rules of the K. B. prison. *East*, 30 G. 2. 3 T. R. 583. *East*, 55 G. 3. 6 T. R. 305. *Trin.* 36 G. 3. 6 T. R. 778.

4. Rule of K. B. respecting day-rules to prisoners in the K. B. prison. *East*, 30 G. 3. 5 T. R. 584.

5. Rule amending rule, touching day-rules to prisoners in the K. B. prison. *East*, 30 Geo. 3. 3 T. R. 584. *K. B. Mich.* 37 G. 3. 7 T. R. 82.

6. Rule as to day-rules for prisoners in K. B. *Hil.* 45 G. 3. 2 *Smith*, 339. 6 *East*, 2.

7. A day rule, when granted, covers by relation the antecedent part of the day. 7 *East*, 151.

8. Where a prisoner applies for four days' rules beyond the usual times, and obtains them, and it is necessary to apply for longer time in the same term, the court will require him to state how he has employed the time before granted. 2 *Smith*, 5.

9. A prisoner is committed to the custody of the marshal of the K. B. prison, under a *habeas corpus cum causâ*. Such writ always remains, as any other warrant naturally would, in the hands of the officer to whom it is immediately directed, and whose voucher or authority for the act of detaining the party it properly is. Hence, such writs, with *committiturs* thereon, are never returned to, and therefore never filed or kept by the court of K. B. or any of its officers, at Westminster, or elsewhere, except in the office of the clerk of the papers in the K. B. prison. The court of K. B. therefore refused an application to compel the marshal to affile of record a writ of *habeas corpus cum causâ*, by virtue of which a person is committed to his custody in execution. The object of the application was, to enable the plaintiff to prove an allegation in a declaration against the marshal, for an escape out of execution, that the party was committed, &c. Hence, proof may be without; and no occasion to aver *prout patet*. 2 *M. & S.* 202.

But

But by the st. 8 & 9 W. 3. 26. it is sufficient to detain prisoners in the Fleet, or rules of the same.

But the warden by licence of C. B. may keep his prisoners in any other place assigned by the court. Cro. Car. 466.

So, B. R. may charge a prisoner in execution there for the king's debt, with execution upon a judgment against him for the debt of a subject. Dub. Dy. 297.

### (E) Newgate.

By charter 1 H. 4. the citizens of London shall have the custody of Newgate.

But the court cannot take notice, that the keeper of Newgate is an officer of London. R. 1 Sal. 349.

### (F) Gaoler; who shall be.

The king may make a subject keeper of a prison. 2 Inst. 100.

And therefore, where the king grants to a corporation a gaol within their precinct, the mayor, &c. is gaoler.

So, the sheriff has the custody of the county gaol.

And cannot farm his gaol.

So, if he gives the gaol to a servant, who sells it, and gives the money to the sheriff. R. 1 Mo. 781.

By the st. 14 Ed. 3. 10. all gaols shall be rejoined to the bailiwick of the sheriff, who shall have the custody of the same; and put in such keepers for whom he will answer.

And by the st. 19 H. 7. 10. the sheriff shall have custody of all common gaols, prisons, and prisoners in his county, except such of which any person spiritual, or temporal, or corporation hath the inheritance; and all patents for future grants of the same for life, or years, shall be void.

By 24 Geo. 2. c. 40. no spirituous liquors shall be used in a gaol, on pain of 100*l.* by gaoler, and for second offence forfeiture of office.]

[A gaoler is bound to receive a prisoner tendered to him, after the return day of the writ on which he was arrested. 1 T. R. 60.]

### (G) Imprisonment; what shall be.

Every restraint of the liberty (*c*) of a freeman will be an imprisonment. 2 Inst. 482. Cro. Car. 210.

Though it be in the high-street or elsewhere, and he be not put into any prison, or house. Per Thorpe, Fitzh. Bar. 301.

### (H) What is a cause for imprisonment.

(H 1.) Lawful process: — Process founded upon a record.

A man may be imprisoned upon any lawful process.

As, upon a process founded upon matter of record: as, upon an indictment, or presentment.

Or, upon a plaint, or original filed, or judgment given.

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(*c*) In attending a constable without any compulsion to a magistrate, on being shown a warrant, there is no imprisonment. 2 N. R. 211.

(H 2.) Founded upon a suggestion.

So, a man may be imprisoned upon the king's writ founded upon a suggestion; for that is a lawful process. 2 Inst. 59.

As, upon a writ to the sheriff *ad capiendum impugnatores juris regni et eos ducendum ad gaolam*. 2 Inst. 53. Reg. 64.

Or, a writ to take up a soldier who has received his prest-money *ad proficiscendum in obsequium regis*. 2 Inst. 53. Reg. 24. 191.

Or, a writ *de apostata capiendo* against a man professed, who departs from his abbey. 2 Inst. 53, 54.

So, upon a writ, *de lepraso amovendo, ne exeat regnum*. 2 Inst. 54. Vide Leprosy.

So, upon a writ *de vi laicâ amovendâ*. 2 Inst. 54.

(H 3.) Process out of a lawful court.

So, upon a process out of any court allowed by law, though it does not proceed according to the common law; for their law allowed in this realm is part of the law of England. 2 Inst. 51.

As, process out of the admiralty, according to the marine law, for an offence upon the high sea. 2 Inst. 51.

Or, process out of the court of the constable and marshal, according to the civil law. 2 Inst. 51.

(H 4.) Authority of law: — What shall be sufficient.

So, a man may be imprisoned by warrant of law, for that is a lawful process: as, by a constable *ex officio*, who upon complaint of a felony may commit the offender to an house, gaol, or stocks, till he can be brought before a justice of peace. H. P. C. 92. Vide Leet (K.)

By any in aid of an officer, who has a lawful authority. 2 Rol. 561. l. 5. 15. H. P. C. 90. (d)

By

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(d) 1. Though an arrest by one in aid must be by authority of the officer, yet he need not be actually in sight. Cowp. 65. Lofft, 524.

2. A third person may, in the presence and at the request of bail, arrest the principal, and may, at the like request, continue to detain him, though the bail go away. 3 Taunt. 425.

3. An action will not lie against a peace-officer for arresting a person *bonâ fide* on a charge of felony, without a warrant, although it turn out that no felony was committed. Dougl. 559.

4. At common law, watchmen and beadle may arrest one carrying property at night, who, on being interrogated respecting it, gives evasive answers. 3 Taunt. 14.

5. Where a party was carried by force to a place, in order that he might be served with a rule for an attachment for non-payment of money, and on quitting it was arrested by the officer in possession of the attachment, and who stated that he had been sent for to make the arrest, but which the plaintiff denied; the court discharged him. 1 N. R. 135.

6. Whether the court will discharge a debtor illegally arrested, is matter of discretion. Cowp. 9. Lofft, 375.

7. Where it is a doubtful point whether the contract under which a defendant has been arrested be not illegal, he will be discharged. 1 H. B. 301.

8. Though it is unlawful to arrest a debtor twice for the same cause, yet the court will not discharge him from the second arrest on motion, since they will not try by affidavits whether the causes are one and the same. The proper remedy is by action. 3 M. & S. 144.

9. The court will not discharge a defendant in the sheriff's custody, where the only irregularity consists in the bailiffs, to whom the warrant was directed, not acting in the arrest together where they ought, but will leave him to his action against them. 2 Taunt. 161.

• 10. C. B.



By a sheriff for an insult upon him in the street. R. 2 Bul. 330.

By the watch, if the person be a night-walker. 2 Inst. 52.

So, if a felony be committed, the offender may be apprehended by any private person. H. P. C. 89.

So, if a grievous wound be given, though death does not follow. 2 Inst. 52. H. P. C. 90.

Or, if hue and cry be levied against him. 2 Inst. 52. 2 Rol. 559. l. 20. H. P. C. 90, 91.

So, if treason or felony be committed, a person probably suspected may be apprehended, though he be not guilty. 2 Inst. 52. H. P. C. 91.

As, a person in company with felons. 2 Inst. 52. H. P. C. 91.

Or, who has the goods in his custody. H. P. C. 91.

Or, flies; or absconds. 2 Inst. 52. H. P. C. 92, 93.

Or, is accused by common fame. 2 Inst. 52. H. P. C. 91.

Or, is a vagrant. H. P. C. 21.

And, upon such suspicion, a man may enter an house if the door be open. H. P. C. 91.

But he cannot break open the door. H. P. C. 91.

So, a man may apprehend another for prevention of an apparent mischief; as, to restrain a madman, combatant. 2 Rol. 559. E.

So, he may seize his villein, ward, &c.

The youngest brother, where the eldest is out of the realm, and suspected not to be alive. 2 Rol. 560. l. 10.

### (H 5.) What not.

But the law gives no authority to apprehend any one upon the command of the king, though it be in the king's presence. 2 Inst. 186, 187.

Or, upon a commission under the great seal, though he be a felon, &c. 2 Inst. 54.

Or, by force of a bye-law. 2 Inst. 54. 5 Co. 64. Vide Bye-Law, (E 1.)

Or, for contemptuous words of a magistrate, not exercising his office. R. Mo. 247. Cro. El. 78.

Though he alleges a prescription for doing it. R. 2 Leo. 34. Cro. El. 689.

So, the law gives no authority to a justice of peace to detain a person suspected, but for a reasonable time till he may be examined.

As, if he be detained above three days in the justice's house, and then sent to another, or dismissed without examination, R. Cro. El. 829.

So, a custom, that he shall be imprisoned for not paying a duty, is not good. 3 Keb. 365.

So, a man shall not be arrested upon a process, when he attends a court of law, *nec eundo aut redeundo*: as, if a man attend to give his answer to a bill in chancery. 1 Ch. R. 92.

10. C. B. will not discharge a defendant from an arrest made within the verge of the palace. 7 Taunt. 311.

11. It is lawful for a private person to do any thing to prevent the perpetration of a felony. 2 B. & P. 260.

If he attend the quarter sessions of the peace, and be arrested in the face of the court. R. 1 Brownl. 15.

Or, going or coming back. Cont. 1 Brownl. 15. Semb. acc. 1 Lev. 159.

But a writ of privilege from the *custos rotulorum* does not excuse. Ray. 100. (e)

(H 6.) Lawful warrant.

So, a man may be imprisoned by a lawful warrant from any, who has a lawful authority. 2 Inst. 52.

As, by a warrant from the sheriff to his bailiff upon process to him.

By warrant of a justice of peace upon complaint or proof of an offence, if within his commission. H. P. C. 93.

Although he who complains does not know, but suspects A. to be the offender, if he be present upon the arrest of A. H. P. C. 93, 94.

Although no indictment be found for the offence. Mod. Ca. 179.

But a person arrested ought to be examined before his commitment.

What shall be an arrest, vide in Execution, (C 12.)—What a good warrant for the security of the peace, vide Forcible Entry, (D 18.)

(H 7.) What shall be a lawful warrant.

A lawful warrant must be made under hand and seal. 2 Inst. 52. H. P. C. 94.

Must contain the cause of the commitment. 2 Inst. 52. 591. H. P. C. 94. 2 Inst. 591. R. in Parl. 3 Car. Rushw. 513. R. 1 Sal. 347. (f)  
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(e) Any detainer under an arrest made after the return of the writ, though only until the writ be renewed, is illegal. 2 H. B. 29.

(f) 1. Though a commitment need not be drawn with the same precision as an indictment, yet it must state those circumstances which are essential to the crime. 5 T. R. 169.

2. A commitment should have that degree of certainty that the defendant may know what to do, in order to obtain his liberty. 3 M. & S. 331.

3. A commitment for "reasonable practices," generally, is legal. 7 T. R. 736.

4. The stat. 38 Geo. 3. c. 36. made no alteration in the form of committal for high treason. 7 T. R. 736.

5. Though in a commitment for felony, the word "feloniously," need not be used, yet it must sufficiently appear, from the facts stated, that a felony has been committed; otherwise the prisoner is bailable. 2 T. R. 255.

6. The court have the power of remanding, notwithstanding the warrant of commitment be defective; which it is the usual course to do where the offence sufficiently appears from the depositions returned. 3 East, 157.

7. A commitment by a magistrate, without any information, is a nullity. 2 T. R. 225. Loft, 243. Unless upon his own view, when he may commit, though it is only probable that the peace will be broken. Loft, 243.

8. A magistrate cannot commit for an attempt without a warrant in writing. 2 Mars. 377. 7 Taunt, 63.

9. A warrant of magistrates committing a parish collector, ran thus:—It adjudged that he should be committed to gaol, there to remain until he had duly accounted and paid, by himself, or his sureties, the sum due; requiring the gaoler to receive and keep him "until he should be discharged by due course of law." Held well; for when the party has accounted and paid over the money, he will be entitled to be discharged by due course of law; so that the conclusion of the warrant is, in effect, a repetition of what had been adjusted before. 3 M. & S. 203.

10 Parol order of commitment by magistrate until the effect of a warrant of distress

[A commitment in execution of a rogue and vagabond under the st. 23 Geo. 3. c. 88. should state that the defendant was apprehended with the implements of house-breaking upon him at the time of such apprehension, &c. *Rex v. Brown*, M. 39 Geo. 3. 8 T. R. 26.]

[Commitment by secretary of state for high treason may be made without oath. *Rex v. Wyndham*, Str. 2.]

[May be for high treason generally. *Ibid.*]

[The warrant need not state the information, evidence, or grounds of the charge. *Rex v. Wilkes*, P. 3 Geo. 3. 2 Wils. 151.]

[Warrant of commitment for a seditious libel need not set forth the libel. *Ibid.*]

[The warrant must specify to what gaol the party is to be carried. *Rex v. Smith*, P. 5 Geo. 2. Str. 934.]

Must have an apt conclusion, viz. until delivered by law. 2 Inst. 52. H. P. C. 94.

Or, until further order; for that imports by order of law. R. 1 Lev. 230. cont. 2 Inst. 52. 592. But that is to be taken for a further order of the party committing. 1 Lev. 230.

So, where a statute authorizes a commitment, it ought to conclude, until he do that which the statute requires. R. Carth. 152, 153.

And therefore, a commission by commissioners of bankrupts, until he conform to their authorities, is bad. R. 1 Sal. 348. Vide Bankrupt, (D 8.)

By the secretary of state, until discharged by law, where he was committed by the st. 35 El. 2. for not answering whether Jesuit or not. R. 1 Sal. 351. Carth. 291.

By a justice of peace, until discharged by law, where it was for not accounting as overseer by the st. 43 El. 2. R. Carth. 152.

tres for a penalty be known, held good on stat. 13 Geo. 3. c. 80. for selling goods on a Sunday. 3 Smith, 513. 7 East, 533.

11. It seems that the magistrates have the power of committing a pauper for refusing to answer touching his settlement. The commitment being to compel an answer, may be, "till he answers." 1 T. R. 653.

12. A warrant of commitment in execution after conviction, must shew before whom the conviction was, and the authority to convict. 5 Burr. 2684.

13. A commitment by a magistrate in execution, not stating that the party had been convicted, but only that he was charged with an offence, is insufficient. 6 T. R. 509.

14. The 10 Geo. 3. c. 18., dog-stealing act, gives a penalty on conviction, half to the informer, and half to the poor of the parish where the offence is committed. A commit-

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So, a commitment or distress by a general warrant made before the offence committed, is bad, if a warrant is necessary. *Semb. Mod. Ca. 214.*

[A justice of the peace cannot take a prisoner in B. R. and send him to the county-gaol, but he may charge him criminally in B. R. prison. *Rex v. Wardham, H. 2 Geo. 2. Str. 828.*]

[A warrant to cause A. to appear, is not a warrant to arrest. *Shergold v. Holloway, M. 8 Geo. 2. Str. 1002.*]

[Commitment of a carrier till he gives security not to carry without university-licence, and to observe university-statutes for life, ill. *Rex v. Barnes, M. 5 Geo. 2. Str. 917.*]

[By st. 12 Geo. 2. c. 13. s. 4. the not indorsing attorney's name on a warrant upon writs, does not vitiate them.]

But a warrant will be good, though directed to a private person. *1 Sal. 347.*

Though it does not describe the offence plainly in the warrant: for it is sufficient to say, that he was an owler, smuggler, &c. *2 Mod. Ca. 5. Vide 2 Inst. 591.*

So, an officer at his peril, must take the very offender named in his warrant. *11 H. 4. 91.*

If a warrant be against B., and A. calls himself B., upon which the officer takes A., false imprisonment lies. *R. Mo. 457. Hard. 323. (g)*

So, an arrest after a *supersedeas* is tortious. *R. 2 Rol. 552. l. 45.*

(H 8.) What will be a justification to an officer, though not duly awarded.

And a lawful warrant from him, who has jurisdiction of the cause, justifies the officer who executes it, although it was irregularly awarded: as, if a justice of peace grant a warrant for arresting for felony, before indictment against the party. *10 Co. 76. b. (h)*

If a *capias* issue at the same time against the principal and his bail,

when it ought to be first against the principal, and afterwards a *scire facias*, and not a *capias*, against the bail. R. 2 Rol. 560. l. 40.

If process for good behaviour issues irregularly out of the sessions of the peace. R. Cro. Car. 602.

If there be a warrant by a justice of peace against any one for not working in the highway, before summons or hearing. R. 1 Vent. 273. cited Lut. 1563.

If a *capias* issue out of an inferior court before summons. Per Powel, Lut. 1565. R. cont. 1 Vent. 220.

Or, a *capias ad satisfaciendum* out of C. B. with a *teste* out of term, though the writ be void. Sal. 700.

So, it justifies the officer, though there was not a proper foundation for such warrant, or process: as, if process issue out of an inferior court when there was no plaint. Per Powel, Lut. 1565.

So, though in reality there was no jurisdiction, if there be an appearance of a jurisdiction: as, if process issue out of an inferior court in a cause alleged within the jurisdiction, though in truth it arises out of it. R. Lut. 937. 1566.

If process issue upon a judgment in C. B. which is afterwards vacated for irregularity. R. 1 Lev. 95.

Or, upon a judgment there, when no judgment is entered upon the roll. Mod. Ca. 184.

If there be a commitment by a governor of the plantations and council there, upon examination of the offence, though there does not appear a good cause of commitment. R. cont.; but the judgment was reversed in parliament. 3 Mod. 160.

So, though no process of such a nature lies by law against such a person: as, if a *capias* be awarded against a peer of the realm. 10 Co. 76. b.

So, though the judge be apparently mistaken: as, if the commissioners of excise determine small beer to be assessed as strong beer; for both are within their jurisdiction. Per Hale, Hard. 484.

If a justice of peace convict for more offences than he ought, or after a limited time. Dub. Skin. 445. 566.

[A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed. Samuel v. Payne, B. R. E. 20 Geo. 3. Dougl. 359.]

[But a private individual cannot. Ibid. Vide infra Trespass, (B 5.)]

(H 9:) What not.

But an officer shall not be excused, when the court or judge that awards the process, or warrant, has not jurisdiction of the cause: as if there be process upon an appeal in C. B.

If there be a presentment in a leet for a private nuisance. Per Hale, Hard. 484.

If the commissioners of excise, who have jurisdiction for the excise upon strong-water, low-wine, &c. to be strong-water. R. Hard. 482, 483, 484.

If commissioners of bankrupts declare a man to be a bankrupt, who is not so. Hard. 478.

If the commissioners of the customs determine calico, silk, &c. to be linen. Hard. 480.

So,



So, if the jurisdiction be confined to time, to place, to persons, or other circumstances, and the cause does not appear to be within such circumstances: as, if there be process upon a presentment at a leet held above a month after Easter, or Michaelmas. Ca. Parl. 50.

So, if a cause in an inferior court appears to arise out of the jurisdiction. Semb. Lut. 1566.

If upon a plaint in the marshalsea, for a matter out of the verge. Pl. Com. 37. b.

Or, a presentment in a leet, for an offence out of the precinct of the leet. Per Hale, Hard. 484.

If a sheriff imprison a man, arrested upon a warrant to the bailiff of a franchise, out of his franchise. Dub. Ray. 421.; but afterwards per three J. it was R. cont. Ray. 467. 469.

[The sheriff, having directed a warrant to A. and all his other officers to arrest B.; A. afterwards inserted the name of C., and it was holden that the arrest by C. was illegal. *Housin v. Barrow*, B. R. M. 35 Geo. 3. 6 T. R. 122.]

If an officer arrests by a warrant of the Ch. J. of B. R. after it was determined by the death of the king. F. g. 80.

So, where there are not such persons as can entitle the court to jurisdiction: as, if a plaint be in the marshalsea, where neither party was of the king's household. R. 10 Co. 77. a.

So, if any circumstances requisite to entitle to the jurisdiction fail: as, where the st. 23 H. 8. 5. enables commissioners of sewers to charge all those who may have profit or loss, &c. according to the rate of every one's portion, &c. if they assess him who has land adjoining to the sea for repairing a wall, without others in the same level, who are in the same danger. R. 5 Co. 100. a. Acc. 2 Cro. 336.

So, where the st. 33 H. 8. 6. prohibits shooting in or carrying a hand gun, &c. the officer shall not be excused, upon a conviction against him who carries a gun in aid of the sheriff in the execution of process; for that is out of the jurisdiction. 5 Co. 72. a.

So, where the st. 43 El. 2. enables to raise by taxation of inhabitants, &c. for the relief of the poor, &c. of the parish; if there be a tax upon the inhabitants of B. for the relief of the poor of A. R. Cro. Car. 395.

So, if process be merely null and void: as, if a *capias* out of C. B. be returnable, omitting a term. Semb. per Holt, Sal. 700.

So, if the matter be out of the jurisdiction, the officer shall not be excused, though he pleads his warrant specially. Per Hale, Hard. 484.

[If a justice of peace grants a warrant to arrest the party for non-payment of wages, it will not justify the officer. *Shergold v. Holloway*, M. 8 G. 2. Str. 1002.]

[If justices make adjudication for A. to pay 13*l.* for concealing run goods, and on the back a further adjudication to pay 5*s.* 4*d.* for costs, and grant warrant of distress to B., a constable, to levy the 13*l.*, and on the back put also the 5*s.* 4*d.*, and on *nuda bona* returned, grant warrant to B. to carry A. to gaol, and imprison till he pay 13*l.*, and A. tenders 13*l.*, and B. insists on the 5*s.* 4*d.* also, it is false imprisonment; for the 5*s.* 4*d.* is not in the warrant, nor have the justices power to give costs. *Smith v. Sibson*, M. 20 G. 2. 1 Wilson, 155.]

[General warrant of a secretary of state to apprehend without a

name is illegal, and no justification of a king's messenger. *Huckle v. Money*, M. 4 Geo. 3. 2 Wils. 206. 1 Bl. Rep. 555.]

[So, a warrant of a secretary of state, to seize a person by name, his papers, books, &c. is illegal, notwithstanding they have been frequently issued since the revolution. 2 Wils. 275. 292.]

### (I) How a prisoner shall be used.

Prisoners ought to be kept in *salva et arcta custodia*. 2 Bul. 148. 191. (i)

Prisoners for contempt, *meane process*, detained in the prison of the King's Bench, till discharged by law. [Vide 1583. E. 35 G. 3. 6 T. R. 305. T. 3. 7 T. R. 82.]

Whoever extorts money from a prisoner *posuit prison. in profundo gaolo inter* he shall be fined for it. 12 Co. 127.

He shall not pay for his liberty, *et pro*

*ferris*. 12 Co. 127.

Imprisonment ought to be *custodia, non pœna*. Co. L. 260. a. Fl. 1. ca. 26. s. 1.

So, no torture to a prisoner will be warranted by law, or prescription. 3 Inst. 35.

And therefore, a prisoner cannot be put to the rack to extort a confession. R. Rushw. 638.

*Custodes gaolarum pœnam sibi commissis non augeant, nec quicquam torquant, vel redimant.* Fl. 1. ca. 26. s. 5.

*is per pedes, scissuram unguium.*

Whoever gives pain to a prisoner procure him stices of both benches of assise, pains, &c.

Whoever for a gaoler to force him to

*e ferro*; yet by the st. West. 2. 1785. 1807. 1808. 1809. 1810. 1811. 1812. 1813. 1814. 1815. 1816. 1817. 1818. 1819. 1820. 1821. 1822. 1823. 1824. 1825. 1826. 1827. 1828. 1829. 1830. 1831. 1832. 1833. 1834. 1835. 1836. 1837. 1838. 1839. 1840. 1841. 1842. 1843. 1844. 1845. 1846. 1847. 1848. 1849. 1850. 1851. 1852. 1853. 1854. 1855. 1856. 1857. 1858. 1859. 1860. 1861. 1862. 1863. 1864. 1865. 1866. 1867. 1868. 1869. 1870. 1871. 1872. 1873. 1874. 1875. 1876. 1877. 1878. 1879. 1880. 1881. 1882. 1883. 1884. 1885. 1886. 1887. 1888. 1889. 1890. 1891. 1892. 1893. 1894. 1895. 1896. 1897. 1898. 1899. 1900. 1901. 1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911. 1912. 1913. 1914. 1915. 1916. 1917. 1918. 1919. 1920. 1921. 1922. 1923. 1924. 1925. 1926. 1927. 1928. 1929. 1930. 1931. 1932. 1933. 1934. 1935. 1936. 1937. 1938. 1939. 1940. 1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 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*Non ligatus manibus.* Fl. 1. ca. 31. 2 Inst. 316.

And the judge ought to exhort him to make answer without fear. 2 Inst. 316.

But he shall have *compedes si necesse sit propter periculum evasionis.* 2 Inst. 316.

By the st. W. 2. 13 Ed. 1. 11. accomptants ought, in prison, *de suo proprio vivere*, and also other prisoners. 2 Inst. 381.

*De rebus propriis debent sustentari donec liberati fuerint, vel condemnati.* Fl. 1. ca. 26. s. 1.

And therefore, it was enacted by the st. *de catallis felonum*, that none should be disseised *de terris vel tenementis suis, vel de catallis suis, quousque convictus fuerit.* Fl. 1. ca. 26. Co. L. 391. a.

[By stat. 32 G. 2. c. 28. officer shall not carry prisoner to alehouse, or private house of officer, without his consent, nor charge him for liquor, but what he freely calls for, nor take any but legal fee, nor carry him to gaol in less than twenty-four hours, unless he refuses to be carried to a safe house (not his own) of his own nomination.]

[But this clause relates only to persons arrested on mesne process. *Evans v. Atkins*, B. R. H. 32 G. 3. 4 T. R. 555.]

[Officer is to take for lodging and diet, only what is allowed by quarter sessions.]

[Prisoner may have his meat and drink from whence he pleases, and also bedding and linen.]

[The two chief justices, and chief baron, and lord mayor and two aldermen for London, and three chiefs, and three justices for Middlesex and Surry, and quarter sessions for other counties, shall settle the fees for gaolers.]

[By stat. 13 G. 3. c. 58. quarter sessions shall ascertain how many clergymen shall attend each gaol, what duty they shall perform, and at what salary, not above 50*l.* *per annum* each; and shall nominate and displace such clergymen. And treasurer shall pay salaries.]

[14 Geo. 3. c. 59. quarter sessions shall order the walls and ceilings of gaols where felons are usually kept, to be scraped and white-washed once a year at least, regularly washed and kept clean, constantly supplied with fresh air by hand-ventilators or otherwise; two rooms (one for men, one for women) for the sick, whither they shall be removed on being seized with any disorder, and kept separate from the healthy; a hot and cold bath or bathing-tub, and every prisoner to be washed in one of them before they go out of gaol, on any occasion; to appoint surgeon or apothecary to attend, with a salary, who is to report the state of the gaol every quarter sessions; the courts of justice to be ventilated, clothes provided for prisoners; prisoners not to be kept under ground when it can be conveniently avoided.]

## (K) *What is not a good cause for imprisonment.*

But a man cannot be imprisoned without good cause. R. 1 And. 298. Vide ante, (H 5.)

So, he shall not be imprisoned after he be let to bail, though an *habeas corpus* comes for him. R. 2 Rol. 558. l. 25.

(L) *Remedy*

## (L) Remedy for false imprisonment.

## (L 1.) By indictment.

If a man be imprisoned without cause, there may be an indictment against him who did the wrong, upon the st. M. Ch. 9 H. 3. 29. 2 Inst. 55.

Vide Indictment (D).

## (L 2.) By action.

So, an action lies for false imprisonment against him who did the wrong. 2 Inst. 55.

Or, an action founded upon *M. Ch.* 9 H. 3. 29. 2 Inst. 55.

And that, in all cases where a man is taken in custody for any time without lawful cause.

If process goes against A., and B. acknowledges himself to be A., yet he may have false imprisonment. Hard. 323. Mo. 457.

So, if a man taken for a lawful cause be continued after the cause removed, an action lies for false imprisonment: as, if the sheriff detain a man arrested upon process after a *supersedeas* delivered; for the detainer is a new imprisonment. R. 2 Cro. 179.

So, if he detain him after the plaintiff had discharged him of his prisoner. R. 2 Cro. 379.

But false imprisonment does not lie, where there was a lawful taking, though there be a neglect of duty afterwards: as, if he refuse bail; for the nonfeasance does not make him a trespasser *ab initio*. Vide Trespass, (D).

So, it does not lie against an inferior officer, who does his duty, for a neglect or wrong in another: as, if by the command of the Ch. J. in court, the inferior officer takes a man and delivers him to the marshal, although he afterwards detain him unduly. R. 2 Rol. 559. l. 5.

If a man take another in aid of the sheriff, &c. although he does not return the writ, or make a false return. R. 2 Rol. 562. l. 35. 50.

So, it does not lie for taking the wife of B. where the judgment and writ was against the same woman before her marriage. R. Cro. 323. 2 Bul. 80.

Vide Pleader, (3 M. 22, &c.)

(L 3.) By writ *de odio et atia*, &c.

So, by the common law, where a man was imprisoned, and might be bailed, a writ *de odio et atia* lay, directed to the sheriff, *quod inquiret utrum A. captus et detentus in prisona, retatus sit odio et atia*. 2 Inst. 42. 55. Vide Pleader, (3 K. 1. &c.)

As, if he was taken for the death of a man. 2 Inst. 42.

And by the st. W. 2. 29. *appellati et indictati, ne diu detineantur in prisona, habeant breve de odio et atia*.

By the st. *M. Ch.* 9 H. 3. 26. nothing shall be given for obtaining it.

And although it was taken away by the st. 28 Ed. 3. 9. yet by the st. 42 Ed. 3. 1. all statutes against *M. Charta* are void, &c. whereby this writ is revived. 2 Inst. 48. 315.

After the writ delivered to the sheriff, by the st. W. 1. 3 Ed. 1. 11. he shall make inquiry *per probos homines*, &c.

If

If upon inquiry it be found, that he was accused by malice, or not guilty, or *se defendendo*, or *per infortunium*, a writ goes to the sheriff *de ponendo in ballium usque ad proximas assisas*. 2 Inst. 42.

Or, to twelve mainpernors. Fl. 1. ca. 26. s. 3. 2 Inst. 42.

But the writ *de odio et atia* does not lie, if a man was indicted before justices in eyre. 2 Inst. 42.

(L 4.) By *homine replegiando*.

So, (k) a man unlawfully detained in custody may have an *homine replegiando*, *si non captus sit per preceptum regis, vel pro alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis*. F. N. B. 66. E. Reg. 77. b. 2 Inst. 55.

And he may have an *homine replegiando* for a negro.

Or, an Indian brought by him into England, and detained from him. 3 Mod. 120.

[This is an original writ, the party may sue it of right, and it is granted on motion or petition in chancery, without shewing cause, returnable in a court of law, and chancery cannot supersede it. It may be declared on below, and defendant must assign cause why he does not comply; if the party suing has not a right, it must be pleaded.]

[If the party suing the writ is party in a suit in this court, it might be otherwise.]

[If it is brought by an infant against his testamentary guardian, or by a villein against his lord, they may plead the special matter at law. Treblecock's Case, H. 1757, 1 Atkyns, 633.]

(L 5.) By discharge for want of prosecution.

By the st. 31 Car. 2. 2. if any be committed for treason or felony expressed in the warrant, on petition in open court the first week of the term, or first day of sessions of *oyer and terminer*, or general gaol-delivery to be tried, be not indicted the next term or sessions, he shall be bailed on motion, unless oath be, that the king's witnesses could not be then ready.

And, if on petition in court the first week of the term, or first day of the sessions to be tried, he be not indicted and tried the second term or sessions after commitment, or be then acquitted, he shall be discharged from his imprisonment. 2 Mod. Ca. 5.

(a) 1. Upon an *homine replegiando*, though the sheriff returns an *elongatus*, the defendant may plead *non cepit*. *Ld. Raym.* 613.

2. If he comes in upon the *elongatus*, he shall continue at large until judgment. *Ibid.*

3. And if judgment is given against him, a *capias in withernam* shall issue against him. *Ibid.*

4. If he does not come in, a *capias in withernam* shall issue against him. *Ibid.*

5. If he is taken upon the *capias*, the plaintiff shall be demanded at the return of the *capias*, and unless he appears and declares, he nonsuits. *Ibid.*

6. If he declares, and the defendant pleads *non cepit*, he shall be bailed. *Ibid.*

7. But he cannot be bailed before. *Ibid.*

8. The bail shall be bound in a sum certain for the appearance of the defendant, *de die in diem*, and in case of judgment against him for his render. *Ibid.*

9. Upon his render he will be in custody as upon the first *capias*. *Ibid.*

10. The defendant shall not, on giving bail, wage deliverance. *Ibid.*



[A person committed to the Tower for high treason, cannot make his prayer at the Old Bailey, to be bailed or tried. *Rex v. Bishop of Rochester*, Sept. 8 Geo. Fort. 101.]

[Nor, at Hicks's Hall. *Rex v. Ld. North and Grey*, Mich. Ses. 8 Geo. Fort. 103.]

(M 1.) *When delivered out of prison.*

When a man may be delivered out of prison by bail, vide in Bail.  
When upon *habeas corpus*, vide Habeas Corpus.

(M 2.) *By consent of the party.*

If a prisoner goes out of prison by consent of the plaintiff, he shall be discharged.

Though the plaintiff allows him to treat for an accommodation, and he without a keeper, or a rule of court, comes to the plaintiff for such intent, and no agreement is made. R. Sti. 117. Vide Escape, (D).

[The court will discharge a defendant out of custody who is in execution at the suit of a plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family, on notice of a motion for the above purpose, decline interfering. *Broughton v. Martin*, C. P. M. 38 Geo. 3. 1 Bos. and Pull. 176. *Wagstaffe v. Darby*, C. P. M. 5 Geo. 2. Barnes, 366.] (1)

(M 3.) *By breaking prison.*

What shall be an escape out of prison, and the remedy for it, vide in Escape, (B 1, &c. — C — D). Vide Escape.

What shall be a rescue, vide Rescous (A) — Justices (R).

By the common law, breaking prison in every case was felony. 2 Inst. 589. H. P. C. 87.

But by the st. 1 Ed. 2. (which seems to be a confirmation of a like statute made 23 Ed. 1. 2 Inst. 589.) *nullus qui prisonam fregerit, subeat iudicium vite vel membrorum, nisi causa pro qua captus fuerit tale iudicium requirat, &c.*

If a man break out of the stocks, though he was not *infra parietes carceris*, it is a breaking prison within the statute. 2 Inst. 589. H. P. C. 107.

Or, out of the gaol of a lord of a franchise. H. P. C. 107.

Or, out of a church, where he has abjured. H. P. C. 107.

Or, out of the custody of a constable, or other person, who lawfully arrests or detains him. H. P. C. 107. 2 Inst. 589.

But if he escape before arrest, it is no felony; for he was not in prison. H. P. C. 111. 2 Inst. 590.

Breaking prison is no felony, if the prison be not actually broke. 2 Inst. 589. H. P. C. 108.

As, if the prisoner goes out when the door is open. 2 Inst. 589. H. P. C. 108.

Or, if the prison is broke by others without his privity. 2 Inst. 589. H. P. C. 108.

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(a) The court will not discharge a prisoner out of execution, because there is no judgment against him docketed, and entered on the rolls of the court. 2 Bos. & Pull. 163.

Or,

Or, he is rescued out of custody by others, without his privity. 2 Inst. 589. H. P. C. 108.

Or, is let out by consent of the gaoler. 2 Inst. 589. H. P. C. 108.

Or, if he break prison for necessity, when it is burst by lightning, or by other persons, without his privity. 2 Inst. 590. H. P. C. 108.

Breaking prison is no felony, if the prisoner was committed for an offence which does not require judgment of life or member: as, for petit larceny. 2 Inst. 590. H. P. C. 110.

For homicide *se defendendo*, or by chance medley. 2 Inst. 590. H. P. C. 110.

For giving a mortal wound, of which a man dies within a year; for though the death relates to the wound, yet it was not felony at the time of breaking prison. 2 Inst. 591. H. P. C. 108.

For suspicion of felony not found by record; when no felony is committed. H. P. C. 109. 2 Inst. 590.

Or, if the prisoner was committed without lawful warrant. 2 Inst. 590, 591. H. P. C. 109.

Or, if the warrant does not shew a cause, that requires judgment of life or member. 2 Inst. 591.

But breaking prison is felony, if the prisoner be committed by a *coram* upon an indictment, or appeal, or other record finding the felony, though no felony was committed. 2 Inst. 590. H. P. C. 109.

Or, if committed only on suspicion of felony, when a felony was committed. 2 Inst. 590. 592. H. P. C. 109.

Or, committed for a felony made so by statute subsequent to 1 Ed. 2. H. P. C. 108. 2 Inst. 592.

If committed for treason, breaking prison is only felony. 2 Inst. 590. H. P. C. 109.

Yet breaking prison with intent to deliver traitors is treason; for it is an abetting of treason, in which there are no accessories. 2 Inst. 590. H. P. C. 109.

A man may be indicted for breaking prison, before he be convicted of the felony; for which he was committed. 2 Inst. 592. H. P. C. 110.

But the indictment ought to be special, and shew that he was committed for felony. 2 Inst. 591. H. P. C. 109.

## IMPROPRIATION.

*Vide Advowson, (E).*

## IN CASU PROVISIO.

*Vide DUM FUIT INFRA ÆTATEM, (D).*

## INCIDENT.

Vide CONDITION, (G 10.)—COURTS, (P 4.)—FRANCHISES, (F 10, &c.)  
—GRANT, (E 11.)—HOMAGE, (G 2, 3.)—PARCENERS, (A 3, &c.)  
PROHIBITION, (G 23.)—RENT, (C 4.)

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## INCLOSURE.

Vide COMMON—DROIT, (M 1. 2.)

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## IN CONSIMILI CASU.

Vide DUM FUIT INFRA ÆTATEM, (E).

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## INCUMBRANCE.

Vide CHANCERY, (4 A 10.—4 I 3, &c.)

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## INDENTURE.

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## INDICAVIT.

Vide DISMES, (M 10.)

## INDICTMENT.

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## (A) Indictment, what shall be.

An indictment is an accusation or declaration at the suit of the king (*a*), for some offence, found (*b*) by a proper jury of twelve men. Co. Lit. 126. b. (*c*)

And

(*a*) 1. From its being the king's suit, the party prosecuting is a competent witness. 2 Hawk. c. 25. s. 3. — 2. Nor, for the same reason, can a party grieved recover damages by indictment, or other criminal prosecution; though the king specially direct that he shall, by the charter constituting the court in which the proceeding is instituted. 1 Rol. Abr. 220. 2 Rol. Abr. 83. Cro. Car. 531. 558. 2 Hawk. c. 25. s. 3. — 3. Nor by an indictment founded upon a statute giving him damages for the aggression; unless the statute itself direct their recovery by that mode. Jones, 380. Cro. Car. 448. 1 Rol. Abr. 220. 2 Hawk. c. 25. s. 3. — 4. Yet the K. B., having the king's privy seal for that purpose, may, upon every occasion, give to a prosecutor the third part of a fine. 1 Keb. 487. 2 Hawk. c. 25. s. 3. — 5. And it is their constant practice to mitigate a fine, upon an understanding that the defendant compensate the prosecutor for his costs and damages. 2 Hawk. c. 25. s. 3. — 6. For the same reason (that an indictment is the king's suit) it is, that though the party injured, and who moves the proceeding, die, yet will not an abatement be the consequence. 1 Wils. 222.

(*b*) 1. Generally upon *ex parte* evidence only. 2 Hale, 157. 4 Com. 303. 2 Hawk. c. 25. s. 145. n. — 2. Being sworn, however, to present the truth, they seem thereby authorised to institute any investigation necessary to elicit it. If therefore they are satisfied that they neither have nor can obtain it from the witnesses for the

And it ought to be found in the same county, where the offence was committed (*d*). H. P. C. 203. (*e*)

prosecution, it seems that they may examine others. Dick. Sess. 116. 117. 1 Chit. C. L. 318. Jac. Dict. Indictm. Dick. Just. Indictm. IV. Burn's Just. Indictm. V. — 3. The evidence produced to them should be the best. 1 Leach, 514. 2 Hawk. c. 25. s. 138. 139. 6 T. R. 294. 3 Campb. 401. 1 Salk. 232. 1 Chit. C. L. 319. — 4. And, upon oath. 2 Hawk. c. 25. s. 138. — 5. The witnesses competent. 2 Hawk. c. 25. s. 145. n. — 6. Which the prosecutor is; and without a release, unless in forgery. 2 Hawk. c. 25. s. 145. n. 4 East, 582. 1 Leach, 150. 157. 2 East, P. C. 1003. — 7. So an unconvicted accomplice, though not previously admitted as king's evidence. 1 Leach, 155. — 8. And in treason against the king's person or government, there must under the statute be two witnesses, or else a voluntary confession. 1 East, P. C. 128. 168. — 9. Though one witness to one overt act, and another witness to another overt act will suffice. 1 East, P. C. 129. 2 Hawk. c. 25. s. 141. — 10. The grand jury ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes. 4 St. Tr. 283. 4 Com. 303. 3 St. Tr. 416. 5 St. Tr. 3. 2 Woodes. 559. 2 Hale, 161. Vide 2 Hale, 157. 3 Inst. 25. — 11. The jury themselves are not amenable for finding through malice or upon insufficient evidence. 1 Hawk. c. 72. s. 5. 2 Hale, 162. 1 T. R. 513. 514. 535. Ld. Raym. 469. — 12. Nor, as it seems, can a subsequent conviction thereon, if in itself unobjectionable, be impugned. 2 Hawk. c. 25. s. 145. n. 1 Leach, 156. 156. 157.

(*c*) 1. Taking 'indictment' in its more comprehensive sense. In which sense, too, a *presentment* by a grand jury, when reduced to form, is termed an indictment, though no bill has been preferred. 2 Inst. 739. — 2. In a more limited and proper sense, a written accusation presented to the grand jury, sworn to inquire for the body of the county, at the suit of the king, is termed '*a bill of indictment*;' and when found by them, on oath, to be true, is called '*an indictment*.' 2 Hale, 153. 2 Hawk. c. 25. s. 1. 1 Stark. xii. — 3. Which indictment, having been so found, is publicly delivered in court. 4 Com. 306.

(*d*) 1. This is the rule at *common law*; and the reason is, that the jurors being sworn to inquire *pro corpore comitatûs*, their jurisdiction is confined to the county. 2 Hale, 163. — 2. Which *rule* obtains as well in cases where, in the nature of things, the offence might have been committed in any county, and is, therefore, in technical phrase, said to be in its nature *transitory*; as in those where it could only have happened in a particular spot or district, and is, therefore, in the same language, said to be in its nature *local*. Hale, 203. 2 Hawk. c. 25. s. 35. — 3. As well, therefore, in the case of murder, as in that of nuisance from neglecting to repair a road. — 4. And the fact of locality must be proved expressly by the prosecutor, being part of *his* case. 2 N. R. 92. 2 Leach, 634. 2 East, P. C. 605. — 5. The *exceptions* to the common law rule are created by acts of parliament; since the king cannot, by charter, authorise the trial of crimes out of the county in which they were committed. Dougl. 791. 2 Hawk. c. 25. s. 51. — 6. Previous to the consideration of which, together with the application of the rule itself, it is to be noticed, that it is the constant practice for offences committed in the county of Middlesex to be tried at the sessions-house in the Old Bailey, which is within the city. Dougl. 796, 797. — 7. The *rule* and its *exceptions* will now be treated of under an alphabetical arrangement. — 8. *Abroad*: where part of an offence is done out of the realm, no indictment lies by common law, or under st. 2 & 3 Edw. 6. c. 24. 3 Inst. 48. 2 Hale, 163. Vide 2 Hale, 12. 33 Hen. 8. c. 23. 1 Esp. C. 63. 2 N. R. 91. 6 East, 589. — 9. Though some acts (in the example, distinct from, though) essential to an offence, done abroad, are, if of a transitory nature, cognizable by a jury at common law. Kel. 15. Vide 1 Esp. C. 63. 2 N. R. 91. 6 East, 589. — 10. So if part of an offence be completed in Middlesex, though the rest were committed abroad, an indictment lies in K. B.; or, in case of misdemeanour, an information, if the offence were committed in any other county. 1 Esp. C. 63. 2 N. R. 91. — 11. And this, though the defendant himself was out of the kingdom at the time, if he caused the offence to be committed here; as where the defendant sent over a libel from Ireland to be published in Westminster. 6 East, 589, 590. — 12. Persons in his majesty's service abroad, committing offences there, may be prosecuted in K. B. by indictment, or information, laying the venue in Middlesex. St. 42 G. 3. c. 85. s. 1. 8 East, 31. — 13. The 57 G. 3. c. 53. s. 1. enacts, that murders and 'manslaughters committed on land at the settlement in the Bay of Honduras, by persons residing or being within the said settlement, and murders and manslaughters committed in the islands of New Zealand and Otaheite, or within any other islands, countries, or places,



places, not within his majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by persons sailing in or belonging thereto, or that shall have sailed in, or belonged to, and have quitted, any British ship or vessel, to live in any of the said islands, countries, or places, or either of them, or that shall be there living, shall and may be tried, adjudged, and punished, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under or by virtue of the king's commission or commissions, which shall have been, or which shall hereafter be issued under and by virtue, and in pursuance of the powers and authorities of the 46 G. 3. c. 54., in the same manner as if such offences had been committed on the high seas. — 14. With a proviso by s. 2. that nothing herein contained shall repeal or affect, or be construed to repeal or affect, the provisions of the 33 Hen. 8. c. 23. — 15. The provisions of the 46 G. 3. c. 54. are, that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, heard, determined, and adjudged, according to the common course of the laws of this realm, and for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons, as the lord chancellor of Great Britain, lord keeper, or commissioners for the custody of the great seal of Great Britain, for the time being, shall from time to time think fit to appoint; and that the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, treasons, piracies, felonies, robberies, conspiracies, and other offences, within any such island, plantation, colony, dominion, fort, or factory, as any commissioners appointed or to be appointed according to the directions of the 28 Hen. 8. c. 15., by any law or laws now in force, have or would have for the trial of the said offences within this realm; and that all persons convicted of any of the said offences, so to be tried by virtue of any commission to be made according to the directions of this act, shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures, as, by any law or laws now in force, persons convicted of the same respectively would be subject and liable to, in case the same were respectively inquired of, tried, heard, determined, and adjudged, within this realm, by virtue of any commission made according to the directions of the 28 Hen. 8. c. 15. — 16. The 57 Geo. 3. above mentioned, was amended by the 59 Geo. 3. c. 44., which after reciting that doubts have arisen, whether in the said settlements in the Bay of Honduras there be a fort or factory to which a commission may issue for the trial of offences under the 46 Geo. 3. c. 54., and that by reason of such doubts, and the great delay and difficulty of removing offenders in Honduras for trial to England, or to any of his majesty's islands, plantations, colonies, dominions, forts, or factories, such crimes do oftentimes escape unpunished; for remedy thereof, it enacts, that all murders, manslaughter, *rapes*, *robberies*, and *burglaries*, committed on land, at the said settlement in the Bay of Honduras, may be inquired of, tried, heard, determined, and adjudged, within the said settlement in the Bay of Honduras, under or by virtue of the king's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons, as the lord chancellor of Great Britain, lord keeper or commissioners for the custody of the great seal of Great Britain, for the time being, shall from time to time think fit to appoint, in the same manner as is provided and enacted with respect to any crimes directed to be inquired of, heard, determined, or adjudged, under and by virtue of any commission issued under and by virtue of the 46 Geo. 3. c. 54. in any of his majesty's islands, plantations, colonies, dominions, forts, or factories. — 17. And the second section enacts, that the commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, manslaughter, *rapes*, *robberies*, and *burglaries*, committed within such settlement in the Bay of Honduras, as any commissioners appointed or to be appointed under the 46 Geo. 3. c. 54. have or would have, for the trial of any offences committed upon the seas; and all persons convicted of either of the said offences so to be tried, by virtue of any commission to be issued according to the directions of this act, shall be subject and liable to, and shall suffer all such and the same pains, penalties, or forfeitures, as, by any law or laws now in force, persons convicted of the same respectively would be subject and liable to, in case the same were respectively inquired of, tried, heard, determined, and adjudged, within any of his majesty's islands, plantations, colonies, or dominions, by virtue of any commission made according to the directions of the 46 Geo. 3. c. 54. and 57 Geo. 3. c. 53. — 18. With a proviso by s. 3., that nothing herein contained shall

repeal

repeal or affect the provisions of the 53 Hen. 8. c. 23. — 19. See farther below tit. 'False Vouchers,' 'High Seas,' 'Ireland,' 'Murder,' 'Newfoundland,' 'Piracy,' 'Shipping,' 'Soldiers,' 'Treason,' 'Wreck.' — 20. *Accessory*: an accessory in one county, to a murder or felony in another, cannot, at common law, be indicted in either. Staunf. b. 1. c. 46. 2 & 3 Edw. 6. c. 24. 1 Hale, 623. — 21. Though now, by st. 2 & 3 Edw. 6. c. 24., he may be indicted in the latter. — 22. If, therefore, A. in one county should procure B., a guilty agent, to commit a murder in the second; A. being an accessory before the fact, would be triable as such in the county where he was guilty of the murderous contrivance. 2 & 3 Edw. 6. c. 24. — 23. But if a person unconscious of the guilty design, be employed in the commission of a murder, the venue must be laid in the county where the death happens, for the person employed is a mere instrument or channel for conducting the injurious means to their end, and the contriver therefore is the principal. 1 Hale, 514, 616, 617. Fost. 349. — 24. See farther below, tit. 'False Vouchers,' 'Felony,' 'Libel,' 'Misdemeanour,' 'Murder,' 'Piracy;' and note, that since, in *misdemeanours*, all procurers are principals, the procurer is guilty of the offence wherever it is committed, in consequence of his procurement. — 25. *Alderney*: Alderney is not within the realm, though part of the dominions of England. 1 Hale, 156. — 26. *Arsenal*. See below, tit. 'Shipping.' — 27. *Berwick*: K. B. has jurisdiction by information over offences committed in Berwick. 2 Burr. 860. — 28. See farther below, tit. 'England.' — 29. *Bigamy*: Bigamy, under st. 1 Jac. 1., shall be tried where the party was apprehended, i. e. imprisoned. Hutton, 131. — 30. If not apprehended, then in the county where the second marriage was. 1 Hale, 694. Kelyng, 15. — 31. If a warrant be issued, the apprehension in the county where the venue is laid, must be proved by producing it, in order to give the court jurisdiction, or the prisoner will be entitled to his discharge. 2 Leach, 826. — 32. And if the party escapes and is never apprehended, he may, under this statute, be indicted in the county where the offence was committed, and be prosecuted to outlawry. 1 Hale, 694. 3 Inst. 87. — 33. *Black act*: Offences against the black act, 9 G. 1. c. 22., are triable in any county. s. st. — 34. Only the privilege must not be abused. Leach, 86. — 35. *Borders of Counties*: The 59 Geo. 3. c. 96. s. 2., reciting that felonies are sometimes committed on or so close to the boundaries of two or more counties, that the offenders escape unpunished from the defect of proof, that the felony with which they are charged was actually committed within the county in which such offenders may be indicted, enacts, that in any indictment for any felony committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of such boundary or boundaries, it shall be sufficient to allege that such felony was committed in either or any of the said counties; and every such felony shall and may be inquired of, tried, and determined in the county within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons so convicted of such felony would have been subject and liable to, in case such felony had been inquired of, tried, and determined, in the county in which the same felony was actually committed. — 36. *Buonaparté*: The 56 Geo. 3. c. 22., an act for the more effectually detaining in custody Napoleon Buonaparté, by s. 6. enacts, that all offences against this act, wheresoever the same shall be committed, whether within the dominions of his majesty or without, or upon the high seas, may be inquired of, tried, heard, determined, and adjudged in any county within that part of his majesty's dominions called England, in like manner, and by a jury of such county, as if such offences had been committed within such county; and that in every information or indictment for such offence, such offence may be laid and charged to have been committed in such county. — 37. *Bridge*: Indictment for not repairing a bridge in A., *ratione tenuræ* in B., may be laid in B. 5 T.R. 498. Sed vide 5 Hen. 7. 3. — 38. *Canal Navigation*: The 59 Geo. 3. c. 27., an act to facilitate the trial of felonies committed on board vessels employed in canals, navigable rivers, and inland navigations, reciting that felonies are frequently committed on board vessels employed in carrying and conveying goods, wares, and merchandise in or upon canals, navigable rivers, and inland navigations, in various parts of the united kingdom, as well by breaking open the casks and packages, containing such goods, wares, and merchandise, as in various other ways; and whereas such felonies frequently remain undetected until the arrival of such vessels at the places of their destination; and in consequence of such canals and navigations passing through several counties forming the boundaries of counties on each side or bank, it can seldom be known within what county such felonies may have been actually committed, and offenders frequently escape unpunished from defect of proof that the felony with which they are charged was actually committed within the county in which such offenders may be indicted;

for

for remedy thereof enacts, that in any indictment for any felony committed on board any barge, boat, trow, or other vessel whatever, employed or used in carrying or conveying goods, wares, and merchandise, or in which any such goods, wares, or merchandise shall be, in or upon any canal, navigable river, or inland navigation, in any part of the united kingdom of Great Britain and Ireland, it shall be sufficient to allege, that such felony was committed within any county or city, through any part whereof such boat, barge, trow, or other vessel, shall have passed in the course of the voyage or journey during which such felony shall have been committed; and in cases wherein the sides or banks of any navigable river, canal, or inland navigation, or the centre thereof, shall constitute the boundary of any two counties or cities, it shall be sufficient to allege that such felony was committed in either of the said counties or cities through which, or any part thereof, such boat, barge, trow, or other vessel shall have passed in the course of the voyage or journey during which such felony shall have been committed; and every such felony shall and may be inquired of, tried, and determined in the county or city within which the same felony shall be so alleged to have been committed; and all and every person and persons, who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons convicted of such felony would have been subject and liable to in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed, with a proviso, that nothing herein contained shall extend or be construed to extend to affect the jurisdiction of the High Court of Admiralty, or of any commission for the trial of offences under the 28 Hen. 8. c. 15. — 39. *Challenge*: If a man writes a letter, with intent to provoke a challenge, and puts it into the post-office at Westminster, addressed to a person within the city of London who receives it there, the writer may be indicted in Middlesex. 2 Campb. 506. — 40. *Clerk*: See below, tit. 'Embezzlement.' — 41. *Conspiracy*: Indictment for conspiracy may be laid where any overt-act has been committed. 4 East, 164. — 42. *Corporate town*: The 38 Geo. 3. c. 52., provides, that where an offence has been committed within any city or town corporate, except a few places which it enumerates, the bill of indictment may be preferred before the grand jury of the county adjoining, at any session of oyer and terminer or general gaol delivery, on the prosecutor's entering into a recognizance to pay the extra costs occasioned by such a proceeding, in case the court shall so direct. — 43. *Customs*: Indictment for assaulting customs or excise officer, in executing his duty, may be laid in any county. St. 9 G. 2. c. 35. s. 26. 4 T. R. 490. — 44. *Dock yard*: See below, tit. 'Shipping.' — 45. *East Indies*: Offences committed in the East Indies may be proceeded against in the K. B. 24 Geo. 3. sess. 2. c. 25. s. 64. 78. 81. 5 T. R. 607. — 46. *Embezzlement*: A servant receiving money in A., and denying the fact in B., is indictable in B. 3 B. & P. 596. 2 Leach, 974. 4 Taunt. 303. — 47. But persisting in his denial in A., is indictable there. East, P. C. Add. 24. — 48. Or, as it seems, either in A. or B. Ibid. — 49. *England*: England comprehends Wales and Berwick-upon-Tweed. St. 20 Geo. 2. c. 42. s. 3. — 50. See farther below, tit. 'Ireland.' — 51. *Excise*: See above, tit. 'Customs.' — 52. *False vouchers*: A. abroad, fraudulently procuring false vouchers to be delivered in Middlesex, is indictable there. 4 East, 164. — 53. *Felony*: At common law, the jury, in cases of felony, cannot take cognizance of facts done out of the county for which they are sworn. 2 Hale, 163. — 54. Hence where a felony begun in one county is consummated in another, the felon cannot, by the common law, be indicted in either. Hale, 651, 652. Cro. Car. 488. Hob. 183. 2 & 3 Edw. 6. c. 24. Staunf. 89. 2 Hale, 163. 6 H. 7. 10. 10 H. 7. 20. 28. Fitz. Ind. 23. 1 Hawk. c. 31. s. 13. Sed vide 7 H. 7. 8. 1 Hale, 427. 48 Edw. 3. 17. — 55. Where the trial of a new felony, done partly within, partly without, the kingdom, is limited to the place where committed, it shall be where the part within the kingdom was done. 1 Hale, 706. 3 Inst. 80. — 56. New felony may be tried where committed, unless excluded, though statute allows trial to be where offender is apprehended. Hale, 694. 3 Inst. 87. — 57. Principal thief not clergyable, taking goods in one county of England and bringing into another, may be indicted in the latter 3 W. & M. c. 9. s. 3. — 58. But neither accessories, nor appeals, nor larcenies ousted of clergy by subsequent statutes, are within the act. 1 Hale, 519. 11 Rep 31. — 59. Where goods feloniously taken in England or Scotland are afterwards in the felon's possession in any other part of the said kingdoms, he may be indicted in the latter part. 13 Geo. 3. c. 31. s. 4. 44 Geo. 3. c. 92. s. 7, 8. — 60. The procurer, in one county, of a felony, through an innocent agent in another, is indictable in the latter. 1 Leach, 142. 169. 2 East, P. C. 1120. 1 Hale, 514. 616. Fost. 349. — 61. See farther below, tit. 'High seas,' 'Piracy.' — 62. *Forgery*: In the case of an indictment for forging notes, it seems not to be sufficient to shew an uttering in the county where the venue was laid, in order to support the locality required for the trial.

2 East, P. C. 992. 2 N. R. 87. — 63. Nor will the finding a forged bill, upon a prisoner in one county, bearing date at a time when he resided in another, support an indictment laid in the latter. 2 N. R. 87. — 64. *Guernsey*: Guernsey is not within the realm, though part of the dominions of England. 1 Hale, 156. — 65. *High seas*: By st. 28 Hen. 8. c. 15., treasons, felonies, robberies, murders, and confederacies, committed in or upon the seas, or in any haven, river, creek, or place, where the admiral has, or pretends to have, jurisdiction, shall be tried according to the course of common law, and in such place or counties as shall be appointed by the king's commission. — 66. Which statute, with respect to treasons done at sea, is not repealed by 35 H. 8. c. 2. 3 Inst. 112. — 67. If K. B. or commissioners, after taking indictment in one county remove into another, the trial must be by jurors of the first. 3 Inst. 11. 1 Sum. 16. 205. — 68. Treason done in Ireland may be tried in England. 1 Hale, 155. 3 Inst. 11. 7 Rep. 23. — 69. The statute saves privilege of peerage. s. 2. — 70. But Irish peers may be tried in England for treason in Ireland. 7 St. Tr. 928. 1 Hale, 195. Dyer, 361. — 71. By 39 Geo. 3. c. 37. all offences done on the high seas, out of the body of the county, are made subject to the provisions of 28 H. 8. c. 15. — 72. See farther, above, tit. 'Abroad,' below, tit. 'Piracy,' 'Shipping.' — 73. *Ireland*: Ireland is no part of the realm of England. 1 Hale, 155. 3 Inst. 11. 7 Rep. 23. See farther, above, tit. 'High seas,' below, tit. 'Libel.' — 74. *Isle of Man*: The isle of Man, though part of the dominions, is without the realm, of England. 1 Hale, 156. — 75. *Larceny*: If a party steal goods in the county of A., and carry them into the county of B., he may be indicted of larceny in the latter county. 2 East, P. C. 771, 772. — 76. See farther, above, tit. 'Felonies.' — 77. *Libel*: A. procuring B. to publish a libel, is indictable wherever publication has been. 7 East, 65. — 78. A mere acknowledgment, by the defendant, in the county in which the venue is laid, of the fact of publication, which, in truth, was in another county, is not sufficient to warrant the trial in the first county. 7 East, 68. — 79. Nor is the post mark on a libellous letter, of a particular place within the county where the venue is laid, sufficient evidence of the publication there by the defendant; but if it be sent to the prosecutor at a place without the county, and yet actually received by him within it, that will be sufficient to support the indictment. 1 Campb. 215, 216. — 80. If a person in Ireland, procures another to publish a libel at Westminster, he may be indicted in Middlesex. 7 East, 68. 3 Smith, 97. 99. 1 Esp. C. 63. 6 East, 589, 590. — 81. *Magazine*: See below, tit. 'Shipping.' — 82. *Mail*: The offence of robbing the mail, may, if committed in England, be prosecuted, either in the county where the offence was committed, or that in which the party was apprehended; and if in Scotland, either in the justiciary court of Edinburgh, or in the court of the circuit where the felony was effected, or the felon arrested. St. 42 Geo. 3. c. 81. s. 3. — 83. *Master and Servant*: see above, tit. 'Embezzlement.' — 84. *Misdemeanour*: Indictment for misdemeanour, compounded of facts in two counties, may be laid in either. Hale, 652. Staunf. b. 2. 91. 19 E. 3. Ass. pl. 6. 5 T. R. 498. 5 H. 7. 3. 2 T. R. 238. 2 B. & P. 381. — 85. Procurer of a misdemeanour may be indicted where it is committed. 7 East, 55. Leach, 169. 4 East, 164. — 86. *Misprision of Felony*: Indictment for misprision of felony, compounded of acts in two counties, may be laid in either. Hale, 652. — 87. *Murder*: Where one, struck or poisoned in one county, dies in another, an indictment may be sued in the latter, both against principals and accessaries, though accessaries were guilty elsewhere. 2 & 3 Edw. 6. c. 24. — 88. Where death ensues here from striking or poisoning abroad, or abroad from striking or poisoning here, offender and accessaries may be indicted where the death, in the first case, and the stroke or poison, in the second, happened. St. 2 Geo. 2. c. 21. — 89. Persons vehemently suspected by the privy council upon examination, of treason, misprision of treason, or murder, in or out of the king's dominions, may be indicted in any county the king may appoint by commission of oyer and terminer. St. 33 Hen. 8. c. 23. — 90. Which statute is repealed as to treason by 1 & 2 P. & M. c. 10. s. 8. 1 Hale, 283. 2 Hale, 164. 3 Inst. 27. accord. Staunf. b. 2. f. 90. contra. — 91. But not as to murder. 1 Hale, 283. 374. 2 Hale, 22. 164. 3 Inst. 27. 8 Mod. 144. 1 East, P. C. 361. 369. Vide recital of 43 Geo. 3. c. 113. s. 6. — 92. The statute does not extend to accessaries. 1 And. 195. 1 East, P. C. 369. — 93. Though it appears to have embraced every description of murder, whether committed within or without the kingdom. 1 East, P. C. 369. 8 Mod. 144. — 94. Accessaries to murder, and principals in manslaughter, have, however, recently been included in the same regulation. St. 43 Geo. 3. c. 113. s. 6. — 95. *Navy*: The 54 Geo. 3. c. 93., an act for regulating the payment of navy prize-money, and the transmission of accounts and payment of balances to Greenwich Hospital, by s. 86. enacts, that where the offence of taking a false oath, or suborning any person so to do, or any of the offences by this act made cognizable



cognizable in any of his majesty's courts of record in Great Britain, shall be committed out of this realm, the same may be alleged to be committed, and may be laid, inquired of, tried, and determined in any county in England, in the same manner, to all intents and purposes, as if the same had been actually done or committed within the body of such county. — 96. *Newfoundland*: Capital offences committed in Newfoundland are triable in any county in England. 10 & 11 W. 3. c. 25. — 97. *Nuisance*: A nuisance in one county to the damage of another, is indictable in the first. Staunf. b. 2. 91. 19 Edw. 3. Ass. pl. 6. — 98. Or, by Hawkins, in either. 2 Hawk. c. 25. s. 37. Vide 2 T. R. 421. 3 B. & P. 381. — 99. *Officer*: See above, tit. 'Customs,' below, tit. 'Soldier.' — 100. *Piracy*: By st. 11 & 12 W. 3. c. 7., piracies and felonies upon the sea, &c. may be inquired of in any place at sea or upon land in his majesty's dominions, appointed by the king's commission. — 101. By st. 4 Geo. 1. c. 11., 8 Geo. 1. c. 24., and 2 Geo. 2. c. 28., several piratical offences therein mentioned, and by st. 18 Geo. 2. c. 30., certain acts of hostility done at sea, in time of war, are triable in the admiralty. — 102. By 11 & 12 W. 3. c. 7., accessaries to piracy may be inquired of according to the st. 28 Hen. 8. c. 15. — 103. *Rivers*: By st. 13 Geo. 3. c. 84., indictment for destroying works upon navigable rivers, erected by authority of parliament, may be laid in any adjacent county. — 104. *Sark*: Sark, though part of the dominions, is not within the realm of England. 1 Hale, 156. — 105. *Scotland*: See above, tit. 'Felony.' — 106. *Servant*: See above, tit. 'Embezzlement.' — 107. *Shipping*: St. 1 Ann. st. 2. c. 9. s. 4., for preventing the destruction of ships by masters or mariners, directs, that such offences committed on the high seas, &c. shall be inquired of, tried, &c. and adjudged, in such shires and places of the realm, as shall be limited by the king's commission under the great seal, in such manner and form as by st. 28 H. 8. is directed for the trial of pirates. — 108. The st. 11 Geo. 1. c. 29. s. 7. against the wilful destroying of any ship or vessel, enacts, that if the offence be committed upon the high seas, it shall be inquired of in such court, and in such manner and form, as by st. 28 H. 8. is directed and appointed for the inquiring, &c. of felonies done upon the high seas. — 109. By st. 12 Geo. 3. c. 24. s. 2., offenders burning or destroying the king's ships, arsenals, magazines, dock-yards, &c. out of the realm, may be indicted and tried for the same, either in any shire or county within the realm, or in the island, country, or place, where such offence shall have been actually committed. — 110. The st. 33 Geo. 3. c. 67., against wilfully setting fire to any ship or vessel, directs, that if any of the said offences shall be committed upon the high seas, the offender may be tried at any admiralty session, &c. — 111. *Soldiers*: By st. 2 & 3 Ann. c. 20. s. 35., certain treasons and felonies committed by officers or soldiers out of England, may be inquired of in the K. B., or before commissioners in any county appointed by the king. — 112. *Stage Coach*: The 59 Geo. 3. c. 96., an act to facilitate the trials of felonies committed on stage coaches and stage waggons, and other such carriages, and of felonies committed on the boundaries of counties; reciting that felonies are frequently committed on stage coaches, stage waggons, stage carts, and other such carriages, employed in carrying and conveying goods, wares, and merchandise, travelling on the several highways in various parts of the united kingdom, as well by breaking open the casks and packages containing such goods, wares, and merchandise, as in various other ways; and such felonies frequently remain undetected until the arrival of such carriages at the place of their destination, and in consequence of such highways leading through several counties, it can seldom be known within what county such felonies may have been actually committed; and offenders frequently escape unpunished from defect of proof that the felony with which they are charged was actually committed within the county in which such offenders may be indicted; enacts, that in any indictment for any felony committed on any stage coach, stage waggon, stage cart, or other such carriage whatever, employed or used in carrying or conveying goods, wares, and merchandise, or in which any such goods, wares, or merchandise shall be, in or upon any highway in any part of the united kingdom of Great Britain and Ireland, it shall be sufficient to allege that such felony was committed within any county or city through any part whereof such stage coach, stage waggon, stage cart, or other such carriage shall have passed in the course of the journey during which such felony shall have been committed; and in all cases where any highway shall form the boundary of any two counties, it shall be sufficient to allege, that such felony committed as aforesaid was committed in either of the said counties, through which or any part whereof such stage coach, stage waggon, stage cart, or other such carriage, shall have passed in the course of the journey during which such felony shall have been committed; and every such felony shall and may be inquired of, tried, and determined, in the county or city within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined



So, by the st. 11 H. 4. 9. (f) An indictment shall be void, unless made by inquests of the king's liege (g) people (h), returned (i) by sheriffs

determined as aforesaid shall be subject and liable to all such pains of death, and other pains, and penalties, and forfeitures, as such person or persons convicted of such felony would have been subject and liable to, in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed. — 113. *Stamps*: Indictment for offences against the stamp-acts, may be laid in the county either where the offence was committed or where the party was apprehended. 53 Geo. 3. c. 108. — 114. *Treason*: By st. 35 Hen. 8. c. 2., all treasons or misprisions of treason beyond the realm, shall be determined before the justices of K. B. by men of the county in which the court sit, or else before such commissioners and in such shire as the king shall appoint. — 115. The st. 1 & 2 P. & M. c. 10. does not affect the statutes relating to treasons committed upon the high seas, or out of the realm. Fost. 238. — 116. That statute enacts, that all trials for any treason in England or Wales, shall be had and used according to common law only. — 117. In indictments for treason within the realm, one overt act of treason must be laid and proved in the county where the indictment is laid. 1 & 2 P. & M. c. 10. s. 7. Dy. 132. a. 4 St. Tr. 447, 448. Kel. 14, 15. 6 St. Tr. 260. — 118. By stat. 7 Ann. c. 21. s. 5. Scotchmen are triable before commissioners in any shire, stewartry, or county of Great Britain, as shall be assigned by the crown, for all treasons and misprisions of treasons, committed out of the realm of Great Britain. — 119. Treasonable offences against 37 Geo. 3. c. 70. may, by that statute, be tried in any county. — 120. Intercepted letters are received in evidence as overt acts of treason in the county where they were written. 2 Campb. 507. 4 St. Tr. 409. Fost. 218. 6 T.R. 527. — 121. See farther, above, tit. 'High seas.' — 122. *Turnpikes*: Indictment for destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by st. 8 Geo. 2. c. 20., and 13 Geo. 3. c. 84., be laid in any adjacent county. — 123. *Wales*: At common law, no offence committed in Wales could be tried in England, and was only inquirable before justices or commissioners assigned by the king in the county of Wales, where the offence was committed. 1 Hale, 156. — 124. But now, by 26 Hen. 6. c. 6., confirmed by 34 & 35 Hen. 8. c. 26., treasons and felonies in Wales, within any lordship marcher, may be tried in the next adjacent English county. — 125. Which statute is not confined to the lordship's marchers. Str. 533. 8 Mod. 134. 4 Com. 303. — 126. And it extends to all felonies subsequently created. 3 Campb. 78. 1 Leach, 109. — 127. But so far as respects treason, is repealed by 1 & 2 P. & M. c. 10. — 128. Salop, not Cheshire, is the next English county to Anglesea. Leach, 125. 8 Mod. 136. Hale, 156. 1 Hawk. c. 31. s. 14. — 129. *Wreck*: Indictment under 26 Geo. 2. c. 19., for plundering a wreck, may, by that statute, be tried in the next adjacent county. — 130. So, by the same statute, indictment for plundering wrecks in Wales, may be tried in the next English county.

(e) In case of indictment at the assizes for offences within the county of a city or town corporate, the prosecutor must, ten days before the holding of the sessions, give notice in writing as well to the defendant, as to the witnesses who have been bound over, or, if they cannot be found, the notice must be left at their residence. 38 Geo. 3. c. 52. s. 5, 6.

(f) Affirming the common law.

(g) 1. An *alien* therefore cannot serve. 3 Inst. 32. Poph. 202. W. Jones, 198, 199. 2 Hale, 155. 2 Hawk. c. 25. s. 16. Willes, 667. — 2. Nor is it necessary, that any part of a grand jury, finding a bill against an alien, should themselves be aliens. 2 Hawk. c. 43. s. 36.

(h) 1. It seems that they must be *freeholders*. 4 Com. 302. 2 Hale, 155. Bac. Abr. Juries, (A). Burn's Just. Jurors, I. Williams's Just. Juries, I. Vide 2 Hawk. c. 25. s. 19. 21. 2 Woodes. 557. 1 Chit. C. L. 308. — 2. And in *Lancaster* they must have 5*l.* per annum. St. 33 Hen. 6. c. 2. — 3. In *Yorkshire* 80*l.* per annum, freehold or copyhold. St. 7 & 8 W. 3. c. 32. s. 8. — 4. But in other counties, the amount of their freehold is not settled. 2 Hale's P. C. 155. — 5. However, they are usually gentlemen of the best figure in the county. 4 Com. 302.

(i) 1. Upon a *precept*, either in name of the king, or of two or more justices, directed to the returning officer. 1 Chit. C. L. 310. — 2. And summons thereon by him, his officer, or lawful deputy, at least six days before-hand; except in Wales, when eight; and in the counties palatine, when fourteen days' notice is requisite. 7 & 8 W. 3. c. 32. s. 5. 3 Geo. 2. c. 25. s. 9, 10. Burn's J. Jurors, III. — 3. The officer, where the service

sheriffs or bailiffs of franchises, without nomination of any (*k*): of which inquests

vice is personal, shewing the warrant under the seal of office; or if the juror be absent, then leaving notice in writing, at his dwelling house with some inmate, under the officer's hand. Ibid. 1 Chit. C. L. 311. — 4. Notwithstanding the precept generally specifies only twenty-four, the sheriff usually returns forty-eight. 2 Hale, 263. Burn's Just. Jurors, III. — 5. The practice, however, varies, in some degree, in particular counties. Thus, in Middlesex, in every term, there are two grand juries summoned and sworn before the senior of the puisne judges, on some day fixed by such judge in the early part of the term; who, after receiving their charge from such judge, adjourn to the grand jury room, and then appoint subsequent days of meeting; and precepts are issued from the crown-office to the constables in the different districts, to make returns of all nuisances, &c. which, on their return, are considered as presentments, and are prosecuted as indictments or presentments. The two juries appoint separate days for receiving the constables' returns. The jury who require the presentments of constables for the more remote parts of the county assemble at the grand jury room, to find indictments on the last day but two of the term; and the jury acting for the metropolis and the adjacent parts, in the like respect, assemble at the like place, for the same purpose, on the last day but one of the term; and after returning their respective presentments and indictments, the jurors are discharged. 1 Chit. C. L. 310, 311. — 6. In Suffolk also, there are two grand juries chosen. Ibid. Bac. Abr. Juries, A. 2 Lit. Reg. 156. 2 Hale's P. C. 26. 154. — 7. But in Yorkshire, only one panel of forty-eight freeholders and copyholders can be returned to serve at the assizes; and at the sessions, only forty can be returned on the panel. 7 & 8 W. 3. c. 32. s. 8. Burn's Just. Jurors, III. — 8. A grand jury charged and sworn usually serves the whole of the assize or sessions. 2 Hale's P. C. 156. Williams's Just. Juries, I. 1 Chit. C. L. 314. — 9. But the court may change them; and usually do so, *first*, when, before the end of the sessions, the grand jury having brought in all their bills, are discharged by the court, and, after that discharge, either some new offence is committed, and the party taken and brought into gaol; or, when after the discharge of the grand inquest, some offender is taken and brought in before the end of the session. Ibid. — 10. Or, *secondly*, when inquiry is to be made under the statute of 3 Hen. 7. c. 1., of the concealment of a former inquest, which provision, though it expressly mentions justices of the peace, extends to the King's Bench, and the sessions of oyer and terminer, for the latter are holden by virtue of a commission of the peace, as well as by their higher authorities. Ibid. — 11. In the first case, an adjournment *de die in diem* must be recorded; since as the sessions are in law only the first day, the trial will otherwise appear to have taken place before the offence was committed. W. Jones, 420. 1 Barnard. 328. 2 Hale, 24. 156. Williams's Just. Juries, I. 1 Chit. 315. — 12. And the same remark holds good, should it appear upon a record, that the grand inquest returned their finding after the first day of the sessions, without an entry of adjournment. Ibid.

(*k*) 1. With respect to the *swearing, charging, and proceedings* of the grand jury, as well at the assizes as at the sessions: at the *assizes*, on the judges coming into court, the crier proclaims silence, while the commissions are read, which they then are by the clerk of the assize, or of the arraigns. The crier then requires the sheriff to return the precepts and writs of assize and *nisi prius*; who, if absent, is fineable. The *nomina ministrorum* are then called over by the clerk of assize; and then the crier calls in the grand jury by their names and additions; and, upon any default on the second calling, declares, that the defaulter will lose one hundred shillings in issue. They are then sworn, by the marshal or crier, three at a time, with their hands upon the Gospel, except the foreman, who is sworn by himself. Silence is then proclaimed by the crier, whilst the king's proclamation against profaneness and immorality is openly read; and then again, whilst the judge charges the grand jury. The charge being finished, proclamations are made for justices, coroners, &c. to deliver inquisitions and recognizances taken by them. The recognizances to prosecute and give evidence are then called, that the bills may be prepared for presenting; which being ready, the prosecutors and witnesses are called, sworn, and sent before the grand jury, who retire to proceed with their duties. 1 Chit. C. L. 313, 314. Cro. C. C. 6, 7. 479, 480, 481, 482. Dick. Sess. 106, 107. 115, 116. 4 Com. 303. Burn's Just. Sess. 8 T. R. 615. — 2. At the *sessions*, the court being assembled before twelve o'clock at noon, the sessions are proclaimed by the court bailiff. Whereupon, after commission of the peace read, the grand jury are called; and then sworn as already mentioned. The chairman of the sessions then charges them; the recognizance of prosecutors and witnesses are then called and proceeded on as at the assizes; though, in cases of difficulty, vindictiveness, or partiality, the evidence may be heard in court, to assist the jury in discharging their duties, 1 Chit.

inquests none shall be outlawed (*l*), or (*m*) fled to sanctuary for treason, or felony. (*n*)

So, if any one was outlawed, or returned (*o*) at the nomination of the party, &c. (*p*) the whole indictment will be avoided, though twenty others were upon the same inquest. H. P. C. 202. (*q*)

And therefore, an indictment, which does not appear to be before twelve (*r*) *probos & legales homines* in the same county (*s*), shall be quashed. R. 2 Rol. 82.

The indorsement upon the indictment (*t*) made by the jury is part of the indictment. R. Yel. 99. (*u*)

And

1 Chit. C. L. 312. Dalt. Just. 185. s. 9. Burn's Just. Sessions. Dick. Sessions. 3 Harg. St. Tr. 417. 4 Com. 303. n. 2 Hale, 159, 160. 2 Hawk. c. 25. s. 145. n. Jac. L. D. Grand Jury.

(*l*) Outlawry in a civil action disqualifies. 2 Hale. Sed vide 2 Hawk. c. 25. s. 18.

(*m*) Attainted of treason, or felony, or convicted of any species of the *crimen falsi*, which renders infamous; for such men are disqualified.

(*n*) 1. Or under 21. St. 7 & 8 W. 3. c. 32. s. 4. — 2. And magistrates at sessions, and justices of gaol delivery at assizes, may reform a panel by inserting proper, in the room of improper, persons returned. St. 3 Hen. 8. c. 12. 2 Hawk. c. 25. s. 32.

(*o*) If any person not returned procure his name to be read among those who are returned, and is, in consequence, sworn, he may be indicted for a contempt of the statute. 11 Hen. 4. c. 9. 12 Rep. 99. 3 Inst. 33. Bac. Abr. Juries, (A). 2 Hawk. c. 25. s. 24. 1 Chit. C. L. 311.

(*p*) 1. He may be challenged before bill presented. 2 Hawk. c. 25. s. 16. — 2. Or after bill found, the fact may, before issue joined, be pleaded in avoidance; with an answer over to the felony. 2 Hale, 155. 3 Inst. 34. Cro. Car. 134. 147. 2 Hawk. c. 25. s. 18. 26. 29, 30. — 3. But, after that event, it seems questionable whether any advantage can be had of the error. 3 Inst. 34. 2 Hawk. c. 25. s. 27. — 4. Unless, indeed, it can be verified by the records of the court, wherein the indictment is depending; in which case, any one may, as *amicus curiæ*, inform the court of the objection. Ibid. 1 Chit. C. L. 308.

(*q*) 1. St. 11 Hen. 4. c. 9. — 2. And an outlawry upon such a finding may be reversed. 11 Hen. 4. pl. 21. 3 Inst. 32. 12 Rep. 99. 2 Hawk. c. 25. s. 18. 28. 33.

(*r*) 1. The grand jury must be twelve in number at the least; the concurrence of so many being necessary to put the defendant upon his trial. Cro. Eliz. 654. — 2. But the number must not exceed twenty-three; since otherwise there might be an equal division, or two full juries might differ in opinion. 2 Burr. 1088. — 3. '*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolent, ullum innocentem accusare, nec aliquem noxium celare.*' Wilk. L.L. Angl. Sax. 117: temp. Ethelred. 4 Com. 302. — 4. In the time of King Richard 1., according to Hovenden, the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. 4 Com. 302.

(*s*) 2 Inst. 32, 33, 34. 2 Hawk. c. 25. s. 16. Bac. Abr. Juries, (A), (E) 4. 2 Hale, 162. 4 Com. 303.

(*t*) Previous to presenting the bill of indictment to the grand jury, it must be engrossed on parchment. 1 Chit. C. L. 316.

(*u*) 1. That is, the indorsement of 'a true bill' coupled with the indictment, forms a complete accusation. — 2. When the grand jury have heard the evidence, if they think the proofs insufficient, they used formerly to indorse on the back of the bill '*ignoramus*,' or we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them. But now they assert in English, more absolutely, 'not a true bill;' or, which is the better way, 'not found;' and then the party is discharged without farther answer. 4 Com. 305. — 3. If they are satisfied of the truth of the accusation, they then indorse upon it 'a true bill;' antiently '*billæ vera.*' The indictment is then said to be *found*, and the party stands indicted. 4 Com. 306. — 4. And the indictment, when so found, is publicly delivered into court. Ibid. — 5. In

And if the jury find *billa vera* for part, and *ignoramus* for other part, it is void; for they ought to find the whole, or nothing. (x) R. Yel. 99. 1 Sid. 414. (y)

So, if they find it conditionally: as, *si messuagium sit in possessione domini regis, tunc billa vera*. R. Yel. 15. (z)

Or, *quæ est billa vera*, without saying expressly *quod est*. 2 Mod. Ca. 296.

So upon an indictment for murder against A. and B. if they find *billa*

— 5. In the case of a bill not found, or defective, another may be sent to the same or a different grand jury. 4 Com. 305. Bac. Abr. Indictm. (D). 2 Woodes. 555, 556. 1 Chit. C. L. 325. — 6. And thus, after the finding of a bill for murder, when the facts amount to petit treason, the crown may procure the indictment to be quashed, and prefer another for the petit treason. Fost. 104. 106.

(x) This rule, however, does not extend to the finding of different counts; for as each count contains a distinct charge, the jury may return a true bill upon one of them only, and the finding will be as valid as if no other had ever been inserted. Cowp. 325. 2 Hawk. c. 25. s. 2.

(y) 1. Which means, that they cannot divide an entire count, by finding it true for part only. — 2. Since, where a bill contains more counts than one, it may be found for some and rejected as to others. Cowp. 325. — 3. Hence, the use of several counts, descriptive of the same identical offence, but so diversified as to meet a contingent variation in the proofs. — 4. Thus, in burglary, it is usual, where such contingency is apprehended, to diversify the intent of the breaking; charging it, for example, to have been in one count, to steal A. B.'s property, in another C. D.'s. 2 East. P. C. 515. — 5. So a count for stealing at common law is usually subjoined to a count upon st. 39 Geo. 3. 85., for embezzlement. 2 Leach. 1103. — 6. Thus it is with the grand jury; the petit jury, however, may convict upon one branch of the same count, and acquit upon another; and may, therefore, upon a count for 'composing, printing, and publishing' a libel, convict for the publication only. 2 Campb. 584. 646. Vide etiam 1 Leach, 88. 2 Leach, 711. 2 Hale, 302. 2 East, P. C. 515, 516. — 7. So they may convict of an inferior degree of guilt, included by a greater charge; and may, therefore, convict for manslaughter, on a charge of murder. 1 Hale, 449. 2 Hale, 302. — 8. For manslaughter or for murder, on one of petit treason. Fost. 328. 2 Hale, 184. 302. 2 Hawk. c. 47. s. 6. — 9. For manslaughter at common law, on a charge of stabbing *contra formam statuti*. 2 Hale 302. 2 Hawk. c. 47. s. 6. — 10. For larceny, on one of highway robbery. 1 Hale, 534, 535. 2 East, P. C. 736. 784. — 11. For larceny, on one for stealing in a dwelling-house and putting in fear. 2 Leach, 671. — 12. For stealing generally, on one of privately stealing from the person. 1 Leach. 473. 2 Hale, 203. 2 Hawk. c. 47. s. 6. — 13. For stealing generally, on one of burglariously breaking in and stealing. 2 Leach, 711. 2 East, P. C. 515, 516. — 14. For stealing to a smaller value than laid. 2 Hale, 302. 2 Hawk. c. 47. s. 6. — 15. Which liberty, however, of convicting of an inferior degree of guilt is thus far limited, that a felony cannot be modified into a misdemeanor, since thereby the defendant loses the benefit of a copy of the indictment, defending by counsel, and a special jury. 2 Hale, 172. Cald. 397. 1 Leach. 14. 702. 2 Str. 1133. Vide Cro. Jac. 497. Kel. 29. 2 East, P. C. 737. 778. — 16. Nor can one defendant be convicted of a trespass, charged as a felony against himself and his guilty companion. 2 Hawk. c. 47. s. 8. — 17. So in an indictment for burglary, as a mere breaking is not sufficient to complete the offence, but a felonious intent is necessary, if the intent charged be not proved, the jury cannot find any part of the accusation. 2 Leach, 702. 2 East, P. C. 702. 1 Chit. C. L. 252. — 18. So where the jury find a verdict generally against the defendant, on a count for an assault, false imprisonment, and rescue, which is bad in part, because it is not sufficiently stated that the arrest was lawful, the court cannot give judgment as for a common assault and false imprisonment. 5 East, 304. 1 Chit. C. L. 252. — 19. So also, if on an indictment for highway robbery, the jury find a special verdict, raising a doubt only, whether the prisoner was guilty of robbery though they find the taking, yet the court will not give judgment, as for a larceny, but will direct a new indictment to be preferred for the minor offence, in case the higher offence should not have been completed. Comyn's Rep. 481. R. T. H. 115. 2 East, P. C. 708. n. 784. 1 Chit. C. L. 252.

(z) 2 Hawk. c. 25. s. 2.



*vera quoad A.*, and *quoad B.* only (*a*) manslaughter (*b*). R. 1 Rol. 407. (*c*)

So, if upon an indictment for murder, they find *billa vera se defendendo*. R. 2 Roll. 52. (*d*)

If upon an indictment for a libel, they find *quoad* the words *billa vera, sed utrum malitiose et seditiose ignoramus*. R. 1 Leo. 286. (*e*)

But finding (*f*) *quoad separales presentes sunt billæ veræ* is well; for that extends to all. R. 1 Sal. 376. (*g*)

## (B) Presentment, what.

A presentment is, when the jury present an offence to the court, without an indictment delivered to them. 2 Inst. 739. (*h*)

And therefore, every indictment contains a presentment, but not *é contra*. 2 Inst. 739. (*i*)

As, if a presentment be found by a subsequent jury, *quod prædict' indictamentum est billa vera*, it shall be quashed; for it is no indictment till the finding. R. 1 Sal. 376. (*k*)

## (C) When

(*a*) In this case it has been said, that though the jury are assured that the crime is only manslaughter, still they should find the bill, that is, for murder, since then the defendant will have the advantage of an acquittal, and be safe from future molestation. 2 Hale, 158. Bac. Abr. Indict. (D). Sed quære.

(*b*) But an indictment against several may be found against one or more, and rejected as to the rest. 1 Chit. C. L. 323.

(*c*) 1. It has been said, that if a grand jury find a bill for manslaughter, on an indictment for murder, the words 'of malice aforethought,' and 'did murder,' may be struck out, and the indictment amended by reducing it to a mere accusation of the inferior offence, in the presence of the jury. 2 Hale, 162. Bac. Abr. Indict. (D). — 2. This, however, seems questionable; and it is agreed to be the safer course to prefer a fresh indictment for manslaughter; and so, where the bill is originally for burglary, to prefer an indictment for theft, which is, in substance, included. 2 Hale, 162. Bac. Abr. Indictm. (D).

(*d*) 3 Bulst. 206. 1 Sid. 230. Cowp. 325. 2 Hale, 158. 2 Hawk. c. 25. s. 2. C. C. C. 32. Burn's Just. Indictm. VII.

(*e*) 2 Hawk. c. 25. s. 2.

(*f*) Where there are several returned at the same time.

(*g*) 1. The jury having indorsed and brought into court the several bills, the clerk of assize, at the assizes, and of the peace, at sessions, calls over the jury, and asking them whether they have agreed upon any bills, bids them present them to the court. Whereupon the foreman hands the indictments to the said clerk, who asks them if they agree that the Court shall amend matter of form, not altering matter of substance; to which they assent. The clerk then reads over the names of offenders and offences with the finding; and usually, though it be not absolutely necessary, files the bill. And at the close of the assize or sessions, prisoners, against whom no bills are found, are discharged by proclamation. 1 Chit. C. L. 324. 4 Com. 306. Cro. C. C. 7, 8. Dick. Sessions, 158. 4 Hargr. St. Tr. 745. — 2. The reason for asking the jurors permission to amend in form, is, that the Court have no authority to change the form of the accusation without the consent of the accusers. C. T. H. 203. Str. 1026.

(*h*) 1. A presentment, *properly* speaking, is the notice taken by the grand jury, of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king. 4 Com. 301. Lamb. Eirenarch. l. 4. c. 5. — 2. Upon such presentment the officer of the court must afterwards frame an indictment, before the party can be put to answer it. 2 Inst. 793.

(*i*) A presentment *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. 4 Com. 301. 2 Hawk. c. 25. s. 1.

(*k*) (B a) *Inquisition, what.*

1. When the accusation is found by a jury specially returned to inquire concerning the



## (C) When necessary.

An accusation for treason, felony, or other offence, generally (*l*) ought to be (*m*) by indictment, or presentment. 2 Inst. 46.

But at common law, if any was taken for larceny in the manner (*n*), and brought presently into court, he might be arraigned (*o*) without indictment; and such was the custom of *infangtheof* in some manors. H. P. C. 198. (*p*)

So in trespass, (*q*) if a verdict finds, that the defendant stole the goods, he may be put to answer, without other indictment. H. P. C. 199.

If an approver charge B. and afterwards waive his charge, the king may proceed against B. thereupon, without indictment. Sho. 109. (*r*)

the particular offence, it is termed an inquisition; as where a person is found guilty of the death of another, upon an inquisition before the coroner on his view. Stark. 13. 2 Hawk. c. 25. s. 6. — 2. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court leet, whereupon the presiding officer may set a fine. 4 Com. 301. — 3. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon the inquisition, and may dispute the truth of it; which brings it to a kind of indictment. 4 Com. 302.

(*l*) 1. Previous to the st. 1 Hen. 4. c. 14., appeals in parliament, by particular individuals, especially of treason, and in Richard II.'s reign, seem to have been frequent, 2 Hale, c. 50. — 2. But are now by that statute taken entirely away. 2 Hale, c. 20. 2 St. Tr. 550. — 3. Though impeachments by the house of commons in the lords' house, are not within it. 2 Hale, c. 20. — 4. In the case of commoners, however, such impeachments are now in practice confined to misdemeanours. 8 Grey's Deb. 332. Seld. Jud. Parl. Parl. Hist. Temp. Rich 2. 3 Bac. Abr. 546.

(*m*) That is, by the rule at common law. Offences created by statute can sometimes be prosecuted in some other form only. Thus the proceeding against a spiritual person for occupying lands contrary to 21 Hen. 8. c. 13. must be by action or information. 1 Burr. 543.

(*n*) 'With the mainour,' that is, with the thing stolen upon him, *in manu*. 3 Com. 307.

(*o*) By the Danish law, he might be taken and hanged upon the spot, without accusation or trial, Stiernh. de Jure Sueon. l. 3. c. 5. 4 Com. 308.

(*p*) 1. This proceeding was wholly taken away by st. 25 Edw. 3. c. 4.; 28 Edw. 3. c. 3.; 42 Edw. 3. c. 3. 2 Hale, c. 20. — 2. Though in Scotland a similar process remains to this day. Kaimes, l. 531. 4 Com. 308.

(*q*) 1. Put *exempli gratia*. — 2. So where in an action for words imputing felony, the defendant justifies that the words are true, and the jury find a verdict for the defendant. — 3. But, according to Serjeant Hawkins, unless the court, in which such a verdict is returned, has jurisdiction over the crime itself, such a verdict seems to be of little force. 2 Hawk. c. 35. s. 6. Stark. xiv. 4 T. R. 493. — 4. But a jury finding A. guilty on the trial of an indictment against B., will not amount to an indictment against B., because the finding of one man guilty on the trial of another is extrajudicial. 2 Hawk. c. 25. s. 6. — 5. Though if on a declaration in the King's Bench against A. for having been guilty of a misdemeanour *simul cum* B., the jury find B. guilty, it is said that such a finding is equivalent to an indictment, because it is not wholly extrajudicial. 2 Hawk. c. 25. s. 6. — 6. If the sheriff return a rescue of a prisoner taken for felony, or breach of prison by one arrested for felony, this is not sufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men. 2 Hale, c. 20. 2 Hawk. c. 25. s. 14. — 7. But an abuse offered to the process of a court, is such a contempt as is punishable by imprisonment; for though by Magna Charta, &c., no man is to be imprisoned *sine judicio parium, vel per legem terræ*, yet it is one part of the law of the land to commit for contempt, not taken away by any statute. See in tit. Attachment.

So, if an appeal be constituted, the king may proceed against the appellant, without indictment. See 199. H. P. C. 199.

So a man may be charged for an offence under felony by information. 1 Shw. 167. &c. 5 Mod. 455. Vide Information, A 1.

### (D) For what offence an indictment lies.

An indictment lies for every crime 'a' by common law, or statute: as, for treason, or felony. 'u.' Vide Information 'B'.

Misprision, 'x', perjury, subornation, forgery, &c. 'y'.

So,

(r) In the case of approvement, the party accused may be tried upon the approver's appeal. 2 Hale, c. 20. Vide Id. 215. 2 Hawk. c. 24.

(s) 1. The appellant having declared; and the appeal itself been well commenced. Vide 2 Hawk. c. 25. s. 9. — 2. So it is, should the appellant die or release. — 3. And in the case of nonsuit, though the party appealed be indicted as well, yet shall the proceeding for the king be upon the appeal. — 4. The 59 Geo. 3. c. 46., reciting that appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same shall be wholly abolished, enacts, by s. 1., that appeals of treason, murder, felony, or other offences, shall cease, determine, and become void; and that it shall not be lawful for any persons to commence, take, or sue, appeal of treason, murder, felony, or other offence, against any other persons whatsoever, but that all such appeals shall from henceforth be utterly abolished.

(t) The following theory of the nature of crime, is, it is submitted, consonant to natural jurisprudence.

The duties enjoined by morality, are *Prudence*, *Beneficence*, and *Justice*; *Prudence* has reference to our own happiness; *Beneficence* and *Justice* to that of others: which the former prompts us to promote, the latter restrains us from invading. Frugality, temperance, industry, are examples of prudence; gratitude, friendship, generosity, charity, of beneficence; security of person and property are the objects of justice.

The observance and neglect of each of these duties, are attended alike with approbation and disapprobation, yet not in the same degree; in that mankind will enforce the obligations of *Justice*, but will commonly leave the observance of the other duties to the choice of the parties obliged; and for reasons sufficiently obvious. We revolt at enforcing obligations, concerning which ourselves can form no definite idea, nor prescribe with certainty any general rules: as the case is with *Prudence* and *Beneficence*. The duties of gratitude, the best defined of any, are in the highest degree loose and uncertain, as altogether founded upon the individual circumstances and relative situations of the benefactor and party obliged. But the duties of *Justice* are, in every sense, definite; and respecting them, therefore, rules may be prescribed, suited to any possible contingency.

The magistrate, however, often, and with propriety, enforces such duties of *Prudence* and *Beneficence*, as are more easily defined and manifestly tend to the social welfare. The laws of all civilized nations oblige parents to maintain their children. Vagrancy is by some denounced as a crime. Solon punished idleness. But of all the offices of a lawgiver, this, perhaps, requires the greatest delicacy in the execution; wholly to neglect it, exposes society to many inconveniences; to push it too far, infringes on liberty.

Setting aside then, as isolated instances, violations of prudence and beneficence specifically denounced, *Crime* and *Injustice* are convertible terms. Any mode of behaviour, therefore, which infringes the security, liberty, reputation, or property, of an individual in his separate, or the community in their aggregate capacity, is, in a comprehensive sense, criminal. The term, however, has, in the English law, a more limited signification, being confined to actions punished at the suit of the whole community.

(u) 1. Crimes, by the English law, are divided into *Treason*, *Felony*, and *Misdemeanour*. — 2. The two former are defined under title 'Justices.' — 3. The word *Misdemeanour*, in its usual technical acceptation, comprehends all offences below felony.

(x) Misprision is a term usually applied with reference to felony, expressing a conceal-

So, for kidnapping. Comb. 10.

So, for a conspiracy to (z) charge one with an offence, without more. (a) R. Mod. Ca. 185. (b)

concealment thereof, or the procuring of its concealment. 1 Hawk. c. 59. s. 2. Vide in tit. Justices.

(y) 1. The guilt of a bad action chiefly consists in the *example*. The English law, therefore, seems to have denounced, as criminal and indictable, all actions of a tendency injurious to public morals or decency. — 2. No actions, however, of a *private* nature are indictable, unless they in some way concern the king. 2 Hawk. c. 25. s. 4. — 3. Hence the objection taken in a late case, (where parties were indicted for enabling others so to pass their accounts with the pay-office as to defraud government,) that the subject was a matter of *private* account only; to which the court answered, that it related to the *public* revenue. 6 East, 136.

(z) 1. For conspiring falsely and without any probable cause, to charge a man with having taken out of a bag, belonging to one of the defendants, a certain quantity of human hair, the goods and chattels of the said defendant; though the charge made by the conspirators do not allege the taking to have been either felonious or unlawful. 3 Burr. 1321. — 2. So for conspiring to pervert the course of justice, as by producing in evidence a false certificate, by magistrates, that an indicted highway is in repair, in order to influence the judgment of the court. 6 T. R. 619. — 3. Whether they knew the fact or not. Ibid. — 4. It is not, however, every conspiracy which forms the ground of a criminal prosecution: the boundaries are often nice between a matter indictable and a fraud cognizable in equity. 2 Ves. 450.

(a) 1. The conspiracy may be laid without any overt act. Str. 193. — 2. And if one defendant be convicted, judgment may be given against him before the trial of the other. Ibid.

(b) The *introduction* which precedes the *cases* in the following note, is an attempt to define the *qualities* of crime, with reference to *natural law*.

Whatever quality can belong to any mode of behaviour, must be founded upon the circumstances of which it is made up. These circumstances can be only three: 1. The disposition of mind which attended it. 2. The movement of the body by which it was accompanied. 3. The consequence which actually does, or possibly may, result from it. Whatever criminality, therefore, can be due to any mode of behaviour, must be founded upon one of these three circumstances.

It cannot be due to the second; since the same movement often accompanies the most innocent and most blameable actions. The acts, for example, of shooting a bird, and shooting a man. Still less to the third; since consequences altogether depend upon fortune. To the disposition of mind, therefore, and to that alone, can any criminality belong.

This disposition consists, either in premeditation or design to injure; or in a state of thoughtlessness and negligence, shewing a want of the sense of what we owe to our fellow-creatures. Each disposition, though in different degrees, excites our disapprobation, and both, therefore, when accompanied (as we shall now assume,) with actual or possible injury, are, though in different degrees, violations of justice. To say, that there is no crime where there is no will, thereby implying merely the absence of any intention to injure, is a false assertion, as being too limited. To say, that there is no crime where there is no will, thereby implying the absence of all controul over the will in every stage of the affair, is a just assertion, as being sufficiently comprehensive.

If, in the abstract, then, crime consists in a malevolent (or thoughtless) disposition of mind; the question arises, whether the same holds good in a legal sense, or whether some action or consequence must not follow, before it can become the object of punishment. Those who maintain, that one or the other must attend it, will reply upon the instinctive feelings of our nature: — When convinced that an individual has a settled design to injure us, the *feelings* of mankind concur with our own in disapproving his conduct. The strength of their disapprobation is in proportion to the strength of their conviction, that his intentions are not to be changed. Yet, though assured that no dissuasives will turn him from his purpose, he is never so entirely the object of their detestation, as if he had actually accomplished his design. And though they will go along with us in precautionary measures to avert the intended evil, they will never take part in a resentment which may prompt us to punish the offender. The reason is, that effects or consequences alone support and oppose the ends of our creation;

every thing, therefore, is good or evil, the object of our desire or aversion, our gratitude or resentment, as it actually and in fact produces benefit or injury. They will also maintain their doctrine by views of utility. If the disposition of mind was alone the cause which excited our resentment, we should feel all the furies of that passion against any person whom we suspected to be indisposed towards ourselves or others; and every court of justice, by punishing thoughts and inclinations, would become a real inquisition.

My brother had but justice,  
In that he did the thing for which he died;  
For Angelo, his *act* did not o'ertake his bad *intent*;  
And must be bury'd but as an intent  
That perish'd by the way: thoughts are no subjects \* :  
Intentions but merely thoughts.

Nor does it impugn this rule, that the case of treason is opposed to it. There the intent is commonly punishable; and for obvious reasons. In the punishment of treason, the sovereign resents injuries which are immediately done to himself; in the punishment of other crimes, he resents those which are done to other men; and partial laws are the necessary consequence of a power to gratify the resentment, and secure by severer sanctions the safety of the ruler. The feelings of his subjects, too, are in unison with his own. Our sympathy with the calamities of others, is in proportion to their condition in life; and every injury done to kings excites in our breasts ten times more resentment, than had the same things happened to other men. In spite of all that reason and experience can tell us to the contrary, the prejudices of the imagination attach to this state a happiness superior to any other; to disturb, therefore, such perfect enjoyment, seems to be the most atrocious of injuries. All the innocent blood that was shed in the civil wars and French revolution, provoked less indignation than the deaths of Charles and Louis. Views of utility, too, strengthen these sentiments; the consequences of treason being of all the most prejudicial.

It may, however, be justly doubted whether mankind are naturally averse from reclaiming by moderate punishment, and destroying, if irreclaimable, one who designs injustice to another. By the constitution of nature, not these objects only which actually occasion good or evil are made the objects of our instinctive desire or aversion, and consequently of our gratitude or resentment; such as have a manifest tendency to produce them, are made so likewise. We destroy mischievous animals for their evil propensities; and the codes of many rude nations, (for the most part the dictates of nature,) the English amongst the rest, punished as murderers those who intended homicide. 3 Inst. 5. 4 Com. 76. n. And if the wisdom of this constitution is in any case defensible, by showing its tendency to the welfare of mankind, it is so in that of malevolence. The effects of malevolence (which it tends to counteract) are to corrupt the mind, by familiarising it with the idea of guilt, and disposing us to view, with comparative indifference, atrocities which at their first appearance struck us with horror. The great supports, nay, almost the parents, of virtue, are habit and resolution of mind. A delicate perception of moral beauty and deformity may even exist, and yet, for want of these supports, the conduct be utterly depraved. No man's conduct seems to have been more unhappy than that of Savage; the moral perceptions of none more accurate and precise. *Qui deliberant desciverunt.* A man often becomes a villain the moment he begins, even in his own heart, to violate the laws of justice. The moment he thinks of departing from the most staunch and positive adherence to what those inviolable precepts prescribe to him, he is no longer to be trusted; no one can say what degree of guilt he may not arrive at; there is no enormity so gross of which he may not be capable. Hence the perfection of civil government has been properly placed in a combination of institutions which induce the general prevalence of virtuous, and guard against the prevalence of vicious, dispositions.

The inconvenience of the rule which would punish malevolence, does not, in a country where confessions are voluntary, seem to consist in making mere thoughts and inclinations the objects of jurisprudence; the inconvenience, if any, lies in placing a man more in his enemy's power; the media of detecting the falsehood of an imputed motive, being less than of an imputed action. It seems, likewise, to be a great mistake, to assimilate to the Inquisition an English court of justice punishing malevolence. We object to the former, not so much from their sitting in judgment on the mind, as from the dreadful means which they employ. Here, as in many other cases, we are apt to confound in a general odium the whole of a system, parts of which only are repugnant

\* That is, for punishment.



to our nature, and to involve in the same censure an institution which resembles it, not in those parts, but in others. The institutions, moreover, of two states, the spirit of their governments, the genius and temper of their inhabitants, may be so different, that penal denunciations proper for the one, may be unfit for the other. A law denouncing intention would, under a despotic government, be inconceivably oppressive. In a free state, its injurious consequences have hardly been noticed; its advantages are sufficiently evident. A chief blessing of a free constitution is, that its genius will admit of the exercise of a parental authority, since there will never be wanting the necessary checks against abuse.

Even, however, assuming the rule, with one exception, to be, that a mere design to violate the laws of justice, how clearly soever it may be established, is not in a legal sense criminal; yet if the offender, instead of confining the operation of his malevolent affections to his own breast, takes any steps towards carrying them into execution, he becomes from that moment the just object of punishment. Both our natural sentiments and views of utility rouse our resentment against an attempt at crime. Whilst the intention lay dormant, our indignation was hardly restrained by views of utility and convenience; but now the intention being quickened into action, those views no longer influence, and, on the contrary, furnish arguments of an opposite tendency.

If it be said, that we are capable of resolving, and even of taking measures to execute, many things which, when it comes to the point, we feel ourselves altogether incapable of executing; why, therefore, punish an attempt which the offender himself might have frustrated? It is answered, that every inference is against the probability. And even his actually turning back, can only operate to lighten his punishment. To rejoice over a repentant sinner can never be a maxim of jurisprudence, as well from the impossibility of knowing that repentance was his motive, as from the sorrows which such rejoicings would infallibly multiply.

Pardon is still the nurse of second woe.

In criminal attempts the various degrees are in proportion to the variety of steps necessary to complete the crime. The last degree in point of guilt is, where there has been an actual determinate endeavour so far co-operating with the intention, that no new exertion of the mind could have interfered to prevent the completion of the crime; as where a man fires at another and misses him. But that the first and all intermediate steps are punishable (though in different degrees) as well as the last, results from the impossibility of drawing any line of distinction. If only the last stage was made penal, what crimes would go unpunished, what offenders, hardened by long impunity, and tutored by experience, be loosed upon society! Such a system would set at liberty the thief whose hand has been caught in his neighbour's pocket before he has grasped any thing; and the housebreaker who has been found placing a ladder to his neighbour's window, but has not entered it. If, then, other stages besides the last are justly denounced, all, from the impossibility of making a difference, are necessarily included. The only difference that could be proposed is, to make responsibility begin from that stage at which society or an individual might suffer. But not only is the proposition incompatible with the rule (of all rules the most important, and whose operation in the case of mere intention is solely prevented by views of superior convenience) of deterring from the very first approaches to crime, and shewing, that no gradations of guilt can be indulged with impunity; the guilt of a bad action mainly consists in the *example*; and no steps, therefore, can be taken which *may not* be injurious. Hence the physician who, intending to poison his patient, mixes up the drug in the shape of medicine, should be punished, though it has never been removed from his laboratory. Hence forgers are punishable by the English law, though the instrument has never gone out of their possession. If the rule admits of any exceptions, they must be founded in the clearest views of superior utility.

1. Such, it would seem, are the principles of natural law; with which, too, the English code appears, in every respect, to agree. — 2. Since, though formerly, we are told, compassing or intending the death of any man, demonstrated by some evident act, was equally penal with homicide itself. 3 Inst. 5. 4 Com. 78. in notis. — 5. Yet the rule, at common law, now is, that the mere intent to commit a crime, is not indictable. Cald. 397. — 4. Any act, however, done in pursuance of such intent, is criminal. Ibid. — 5. For should it be objected, that the latter doctrine was laid down with reference to the last degree of a guilty attempt, (where no new exertion of the mind could have interfered to prevent the completion of the crime), it is answered, that the decisions which make it penal to prompt another to commit a crime, are authorities for giving to the doctrine the utmost latitude. 3 Inst. 147. L. R. 1377. 4 Burr. 2494. Cald. 400. 2 East, 5. 14. 16, 17. 22. 5 East, 231.



So, for every misdemeanor (*c*) to the prejudice of the public good : as for a libel against the government, or a magistrate. (*d*) Sal. 698. 3 Mod. 139.

Though the words are not actionable. R. 3 Mod. 139. Vide Libel, (A. 1. &c.)

For words, which tend directly to the breach of the peace. Sal. 698. (*e*)

So, for every breach of the peace ; as, false imprisonment. 2 Inst. 55. Battery, riot, &c. (*f*)

Sending a challenge. Comb. 10. Sal. 698. (*g*)

Debauching another man's wife. Comb. 377. (*h*)

For an abuse in the execution of an office : as (*i*), the removal of a sick poor person. 2 Mod. Ca. 326.

For a refusal in any officer to execute his office. (*k*) R. 1 Sal. 381. Skin. 370. 2 Sho. 75. (*l*)

6 East, 464. — 6. So, likewise, are those which punished a man for having coining instruments in his custody with intent to coin and utter current money. C. T. H. 370. 2 Str. 1074. Brandon's case, 1 Russell, 64. — 7. For procuring counterfeit money with intent to utter. Stewart's case, 1 Russell, 64. Cox's case, *ibid.* — 8. For having in possession picklock-keys with intent to break houses and steal goods. Lee's case, 1 Russell, 64. — 9. Proceeding upon the principles of deterring from the indulgence of evil propensities, and diminishing the facilities of injuring the public. — 10. And, upon the second ground, it has been properly observed, that all acts or attempts tending to prejudice the community are indictable. 2 East, 8. — 11. As an attempt to pick a pocket ; or to commit sodomy. Str. 196. — 12. An information, therefore, was granted, as for a nuisance, for keeping great quantities of gunpowder to the endangering of the neighbourhood. 2 Str. 1167. — 13. And, for the same reason, merely writing a libel, without any publication, or intent to publish, is criminal ; since it may pass into the hands of others. L. R. 414. — 14. Various provisions of the legislature are quite in the spirit of these doctrines. — 15. And an act prohibited by law is indictable without the addition of corrupt motives. 4 T. R. 451.

(*c*) 1. Many actions are illegal and criminal from the manner in which they are performed : thus, inoculating for the small-pox under such precautions as will secure the public from the infection, is lawful ; the reverse, or neglect of such precautions, is a crime. 4 M. & S. 272. — 2. An indictment for carrying a person infected with the small-pox from one parish to another, must aver that the defendant knew that the party was infected, and likewise, it is said, an evil intent. Andr. 162.

(*d*) Hence, for saying to a justice of the peace, in the execution of his office, ' You are a rogue and a liar.' Str. 420.

(*e*) 1. Upon which grounds, an indictment lies for maliciously blackening the memory of one who is dead. 5 Rep. 115. — 2. Such indictment, however, must allege the act to have been done with a design to bring contempt upon the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace. 4 T. R. 126.

(*f*) 1. Entering a house, *et vi et armis, et manu forti*, turning out the prosecutor. 3 Burr. 1699. — 2. So taking goods with a force amounting to a breach of the peace ; though the goods are one's own. 3 Salk. 187.

(*g*) The deliberate challenging of another to fight a duel, from whatever provocation, is a high misdemeanour. 3 East, 581.

(*h*) Salk. 552. *contra per Holt, C. J.* Vide *infra*, Leet, (L 4.)

(*i*) A discharging, by a constable, of a person brought to the watchhouse by a watchman in the night. 2 Burr. 864.

(*k*) Hence against an overseer for refusing to receive a pauper removed by order of two justices under 13 & 14 Car. 2. c. 12. 2 Burr. 799.

(*l*) 1. For a refusal to execute the office of constable. Str. 920. — 2. A man, therefore, elected constable at a wardmote, which is in the nature of a leet, may be indicted, and at the sessions, for refusing to execute the office of constable. — 3. So a refusal to execute the office of overseer, to which he has been duly appointed, is indictable ; for it is in disobedience of an act of parliament. Str. 1146. — 4. It seems, likewise, that an indictment lies for refusing to undertake an office in a corporation. Ld. Raym. 499. 5 Mod. 440. 441. 1 Kyd. 398.

Or,

Or, a refusal to receive, or maintain his apprentice. R. 1 Sal. 381. Mod. Ca. 163.

So, for a bad contrivance, though it be not executed: as, for a contrivance to kill such a one. R. 1 Sid. 231. (m)

To charge one with a bastard, whereby he may gain money from him. R. 1 Vent. 304, 305.

If one slander a justice of peace in the execution of his office. Comb. 46. 65.

Or, refuse obedience (n) to an order of justices. Comb. 63. 213. 325. (o)

If any one collect money for the public use, and do not pay it. 1 Rol. 2.

So if he refuse to be a juror within his wardmote. Semb. 2 Sho. 529. (p)

So, for a great immorality in public, (but it was accompanied with a riot.) R. 1 Sid. 168. (q)

For setting up a mountebank's stage. Comb. 304.

So, for a fraud or deceit upon a particular person: as, for playing with false dice. R. 2 Rol. 107.

Pretending to be a broker and selling beer, for Portuguese wine. Mod. Ca. 301.

For forging a protection, though he could not use it. 1 Sid. 142. (r)

If a tradesman (s) commits a deceit (t), or abuse (u) in his trade. Per Holt, Comb. 16.

If any one by false insinuations gets a note, an account signed, &c. into his hands, and then cancels it. Mod. Ca. 175.

So, for any thing generally prohibited by statute, if it be done,

(m) Vide supra 499. n. (b).

(n) Obstructing an officer in the execution of his duty is an indictable offence. 1 B. & P. 187.

(o) But refusing obedience to the order of a mayor, also a magistrate, to admit to the freedom of the corporation, is not indictable. 3 Salk. 188.

(p) Or, being a parishioner, to perform his statute labour. 2 Burr. 832.

(q) 1. Whatever offends against the order and good morals of society, is an offence against the law of England, and punishable at common law. Lofft. 385. — 2. Hence the disinterment of dead bodies, though for dissection. 2 T. R. 735. Leach, 561.

(r) 1. Vide supra 499. n. (b). — 2. Using a false affidavit made abroad, to the perversion of justice, is indictable. 3 East, 364.

(s) 1. Where a tradesman is guilty of a fraud in the sale of his wares, or other carrying on of his business, the fraud is not an indictable offence, unless he used tokens whereby to gain a fictitious and greater degree of confidence. 4 M. & S. 214. — 2. And, therefore, a miller who receives barley to be ground, cannot be indicted for returning meal as the produce of the barley, which, in fact, is a mixture of oat and barley meal; unless, indeed, the customer was obliged by the *lex loci* to grind at his mill. Ibid. — 3. Knowingly exposing to sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight, though indictable in goldsmiths, is a private fraud only in common persons. Cowp. 323.

(t) If, by the *lex loci*, inhabitants are bound to grind their grain at a particular mill, it is an indictable offence in the miller to return them, as for the produce of their own grain, a different meal. 4 M. & S. 214.

(u) If a baker mixes a perilous article, alum for instance, with his bread, himself or those whom he employs, must use it with such precautions as to render it harmless; since if the bread, through its use, is made noxious, he is indictable. 3 M. & S. 11.

an indictment lies for it (*x*): as, for champerty. Cr. Just. 87. b. Vide in Actions upon Statutes. (*y*)

For being a vagabond. R. 2 Cro. 577. 2 Rol. 172.

For selling in pots unsealed. 1 Sid. 409. 1 Vent. 13.

For travelling with more than five horses, contrary to the st. 22 Car. 2. 4 Mod. 145.

So, if a thing before unlawful be prohibited by statute, and a particular remedy or method directed for the punishment, yet an indictment lies for it: as, for keeping hogs in the city of London, contrary to the st. 2 W. & M. 8. s. 20. for it is a nuisance by the common law. Sal. 460. (*z*)

So an indictment lies for a thing to the public damage, though prohibited only by a private statute. Per Twisd. 1 Sid. 209. (*a*)

For a common nuisance. (*b*)

For setting up a fair, market, leet, &c. Mod. Ca. 183.

For fishing in another's fish-pond. Mod. Ca. 183.

### (E) For what, not.

But no indictment lies for a thing prohibited by a statute which directs a particular method of prosecution, if it was no offence before; (*c*) as, for keeping an alehouse without licence. Per Hought. 2 Rol. 398. Pal. 388. R. in Joice's case, Sho. 399. Semb. Sho. 398, 399. R.

(*x*) An indictment lies as at common law for obstructing the execution of a power conferred by statute. Dougl. 441.

(*y*) 1. Where a statute *prohibits* what was lawful before, an indictment lies, notwithstanding a specific (though not exclusive) remedy is thereby given. 1 Burr. 543. 4 T. R. 205. — 2. Whether given by the prohibitory or another clause. 1 Saund. 312. in notis. — 3. And whether the motive which induced the action be corrupt or not. 4 T. R. 457. — 4. The same holds, where a statute enjoins an act. Say. 133. 2 Burr. 832. Cowp. 648. — 5. With this proviso in both cases, that the act, though public, do not relate merely to *private* rights. 8 T. R. 657. — 6. See below, (E), in notis.

(*z*) 1. Ld. Raym. 1163. — 2. Where a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, a prosecutor is not obliged to sue for the penalty, but may proceed, upon the prior clause, as for a misdemeanour. 4 T. R. 202.

(*a*) Obstructing the execution of powers conferred by statute, is indictable at common law. Dougl. 441.

(*b*) 1. As for a smell, which, though not actually unwholesome, still renders life and property uncomfortable. 1 Burr. 353. — 2. So for making great noises in the night with a speaking trumpet. Str. 704.

(*c*) 1. Where a statute creating a new offence is not prohibitory, but only inflicts the forfeiture, an indictment will not lie. 1 Burr. 543. Ld. Raym. 672. — 2. But the course prescribed by the act must be pursued. 2 Burr. 805. 832. Vide Cowp. 524. 650. 1 Hawk. c. 25. s. 4. — 3. Wherefore an indictment for assaulting a custom-house officer in doing his duty, was quashed, because the st. 3 Car. 1. c. 3. assigns a particular mode of punishing the offence. Ld. Raym. 991. 3 Salk. 189. Str. 679. — 4. And in like manner, an indictment for killing a hare. Str. 679. — 5. And in a case where neither the penalty imposed was appropriated, nor mode of recovering it pointed out; it was held to be in the nature of a debt to the crown, and recoverable, not by indictment, but in a court of revenue. Str. 828. — 6. Where, however, a new (though not exclusive) remedy is given for an existing offence, it is cumulative. 2 Burr. 805. 832. — 7. Therefore an indictment lies for disobeying an order of sessions, it being an offence indictable at common law. 2 Burr. 799. — 8. And where no particular remedy is pointed out by the statute giving the sessions jurisdiction; or where such remedy is given, but, by any circumstance, is rendered impracticable, there the only remedy is by indictment. Ibid.

Sal. 460. Mod. Ca. 86. — Per 2 J. Ch. Just. cont. 4 Mod. 144. Dub. per Holt, Comb. 405.

For being a justice of peace, when he had not 20*l.* per annum. R. 2 Cro. 643. 644. 2 Rol. 247. 248.

If a nonconformist come within five miles of a corporation, where the st. 17 Car. 2. 2. gives 40*l.* penalty, to be recovered by debt, or information. R. cont. per 2 J. 1 Mod. 34. 1 Vent. 63. 1 Sid. 439. But the reporter makes a quære, and Sho. doubts of it. Sho. 399. Denied to be law. F, g. 47.

If an overseer refuse to make an account. Dub. 5 Mod. 180.

If a man, having lands which maintain a plough, do not send his cart to the repair of the highway. Dub. 2 Rol. 412. (*d*)

If any make bricks contrary to st. Geo. which gives a penalty. F, g. 47. (*e*)

So an indictment does not lie for a thing prohibited by a private statute, which tends only to the damage of a particular person. 1 Sid. 208. 209.

So an indictment does not lie for a misdemeanor, which prejudices a particular person only: as, for inticing away an apprentice from his service. R 1 Sal. 380. Dub. Mod. Ca. 99. Acc. Mod. Ca. 182. (*f*)

For inclosing land, whereby commoners cannot take their common. Semb. Cro. El. 90. (*g*)

For cheating in woadi*ng* cloth to the third but not to the fourth stall, as usage requires. R. Skin. 109. (*h*)

So it does not lie for unmannerly words of (*i*) a mayor, &c. of a corporation, though they are a cause for surety of his good behaviour, and for a commitment unless he gives surety. R. Sal. 697. Mod. Ca. 124. (*k*)

Nor, for words to the prejudice of a market of a corporation. R. 1 Sal. 370.

Or, to the scandal of a justice of peace for such a particular fact. R. Sal. 698.

So it does not lie for imposing upon the credulity of another; as, if he receive money from B. alledging that A. sent him for it, whereas A. did not send him: unless he comes with false tokens. (*l*) R. 1 Sal. 379. Mod. Ca. 105. (*m*)

If

(*d*) 1. Supra, (D) in notis, contra. — 2. Every unauthorised obstruction of a highway to the annoyance of the king's subjects, is an indictable offence. 3 Camp. 227. — 3. The decision, therefore, which held it not an indictable offence to place a distributor of hand-bills upon the foot path, to the obstruction of passengers, is questionable. 1 Burr. 516.

(*e*) Str. 828.

(*f*) In other words, an indictment will not lie for an injury merely civil. 3 Burr. 1698. 1706. 1731.

(*g*) For throwing down skins into a public way, whereby a personal injury is accidentally occasioned. Str. 190.

(*h*) 1. A mere act of trespass, not amounting to a breach of the public peace, is not indictable. 3 Burr. 1699. 3 Burr. 1706. — 2. Otherwise it is. Supra, (D) in notis.

(*i*) 1. Words, spoken by a magistrate to a grand jury, of a nature highly improper, are not the subject of indictment, because delivered in a course of duty. Lofft, 56. — 2. They are however a ground for applying to the great seal to remove him. Ibid.

(*k*) 1. Nor for an offence against the constitutions of a borough. 4 T. R. 777. — 2. An offence, to be indictable, must be contrary to the general laws of the land. Ibid. — 3. Nor does it follow, that, because an action cannot be maintained, therefore an indictment lies. 8 T. R. 634.

(*l*) 1. That a fraud may be indictable at common law, either a conspiracy must exist,  
or

If a man upon payment of money do not deliver the goods pledged for it. 1 Sal. 379. (*n*)

So an indictment does not lie against a justice of peace, &c. for not committing a rioter charged by oath; for he is the judge in such a case. Comb. 317. (*o*)

**(F) Against whom an indictment shall be prosecuted ;  
and when an indictment against several is good.**

So, for an offence (*p*) joint and several in its nature, two may be indicted together: as, for a trespass. 1 Sal. 384.

And

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or a false token be used. Str. 866. — 2. And the false token used must be such as is calculated to gain the impostor credit with a prudent person beyond what his own assertion would produce. 6 T. R. 565. — 3. Therefore a check drawn by the defendant upon a banker as the price of the articles, &c. is not such a token; it imports only an assurance that he has the right of drawing. 6 T. R. 565. — 4. An indictment will not lie for delivering less beer or oats than what has been contracted for, as and for the due quantity. 2 Burr. 1127. 1 Blk. 273. 2 Burr. 1125. 1130. 1 Wils. 301. — 5. Nor against a common person for knowingly exposing to sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight; though against a goldsmith for so doing it will. Cowp. 323. — 6. Information at common law, that A. wrote to B. and informed him 'that he was applied to to prosecute him upon the stamp acts, and that he A. had informed the parties that the prosecution must be carried on by the public officer, and requested B. to write to him, A., and make the best terms of stopping it;' without averring that B. had been guilty of any offence for which such prosecution would lie; nor did A. actually extort any money. The information was held insufficient, for the bare threat properly was too weak, and therefore was no offence at common law, however punishable under 18 Eliz. c. 5. s. 3. 2 Smith, 305. 6 East, 126.

(*m*) 1. So an attempt to defraud, unaccompanied either by false tokens or by conspiracy. 2 Str. 793. — 2. Which makes the difference; and, therefore, though selling short measure is not indictable, yet selling by false measure is. 3 Burr. 1697. 3 T. R. 104.

(*n*) 1. Vide 2 Salk. 522. — 2. Nor for not curing a sick person, pursuant to promise. Ld. Raym. 366. 3 Salk. 189. — 3. Though circumstances may exist of mere non-feazance towards a child of tender years (such as the neglect or refusal of a master to provide sufficient food and sustenance for such a child, being his servant, under his controul) which may amount to an indictable offence. 2 Campb. 650. — 4. Nor against a miller for detaining part of the corn. Str. 793. — 5. Nor for keeping an open shop in a city, of which the party was not free, contrary to immemorial usage. 5 Salk. 188. — 6. Nor for exercising trade in a borough, contrary to its bye-laws. 4 T. R. 777.

(*o*) 1. So bringing bastards into parishes to which they cannot become chargeable, is not indictable. Str. 644. — 2. Or, with a similar qualification, pregnant single women. S. R. — 3. But without it, an indictment lies. 2 Chit. C. L. 700. — 4. And, for a similar reason, though it is not indictable to procure the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. 1 Esp. C. 304. — 5. Yet is it, to bring into a parish, where she had no settlement, a sick pauper who shortly after died, and put the parish to expense. 2 Chit. C. 699. 700. 4 Wentw. 353. C. C. C. 648. Sed vide Str. 707. — 6. It is not indictable to keep a house for the reception and delivery of pregnant single women. Burr. 1646. — 7. Nor is the entertaining of idle and vagrant persons in one's own house. Ld. Raym. 790. — 8. Nor is the secreting of A., who affirmed that she was with child of a bastard by him. Ld. Raym. 1368. — 9. Nor the refusal to obey the order of a mayor, also a magistrate, to admit to the freedom of a company. 3 Salk. 188. — 10. Nor for casual damage in doing a lawful act; as where, in unloading goods, the wind blows them upon a passer by. Str. 190.

(*p*) 1. Crimes, viewed in relation to the offender, are divisible into three distinct classes: 1°. Common offences, of which every person, whatever be his circumstances, may



may be guilty; as treason, murder, theft; which are intended, when 'crimes of the *first class*' are hereafter spoken of. 2°. Exercising a right without being qualified; as by exercising a trade, not having served an apprenticeship; which are intended, when 'crimes of the *second class*' are hereafter spoken of. 3°. The breach of a public duty either in office, or by not repairing a public bridge, or a public highway; which are intended, when 'crimes of the *third class*' are hereafter spoken of. — 2. These classes will furnish the subordinate divisions of the following heads; under which will be considered, — I. *Against whom an indictment shall be prosecuted; and whether against one of several joint offenders.* II. *Of indicting several for the same joint offence or offences.* III. *Of indicting several for distinct offences.* IV. *Of indicting one for the crime of another.*

I. *Against whom an indictment shall be prosecuted; and whether against one of several joint offenders.*

1. In crimes of the *first class*, and in the case of a *single offender*, it is plain who is the party indictable, unless, perhaps, in some cases of nuisance. — 2. The occupant of premises upon which a nuisance is placed, is liable to the public, as well as the party who raised it; and where it arises from suffering a building, for example, thereon to fall to decay, (as where the building overhangs a public road,) the occupier is indictable, though his landlord may have engaged to repair it. — 3. And where *several have joined* in an offence of the first class, one may be indicted alone; since an averment that A. murdered B. is proved by shewing that C. united with him. Vide 1 Keb. 153. pl. 93. — 4. To which rule, however, there are exceptions; for it seems, that in an indictment for *conspiracy*, two, at the least, must be made defendants, the same as in the civil writ of conspiracy now obsolete, or it must be shewn, that one who joined with the party indicted is dead. Not for this reason, that two must have joined to constitute the crime of conspiracy, since that they did join, might be averred on indicting one; but that number being requisite to make the offence, was each offender to be indicted separately, there might be two contradictory verdicts. — 5. It should seem, also, that an exception to the rule sometimes obtains in an indictment for a *riot*. Thus, if the indictment names three rioters, it will perhaps be defective if it does not include them all, since if sued against two or one only, the reasoning just applied to the case of conspiracy, by changing its terms, will apply. — 6. That the survivor of two conspirators may be indicted, see Str. 1227. 15 East, 412. n. — 7. Though the law used to be otherwise. Cro. Eliz. 701. — 8. And an indictment against two for a riot *cum multis aliis* is unexceptionable, since *non constat* that any one besides those indicted is known. Str. 195. 15 East, 415. 416. in notis. — 9. With respect to offences of the *second class*; it seems that, as well an assistant employed in asserting the right, as the principal in whose name and for whose use it has been asserted, may be indicted. — 10. And as to those of the *third class*; if consisting of a *breach of official duty*, by a *single offender*, the person who filled the office when the breach of duty happened, should be indicted; for upon him alone was the duty imposed, and he alone, therefore, could be guilty of neglecting it. — 11. Hence, if the gaoler of a county prison liberates a prisoner, though he may be indicted as a rescuer, yet the indictment for breach of duty, supposing it lies, must be sued against the sheriff. — 12. In the case of *joint offenders*; if two fill an office jointly, of sheriff for instance, each may be indicted separately for a breach of duty for which both are liable. — 13. Such are the rules where an offence of the third class consists in a breach of official duty. If consisting in *neglect to repair a bridge*, and by a *single offender*; where a bridge by falling to decay becomes a common nuisance the rule to determine who should be indicted is the following. If the bridge is public property, the party bound to repair should be made defendant. If private, the person who built it; or, standing in a public road, either the builder, or the party bound to repair the road. Where the builder is indicted, it is for raising a nuisance, not for neglecting to repair the bridge, since no duty to maintain it is cast upon him. And when the party bound to repair the road is made defendant, he is indicted, not for suffering the bridge to decay or for raising a nuisance, but for allowing the road to be impassable. — 14. Where an indictment for not repairing a bridge proceeds *ratione tenuræ*, an occupant of the tenement obliged may be made defendant. 3 Salk. 77. pl. 1. — 15. Where upon the ground of prescriptive obligation, the tenant in fee must be indicted, since to his estate alone can a prescriptive burthen be attached. 7 Mod. 54. — 16. In the case of *joint offenders*; the whole county, when bound to repair a bridge, should be indicted for letting it go to decay, and not those inhabiting a portion of it, the obligation to repair being cast upon all. — 17. So where several are proprietors of land charged with repairing a public bridge, the reason just given for indicting the whole county holds to require

require that all should be made defendants. And, perhaps, so long as the land remains with the original obligors, all should be indicted jointly. But after it has passed to others, that rule fails from necessity or convenience, and any one proprietor may be sued; the public have no ready means of ascertaining the state of the property. Hence if the lord of a manor charged with maintaining a bridge, alienes it to A. B. and C., in severalty, B. may be indicted alone for non-repair, and may afterwards make A. and C. contributory. 3 Salk. 77. pl. 4. W. Jones, 273. 1 Salk. 358. 7 Mod. 98. Vide 16 East, 225. — 18. If the offence consists in neglecting to repair a highway, and by a single offender; the person bound to maintain it is the party indictable. — 19. If a highway becomes impassable from a nuisance placed therein, the same rule holds, with this addition, that the person who placed it there may also be separately indicted as for a nuisance. — 20. Where the burthen of repair is cast upon *several jointly*; what was said when speaking of bridges may be repeated here; so that the whole parish in which the road wanting repair lies, must be indicted, and not a particular division within the parish. A rule that holds good where a parish is situated in two counties. 5 T. R. 498. over-ruling 4 Burr. 2511. Vide 34 G. 3. c. 64.

II. *Of indicting several for the same joint offence or offences:*

*And first, for the same joint offence.*

1. If several join in an offence of the first class, as treason, theft, or murder, they may be jointly indicted, as may any number less than the whole; for no injustice to those prosecuted can follow this mode of proceeding. Vide *supra*, in the text. 2 Hale, 175. 174. 2 Hawk. c. 25. s. 89. 10 Mod. 335. 356. 1 Vent. 302. Ld. Raym. 1248. 8 East, 47. — 2. In applying which rule, however, it should be accurately distinguished, what offences may be reckoned joint, what must be accounted several; for two may unite in a crime, and so to all appearance be joint offenders, when by law the crime of each is a separate offence. The test to decide, whether an offence by two is joint or several, is to consider whether the crime of one may be reckoned that of the other, insomuch that each might be charged separately with the commission of that crime, and convicted by proof, that his companion was the actual offender. If it may, the offence is joint; if not, it is several. — 3. In most offences of the first class two or more may join. — 4. One in which they cannot is that of perjury, since the one is not perjured by the false testimony of the other, even though he suborned; one is guilty of perjury, the other of subornation of perjury. Vide Str. 921. 2 Hawk. c. 25. s. 89. in notis. 1 Sess. Ca. 424. 2 Burr. 983. 3 T. R. 103, 104. — 5. In short, where both may be reckoned principals, the crime is joint; where one is principal, the other accessory, or where the two are neither principals, nor principal and accessory, their offences are separate. Vide 2 Burr. 984. — 6. So the same persons being concerned as principals in the same offence, may all be joined in the same indictment, though the degrees of guilt may differ. Thus in case of felony, where several are present aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment either as the actual perpetrators, or as aiders and abettors. 2 Hawk. c. 25. s. 64. 1 Leach, 64. 359. 505. 3 T. R. 305. 1 Chit. C. L. 269. — 7. And in all cases of high treason, petit larceny, mayhem, and offences inferior to felony, the act of one being in law the act of the rest, they may all be charged as having jointly committed the offence. 1 Hale, 615. 521. 4 Com. 36. 7 East, 65. 1 Chit. C. L. 269. — 8. Except in the case of becoming a traitor, by harbouring another traitor, in which case the indictment must be specially framed. Fost. 345. 1 Chit. C. L. 269. — 9. Where the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present, aiding and abetting at the felony, and murder (as the case is) committed in manner and form aforesaid. 4 Rep. 42. 2 Hawk. c. 25. s. 64. c. 29. s. 17. 1 Hale, 521. Ld. Raym. 846. 1 Chit. C. L. 269. — 10. But merely to charge with him being present will not suffice, because he may possibly be innocent. 4 Rep. 42. 2 Hawk. c. 25. s. 64. Fost. 351. 1 Chit. C. L. 269. — 11. In indictments for homicide it is safer to aver the abatement generally; but if it be laid specially, it should refer to the stroke and not to the death. 4 Rep. 42. 1 Chit. C. L. 269. — 12. And it seems proper to aver the abetting with malice propense, and then to draw the conclusion, that all present murdered the deceased. 9 Rep. 62. 1 Chit. C. L. 269. — 13. But care must be taken, if the stroke and death were on different days, to lay the murder on the latter, though the abetting was on the former, for till then no felony was completed. 4 Rep. 42. 1 Chit. C. L. 269. — 14. If money and goods be obtained upon false pretences, all who are present aiding may be included in one indictment under the statute. 1 Leach, 505. 1 Chit. C. L. 269. — 15. And if the crime arise out of the same act, though the parties stand in different relations, they may be joined in the

the same indictment; thus, if a wife join with a stranger in the murder of her husband, they may be prosecuted together, though the wife is guilty of petit treason, and the stranger of murder only. *Fost.* 106. 329. 1 *Chit. C. L.* 270. — 14. And in that case the indictment may conclude, that they ‘feloniously, traitorously, and of their malice aforethought, did kill and murder,’ which will be good for both of them, applying to each their appropriate terms. *Ibid.* — 15. So several present at the death of a man may be charged with different degrees of homicide in the same indictment; thus if A. with malice abet B. who gives the blow without malice, it is murder in the former, and but manslaughter in the latter; and thus it may be stated in the proceedings. 9 *Rep.* 67. 3 *Bulst.* 206. 1 *Leach*, 360. 1 *Chit. C. L.* 270. — 16. And there seems to be no reason why, on the trial, if two be indicted for murder, the jury may not find it murder as to one, and manslaughter as to the other. But if this distinction appear to the grand inquest upon the evidence to support the bill, a new bill for the inferior offence should be presented against the less guilty individual. 3 *Bulst.* 206. 2 *Rol.* 408. 1 *Sidf.* 230. 2 *Hale*, 162. 2 *Hawk. c.* 29. s. 7. — 17. If several be concerned in executing a treasonable or seditious design, it is best to include them in one proceeding, that the evidence for the crown may not be disjoined. *Kel.* 9. 1 *Chit. C. L.* 271. — 18. From what has been said, however, it must not be concluded, that separate offenders cannot be joined in the same indictment. Whether that can be done, will be considered presently. — 19. The joinder of more defendants in an indictment than are guilty of the crime charged, can seldom be objectionable, provided the offence is such as all might have concurred in, and that the indictment itself does not shew the truth. The reason is, that an averment that A. and B. murdered C., is proved *quoad* A., by shewing that he alone was guilty. — 20. Though sometimes an indictment may be defective for including too many; as for indicting a woman for the murder of her illegitimate child, and another person being present aiding and abetting; if the only evidence of guilt be the concealment, both the prisoners might be acquitted. 1 *East, P. C.* 220. 1 *Chit. C. L.* 271. — 21. As, at common law, the accessory cannot be convicted before the principal, without his own consent, and as the crime of the former depends upon the guilt of the latter, it is both usual and proper to include them in the same indictment. *Fost.* 365. 1 *Hale*, 623. 1 *Chit. C. L.* 272. *Infra*, *Justices*, (T 3.) — 22. With respect to offences of the *second class*; if a case can be put in which an offence of this class can be considered joint, the rule under the last head will apply. Where two jointly exercise a trade without having served an apprenticeship, their offences are separate; the crime consists, not in the act of exercising the trade, but in having omitted to serve an apprenticeship, which omission being several in each, the crimes resulting from it must likewise be several. *Vide* 1 *Salk.* 382. *et infra*, in the text. — 23. As to offences of the *third class*; the rule under the first division may be applied to the several classes of the present. Hence, for one consequence, if two fill the office of sheriff, they may be indicted jointly for a breach of duty. *Vide etiam* 12 *Mod.* 198. — 24. But the person placing a nuisance in the highway and the party bound to repair the way cannot be joined, their offences being of different natures.

*Against several for the same joint offences.*

1. Whether two or more may be indicted together for several joint offences, is a question of pleading, and is answered by the following rule: If the offences are such as might be included in an indictment against one offender, the parties may be charged jointly; otherwise not. — 2. With respect, then, to the joinder, in an indictment of several offences against the same defendant; in point of law, and therefore on demurrer, motion in arrest of judgment, or writ of error, it is no objection to an indictment, that distinct offences of the same nature, and upon each of which there is a similar judgment, are joined in the same indictment. 3 *T. R.* 98. — 3. Where, however, several felonies are charged, and it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice for judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a jurymen’s trying one of the offences, though he might not object to his trying the other. If the joinder of two distinct felonies be not discovered before the prisoner has pleaded; the court, in its discretion, may put the prosecutor to elect on which he will proceed. 3 *T. R.* 106. *Leach*, 531. 568. 2 *Camp.* 132. 8 *East*, 41. 1 *Stark.* 36, 37. — 4. And where two are indicted as for a joint offence, and the evidence adduced affects each differently, bearing more strongly against one than the other, the judge may sum up the evidence and take the verdict against each separately. 3 *T. R.* 103. 106. — 5. But, though two different felonies ought not to be included in the same indictment against the same defendant, yet the same act may be charged as a different offence in different counts. *Leach*, 568. 1 *Stark.* 37. — 6. Thus a count for a robbery

bery may be joined with another for stealing privately from the person. Leach. 531. — 7. And Lord Hale speaks of a bill containing two offences, as burglary and theft, forcible entry and detainer, as usual in practice. 2 Hale, 163. 173. Yelv. 99. 1 Stark. 37. — 8. So a prisoner may be indicted for petty treason and murder at the same time, and may be found guilty of the murder and acquitted of the treason. Leach, 512. Fost. 106. 328. 10 St. Tr. 36. 1 Stark. 37. — 9. So if the special description of the offence in the indictment include a more general offence, the prisoner may be found guilty of the latter, and acquitted of the former. Leach, 102. 771. 816. 1 Stark. 37. — 10. And, in general, whenever an offence, as described in the indictment, is made up partly of facts and circumstances, which constitute a less aggravated offence, and partly of circumstances peculiar to itself, the defendant may, if the evidence warrant such a conclusion, be found guilty of the more simple, and acquitted of the more serious offence. Fost. 328. 1 Hale, 378. 449. 2 Hale, 184. 302. 2 Hawk. c. 23. s. 95. c. 47. s. 8. Leach, 513. 1 Stark. 38. — 11. And for this reason it is in many cases unnecessary to subjoin to a special count, describing the aggravated offence, other counts which differ only in the omission of the particular allegations in which the aggravation consists. 1 Stark. 39. — 12. Which rule, however, has this limitation; that a charge of felony cannot be modified into a misdemeanor, since thereby the defendant would lose the benefit of full counsel, of a copy of the indictment, and of a special jury. Leach, 15. Vide Cro. Car. 332. Cro. Jac. 497. Kielw. 29. Cald. 401. 1 And. 351. 1 Stark. 38. Str. 1133. 2 Hen. 7. 10. contra. b. 2 Hawk. c. 47. s. 8. — 13. It seems, likewise, to be a general rule, that the joinder of offences which necessarily require different judgments is bad in point of law, and therefore a ground for demurrer, motion in arrest of judgment, or error. 3. T. R. 108. 3. M. & S. 556. — 14. The rule, however, though general, is not invariable, but admits a variety of exceptions; for example, in the offence of embezzling naval stores, the having in possession new stores, or stores not more than one-third worn, is subject to transportation for fourteen years: but if they be not new, or be more than one-third worn, the punishment is different. Yet counts for both these offences may be included in the same indictment. 3 M. & S. 550. — 15. So in conspiracy the judgment upon conviction is, that the party is infamous; yet to counts for a conspiracy may be added other counts which do not include a charge of conspiracy. 3 M. & S. 550. — 16. And the rule to determine whether two offences are amenable to the same punishment, and therefore whether their joinder in the same indictment is not legally defective, is gained by considering whether they are primarily liable to the same punishment; if so, the joinder is not legally defective, notwithstanding they may, under circumstances, be amenable each to a different punishment; since, then, they are offences of the same nature. 3 M. & S. 559. — 17. It is no objection to an indictment that it charges different misdemeanors upon the defendant in different counts, for the judgment is the same. 3 T. R. 108. 2 Burr. 984. 8 East, 141. 2 Camp. 152. 1 Stark. 40. — 18. But the joinder of offences of a perfectly different nature, is legally defective. 3 M. & S. 549.

### III. *Of indicting several for distinct offences;*

#### *And first, for distinct offences of the same nature.*

1. An indictment against separate offenders, for offences of the same nature, is not bad in point of law, and therefore not objectionable by demurrer, motion in arrest of judgment, or writ of error; but it may be quashed at the discretion of the court in which it is pending. 8 East, 41. — 2. As to the reason of the rule; in civil matters separate offenders cannot be sued in the same action; and if the reason of the rule in its original was, because by the form of the declaration, which anciently could not be violated, the several demands comprised therein are required from, or to be awarded against, the several defendants charged, the foundation of the difference between civil and criminal proceedings is plain. An indictment against separate offenders demands, not that the same punishment be adjudged against all, but that the jury do inquire concerning distinct facts upon the same occasion, instead of at different times. If however the reason of the civil rule is, that by charging separate offenders the attention of the jurors might be distracted indefinitely, it may be difficult to assign a satisfactory ground for the criminal rule, unless this be one; the court cannot in civil suits exercise that discretionary power of quashing the proceeding which they do in criminal. — 3. If the offences are many or their investigation intricate, the attention of the jury may be distracted, and they be thereby disabled from forming that distinct and accurate judgment on each of the questions thus collectively submitted to them, which they might have given by considering each question apart. This inconvenience may not be experienced in every case, so that whether it objects itself in a given instance, is a matter of judgment for the court wherein the indictment is pending to determine, and as they decide one way or the other they may quash or allow the proceeding



For extortion. R. 1 Sal. 382. (q)

Husband and wife for keeping a bawdy-house; for it is a nuisance. R. 1 Sal. 384.

So for keeping several inns *separaliter*, *ad nocumentum*. 2 Rol. 345. (r)

But where a single act makes an offence, several cannot be indicted for the same act: as, for using a trade without being an apprentice. 1 Sal. 382. (s)

For

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proceeding; and in the latter case may adopt such precautions as shall secure the defendants from any inconvenience. — 4. It seems to have been laid down as a general rule, that an indictment against separate offenders is not objectionable in any shape, provided it charges the offences to have been committed *separaliter*, so that the cases wherein indictments of that form have been quashed, are to be reckoned exceptions to the rule. Now the only use of the word *separaliter* is to shew, that the several defendants are meant to be charged separately with offences, which without the addition of that word, would from the form of the indictment appear to be charged jointly. Thus if two, having perjured themselves, in a joint affidavit are indicted together, and the indictment states, that A. and B. came before a commissioner, &c. this is alleging that they both were guilty of one and the same crime, when by law, their crimes are distinct, and so the indictment is vicious; but if the word *separaliter* is used, then the affirmation is, that each was guilty of a separate offence. Nothing then is gained by using the word *separaliter*, but only an error is thereby avoided, except that its use obviates the necessity of double counts. Lord Hale has said, it is common experience at this day, that twenty persons may be indicted for keeping disorderly house, &c. for the word *separaliter* makes them separate indictments. 2 Hale, 174. — 5. Two may be included in the same indictment for an assault. Lofft. 271. — 6. And several defendants included in the same indictment may sever in their challenges and be separately tried. 6 T. R. 638.

*Secondly, for distinct offences of different natures.*

1. It seems, that an indictment against several for distinct offences of different natures, is bad in point of law, and the reason may, in all cases, be, to preserve uniformity in the pleas and judgment; in some, to secure one defendant from an inconvenience, and exclude another from an undue advantage. Vide 8 East, 41. — 2. This rule must be confined to offences having no connexion one with another. Several offenders may be joined in one indictment, though their offences are of several degrees, if dependent one upon another; as the principal in the first degree and the principal in the second degree, so principal and accessory. 2 Hale, 173. — 3. Several cannot be jointly indicted for unlawfully exercising the trade of tanning leather contrary to 1 Jac. 1. c. 22. s. 5. 4 Burr. 2046.

*IV. Of indicting one for the crime of another.*

1. A master may be indicted for his servant's misconduct, done in the ordinary course of his employment, though contrary to his orders. As where he throws rubbish out of the house into the street; where the servant of a bookseller sells a libel to a customer; or where those employed by the proprietor of a newspaper to print and publish it, insert a libel therein. 3 Esp. C. 21. — 2. If a bailiff neglects to execute criminal process, or sets a prisoner at liberty, it should seem the sheriff may be indicted as for a breach of duty, and that the rule, that the sheriff is not criminally liable for the act of his officer, means as for that act. — 3. Where two fill the office of sheriff, both are indictable for neglect of duty, though it was occasioned by one alone. — 4. A husband cannot be indicted for the crime of his wife, unless she can be reckoned his servant in the affair. On indicting the wife, the husband need not be joined for conformity.

(q) Deer stealing, maintenance, keeping disorderly houses, and so forth. 2 Hale, 773, 174. 2 Hawk. c. 25. s. 89. 1 Vent. 302. 10 Mod. 335, 336. Ld. Raym. 1248.

(r) A wife or servant joining with a stranger in the same murder, may be charged in one and the same indictment; and concluding *felonice proditorie et ex malitia præcogitata* &c. is, *reddendo singula singulis*, good for both. Foster, 329.

(s) 1. 2 Rol. Abr. 81. 2 Hawk. c. 25. s. 89. 2 Hale, 184. 1 Vent. 302. 5 Mod. 181. 10 Mod. 335, 336. 1 Str. 623. 2 Sess. Ca. 221. — 2. Nor for absenting themselves from church. Trem. P. C. 267. — 3. Nor several parishes for non-repair of a high-



For having inmates in their houses. R. 2 Rol. 164.

For doing a thing against a statute, or proclamation. Mod. Ca. 210.

So, if several are joined in the same indictment for having several inns, they must be charged severally for their offence. R. 2 Rol. 345.

### (G) The form of an indictment.

(G 1.) It ought to have certainty. — Of the party.

An indictment ought to be certain. 5 Co. 121. a. (t) Vide Abatement, (F. 22, &c.)

Yet

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a highway. R. T. H. 105. Styles, 157. — 4. Nor several individuals for omitting to repair the pavement before their respective houses. 2 Rol. Abr. 81. 2 Hawk. c. 25. s. 89. — 5. Nor for being common scolds or barrators. 2 Str. 921.

(t) 1. Meaning *circumstantial*; for there are two ways of stating a case; either by giving the result alone, or detailing its constituent circumstances; and though considered by themselves, the former is preferable to the latter, yet it cannot be employed, for the following reasons: — 1°. The right determination of every case depends upon the accurate solution of two questions; the one, whether by the rules of law its operation is such as to make it available to the end proposed; the other, whether its constituent facts exist. Since, then, the legal operation of any affair can only be known on a view of its circumstances, and must be declared by the court; a circumstantial detail is requisite to the due decision of the former question. — 2°. The traverse of a summary statement puts in dispute the various circumstances of which it is combined. Now it is a rule in pleading, that the case be discussed with as much brevity as will accord with its end of doing justice between the parties. And, as the ends of justice may as easily be attained by disputing one material fact as many, the case must be so stated, that on issue taken upon any specific allegation, one question only may be raised. — 3°. To the attainment of justice it is necessary, that the one party be apprised of the nature of his adversary's case; whereby he may be enabled to meet it by its own, or resist it by contrary proofs. A summary statement leaves the matter in doubt; so that for this additional reason a circumstantial one is requisite. — 4°. The record of a judgment given on a summary statement, does not disclose those particular circumstances, by which the matter in controversy is distinguished from all others of the same species; so that should either party, on any future occasion, seek to bring it again into dispute, the attempt cannot be frustrated simply by producing the former record, but only by collateral proof that the question then disputed was the same with the present. A summary statement, therefore, deprives the adversary of an advantage, to which by law and in reason he is entitled. Formerly, indeed, this advantage was of more importance than it is now; for then it was considered, that where it was not apparent upon viewing the record, that the two questions were similar, the fact could not be proved through any other medium. This doctrine, however, would hardly have been tenable on a fair discussion, since exceptions to the rule that a narrative must be circumstantial, have always obtained, and yet many of the exceptions, if the doctrine were upheld, are plain violations of justice. — 5°. The fifth reason for a circumstantial statement is, that the community may be furnished with a precedent in future similar instances. — 6°. These five reasons for a circumstantial statement hold universally and upon every occasion. There are others that influence in particular cases only, of which the three principal ones are — that the court may pronounce an appropriate judgment — the jury give a discriminating verdict — and the sheriff levy in execution. — 2. The general rule then is, that an indictment must define circumstantially the particular crime charged. The exceptions to which rule are indictments for barratry, for keeping a disorderly house, and for being a common scold; in which cases, independent of any peculiar relations, the indictment may be general. Of the first exception, the reason is not known. That of the second is, that it may be notorious to the neighbours that disorderly persons frequent the house, and at the same time they may not know who such persons are, and therefore to require them to be named, would be requiring an impossibility; the indictment must shew the situation of the house. As to the third offence; it does not consist in using particular expressions, but in the circumstance that the defendant is always scolding. 1 T. R. 748. —

5. If

Yet certainty to a general intent is sufficient. Co. L. 303. a. 5 Co. 121. a. (t)

And

3. If, too, any matter be described in a way in which, though general, it might for any thing that appears have happened, the description is sufficient. 3 T. R. 98.

(t) 1. Dougl. 158. Cowp. 682.—2. The rule ascertaining the requisite degree of detail, consists of two branches, namely, that every fact (or negation) essential to the case must be alleged, or a correct judgment of its merits cannot be formed; and with a degree of precision sufficient to the ends proposed in the last note. — 3. And though this second branch still leaves the rule very much at large, and in a manner without any fixed or determinate limitation, it is impossible to define it, in the general, with greater exactness, but in every new case, the judgment is the standard to which recourse must be had, aided by the analogies to be drawn from decisions. Lord Coke, indeed, has assigned to the different divisions of pleading different degrees of certainty, by taking as a standard that degree of precision, which in our daily intercourse, we consider sufficiently definite to express our intentions at once, calling it by the name of certainty to a common intent, holding it sufficient in certain divisions, but requiring in others a greater exactness, namely, a degree which he calls certainty to a certain intent in general, and in others again a still nicer precision, which he calls certainty to a certain intent in every particular. These distinctions of the chief justice have been characterised by some, as a jargon of words without meaning, whilst others have considered, that they are chargeable only with quaintness, and graduate, with as much precision as the nature of things will admit, the scale of certainty in circumstantial statement. But, besides that they are calculated to afford little assistance, they seem open to two objections; one, that certainty to a common intent, selected as the standard of gradation, can only be applied to modes of expression: the other may be explained thus. Since the reasons for exacting precision in statement, are the attainment of certain ends, it follows, that if a greater degree of precision is required in one class of pleading than in another, it must be, because the ends contemplated by each are different, and because to the attainment of these ends different degrees are requisite. Now the ends contemplated by the constituent parts of pleading, considered in the general, are two: the plaintiff seeks to impose a liability upon the defendant, the defendant to be exonerated; and as the degrees of certainty must be the same in each, inasmuch as the reasons for a circumstantial statement are alike common to each, there is nothing in the reason and nature of things which requires a greater precision in one than in another. Sometimes, indeed, a plea may be more general than a count, a count more general than a replication, and so forth; the reason of which is, not because the pleading is a count or plea, but either from certain relations subsisting between the parties, or from certain positive rules peculiar to a particular form of action. If therefore we would establish a scale of certainty proper to the constituent parts of pleading, it must be by considering each part in relation to the different classes of actions, or the particular relations that may subsist between the parties. It is observable, that the distinctions taken by Lord Coke are not his own, though by him digested into a more regular system, and followed afterwards with that implicit obedience, which his doctrines have almost invariably met with. Previous to his time, there seems to have been no fixed scheme of precision in statement. It is further observable, that in a variety of instances, a greater exactness is requisite in criminal, than what would suffice in civil proceedings. When it was debated, whether a relaxation of the nicest precision and certainty should turn to the criminal's advantage, a feeling for the general good was balanced with one of commiseration for the prisoner. That his immunity from punishment would be injurious to society, was questionable, since, being purely accidental, it gave to others no reasonable hope of offending with equal impunity. The cases in which the question first arose might have been not aggravated. These considerations joined their force to sympathy, and turned the scale in favour of the criminal. — 4. Facts essential to the case naturally range themselves under two distinct heads: 1°. Circumstances which are constituent parts of an act unlawful in itself, without the aid of collateral occurrences or relations; as in the case of murder: 2°. Circumstances which make unlawful an act that without them would be indifferent; as in the case of neglect of official duty. — 5. Of the second class of circumstances, those of *intent*, and knowledge, and notice, may be discussed now. — 6. Where an evil intent is essential to crime, it must be averred, unless the presumption inevitably, and without the aid of extrinsic circumstances, is, that it exists; which presumption always obtains, where the act in question is apparently pernicious and unlawful.

And therefore, an indictment ought to show the christian (*u*) and surname (*x*) of the defendant. (*y*)

6 East, 474. Ld. Raym. 879. 3 M. & S. 11. — 7. Hence an indictment for seditious words, need not aver an intention to alienate the affections of the king's subjects, since apparently they have that tendency. Ld. Raym. 879. — 8. So an indictment against a baker for fraudulently delivering unwholesome bread for the use and supply of the children of an asylum, was held good, though it did not aver that he did so intending to injure the children's health. 3 M. & S. 11. — 9. So where notice or knowledge is essential to crime, their existence must be averred, unless, as in the other case, the presumption inevitably, and without the aid of extrinsic circumstances, is, that they have place; which presumption always obtains, when apparently notice or knowledge is an act of duty imposed upon the defendant, or lies alike in the knowledge of all men. 5 T. R. 621. 1 B. & P. 186.

(*u*) 1. *As to the christian name by which a party shall be indicted*; it may be that by which he is known. Mod. Ca. 116. 1 Salk. 6. C. T. H. 286. accord. Theo. Dig. l. 6. c. 2. s. 9. contra. — 2. So by his name of confirmation. Theo. Dig. l. 5. c. 1. s. 7. 2 Rol. Abr. 135. — 3. And though he cannot be sued as by two different christian names, since he cannot have them. Ld. Ray. 562. Willes, 654. — 4. Yet where he has two christian names making one, and has omitted one of them in the transaction upon which the indictment is founded, it seems that he may be sued by that. Vide 2 Mars. 230. 6 Taunt. 530. — 5. *In what manner*: The name should be repeated to every distinct allegation; though it will be sufficient to mention it once, as the nominative case, in one continuing sentence. 4 Harg. St. Tr. 747. — 6. It has been decided, that a defendant cannot be described with an *alias dictus* of the christian name. Ld. Raym. 562. Willes, 554. 3 East, 111. — 7. But it seems, says Mr. Chitty, that this doctrine is not well founded; for, admitting that a person cannot have two christian names at the same time, he still may be called and known by two such names, which is sufficient to support a declaration, or indictment, baptism being immaterial. 1 Chit. C. L. 205. in notis, referring to R. T. H. 286. 6 Mod. 116. 1 Campb. 479. — 8. And see in confirmation of this, *infra*, the next note, assigning the reason why a defendant may be described by a second surname laid under an *alias*. — 9. *As to what is or is not a misnomer*: Mis-spelling is not, if the name is still *idem sonans*. 2 Hawk. c. 27. s. 81. Str. 889. 10 East, 84. 16 East, 110. 2 Taunt. 401. — 10. For letters being certain arbitrary signs descriptive of (words or) sounds, and having therefore no necessary connection with the sounds which they describe, it follows, that wherever these sounds may be described as well by one set of letters as another, a deviation is allowable. Hammond's Analysis of Pleading, 89. — 11. And if two names are in original derivation the same, and are taken promiscuously in common use, though they differ in sound, yet is there no variance. 2 Rol. Abr. 135. Bac. Abr. Misnomer. 1 Chit. C. L. 208. — 12. Shakespeare and Shakepeare are not *id. son.*; and it is therefore a misnomer to use one for the other. 10 East, 83. — 13. So is the inversion of two christian names of baptism making one. 5 T. R. 195. — 14. So the omission of one. 1 Mars. 477. — 15. Or of the whole name. 1 Mars. 477. — 16. But 'A. otherwise B.' is not *prima facie* a misnomer, since the inference, until rebutted by plea, is, that the whole is one christian name. 3 East, 111. — 17. *As to the consequences of misnomer*: The defendant may plead in abatement. 2 Hale, 176. 237. 238. 2 Hawk. c. 25. s. 68. *Infra*, Justices, (W 3.) — 18. But cannot otherwise object. Bac. Abr. Misnomer, (B). Indictment, (G 2.) 2 Hale, 175. C. C. C. 34.

(*x*) 1. A defendant may be indicted by the name by which he is known. Ast. Ent. 1. Theo. Dig. l. 6. c. 2. s. 1. 4 Mod. 347. 1 Hen. 7. 29. 2 Hale, 259. 1 Salk. 6. Ld. Raym. 1015. — 2. And whether a man is known in the world by a particular name, depends upon his having been called so, not merely upon one or two occasions, but a plurality of times. 3 M. & S. 455. See the last note. — 3. If, therefore, a defendant, so sued, should plead a misnomer, the prosecutor may reply, that he is known as well by the one name as by the other. 2 Hale, 238. Kel. 11. 12. — 4. Though it is said to be the best, and more usual practice, to allow the plea, as the defendant must set forth his right name therein, and a new and more regular indictment may immediately be preferred against him, and he will be concluded by his own averment. 2 Hale, 176. 258. 1 Chit. C. L. 205. — 5. So a defendant may be described by a second surname, if it be laid under an *alias*; for a man may be known by two surnames. Leach, 469. 1 Hen. 7. 28. Bro. Misnomer, 47. Vide *supra*, Abatement, (F 18.) — 6. A mis-spelling is immaterial, provided the name, as mis-spelt, and the true one, are *id. son.* *Supra*, in the last note. — 7. But Syms and Symonds are not. 4 Mod. 347. — 8. Nor Shakespeare and Shakepeare. 10 East, 83.

And

And by the common law, if the defendant had a dignity, it ought to add his dignity; for it is parcel of his name (*a*).

So, if he had an office, and was indicted in respect to his office, it ought to add his name of office.

So, by the st. 1 H. 5. 5. (*b*) the addition of (*c*) the defendant's (*d*) estate, degree (*e*), or mystery, the town, or place (*f*) and county of which

(*y*) 1. A corporation must be prosecuted in their corporate name, and the names of the individuals composing it will not suffice. 1 Leach, 253. 2 East, P. C. 1059. — 2. But trustees under an act of parliament, not incorporated, must be described individually, and their character as trustees subjoined as a description of the character in which they are prosecuted. 1 Leach. 514. 578. 1 Hawk. c. 34. 35. — 3. On indicting a parish, as for not repairing their highways, the inhabitants are not named. Rol. Abr. 79. Hawk. b. 2. c. 25. s. 68. 1 Chit. C. L. 203. — 4. The defendant's name should be repeated to every distinct allegation; though it will suffice to mention it once, as the nominative case in one continuing sentence. 4 Harg. St. Tr. 747: 1 Chit. C. L. 203. — 5. And with respect to describing third persons, it is, in general, necessary to set forth their names with sufficient certainty, and therefore it seems to be generally agreed at this day, that an indictment for suffering divers bakers to bake, &c. against the assize, when that was an offence, or for distraining divers persons without just cause, or for taking divers sums of money of divers persons for toll, cannot be supported. Hawk. b. 2. c. 25. s. 71. Bac. Abr. Indict. (G 2.) Bro. Indict. 21. 2 Rol. Abr. 80. 1 Chit. C. L. 211.

(*a*) If a knight or other higher dignity under a peer, in addition to the christian and surname; and if a peer, to stand instead of a surname. 2 Inst. 666. Bac. Abr. Misnomer, (B 2.)

(*b*) 1. Which very much extended the rule of the common law. — 2. That statute enacts, that in every original writ of actions personal, appeals, and indictments, and in which the *exigent* shall be awarded, in the names of the defendants in such writs original, appeals, and indictments, additions shall be made of their estate or degree, or mystery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be, or were, conversant; and if, by process, upon the said original writs, appeals, or indictments, in the which the said addition be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none; and that before the outlawries pronounced, the said writs and indictments shall be abated *by the exception of the party*, where in the same the said additions be omitted. Provided always, that though the said writs of additions personal be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated; and that the clerks of the chancery, under whose names such writs shall go forth written, shall not leave out, or make omission of the said additions as is aforesaid, upon pain to be punished, and to make a fine to the king, by the discretion of the chancellor.

(*c*) 1. No addition need be given to any other person than the defendant; for the statute of additions has reference to him alone. 2 Leach, 861. 2 Hale, 182. Burn's Just. Indictm. Bac. Abr. Indictm. (G 2.) — 2. Though, if more persons than two, having similar names, are referred to, it is necessary to distinguish them by an addition, or in some other way. Ibid.

(*d*) 1. Diversity of names is no plea in an indictment; for the name cannot be changed but by the jury. 9 Hen. 4. 5. Theo. Dig. l. 6. c. 13. s. 6. — 2. Hence there is no need of the addition of elder or younger. Ibid.

(*e*) 1. *The following are names of dignity*: Earl. 39 Edw. 3. 35. 22 Ass. pl. 24. Dav. 60. Th. D. l. 6. c. 3. s. 6.; l. 3. c. 5. s. 8. — 2. Duke, marquis, and all titles whether by birth or creation; hence archbishop, and bishop. 27 H. 6. 5. — 3. So duchess, countess, countess-dowager. Skin. 15. — 4. Knight. Mod. Ca. 105. 5 Mod. 302. Vide Theo. Dig. l. 3. c. 3. s. 14. — 5. Master of an hospital. 2 Ed. 3. 47. Theo. Dig. l. 6. c. 3. s. 5. — 6. Sergeant at law. 2 Inst. 668. 2 Hawk. c. 3. s. 110. Bac. Ab. Misnomer, (B 2.) — 7. Garter king at arms. Cro. Eliz. 224. Vide Cro. Eliz. 342. Owen, 61. — 8. Clarenceux king at arms. Str. 850. — 9. Baronet. Hob. 129. Clift. 17. 1 Vent. 154. — 10. Knight and baronet. Carth. 14. — 11. Degrees taken at the university. 2 Hawk. c. 23. s. 110. 2 Inst. 668. — 12. Widow, single woman, spinster, and gentlewoman. 2 Inst. 668. 2 Hale, 177. 2 Hawk. c. 23. s. 111. Bro. Add. 64. 66. — 13. *The following either are not names of dignity, or being such, need not be given*: Gentleman, or esquire. 14 H. 6. 15. Theo. Dig. l. 6. c. 6. s. 9. 5 Mod. 302. —



which he is or was (*g*): and if omitted (*h*), outlawry thereon shall be void, and the indictment (*i*) may be abated by exception. R. 2 Rol. 225. Vide Abatement, (F. 23, &c.)

The addition may now be of a degree by creation, or without creation (*k*); as, earl, bishop, knight, esquire, gentleman, widow, doctor, clerk, &c. 2 Inst. 666.

Or an occupation (*l*): as, merchant (*m*), grocer (*n*), labourer (*o*), spinster (*p*), &c. 2 Inst. 668.

And

14. Sed vide supra in the text. — 15. And it is held that an inferior person may be described by his reputed degree of gentlemen, if so reputed, though only a yeoman in legal understanding. 2 Inst. 668. 1 Chit. C. L. 205. — 16. But if he be not so reputed, the mistake will be fatal. Ibid. etiam supra in the text, farther on. — 17. And note, that gentleman and esquire are convertible terms, and may be used for each other without variance. Bro. Add. 44. Fortes. 354. Bac. Abr. Misnomer, B 3. 1 Chit. C. L. 206. — 18. Dean, archdeacon, præcentor. Theo. Dig. l. 6. c. 3. s. 1. 8. 27 Hen. 6. 5. Vide Theo. Dig. l. 3. c. 3. s. 6. 17. — 19. Provost. 17 Edw. 3. 1. Theo. Dig. l. 6. c. 3. s. 14. — 20. Dignitary of another kingdom. Mar. pl. 26. Dav. 60. 9 Rep. 118. 2 Leach, 547. 620. 2 Salk. 451. 2 Hawk. c. 23. s. 109. Vide Theo. Dig. l. 3. c. 3. s. 7. — 21. Though anciently, it was said, an Irish bishop might be indicted by the addition of his diocese. 21 H. 6. 3. 4. 2 Hawk. c. 23. s. 109. Bac. Abr. Misnomer, (B 2.) — 22. Therefore a knight shall be so named, though he is an earl of another kingdom. Mar. pl. 26. — 23. It seems, however, that if a name of foreign dignity be added, it does no harm. 3 Lev. 42. — 24. So if a man be deprived of his dignity, it need not be given; as if a deanery be dissolved by act of parliament. 4 Hen. 7. 6. Vide Theo. Dig. l. 3. c. 3. s. 16. l. 6. c. 3. s. 10. — 25. Though the deprivation was *minus juste*; for it stands in force till restitution. 13 Ass. pl. 2. Theo. Dig. l. 6. c. 3. s. 15. — 26. See farther below.

(*f*) In indictments against peers, and in all other cases where no process of outlawry can issue, the addition of place is unnecessary. 1 Chit. C. L. 208. etiam infra.

(*g*) The words 'estate or degree,' in the statute, are construed to signify the same thing; and include the titles, dignities, trades, and professions of all ranks and descriptions of men. 2 Inst. 666.

(*h*) 1. Unless where outlawry lies, no addition is requisite; not therefore in an indictment for mere forcibly entry. Comb. 70. Bac. Abr. Indictm. (G 2.) Misnomer, (B 2.) Cro. Eliz. 148. 2 Hale, 177. 1 Wils. 244. — 2. Or for encroaching upon a highway. Cro. Eliz. 148. 8 Hen. 6. 9. — 3. Or in informations in nature of *quo warranto*. 1 Wils. 244. — 4. *Secus in quo warranto* informations by original. 1 Wils. 244. — 5. So no addition need be given on indicting a peer, unless for treason, felony, or actual breach of the peace. 2 Hale, 177. 199. Cro. Eliz. 148. Comb. 70. 1 Wils. 244. 245. Cro. C. C. 35. — 6. And on indicting a *feme covert* as the wife of A., no other addition of place or mystery is necessary. Cro. Eliz. 198.

(*i*) 1. Being such upon which outlawry lies, supra. — 2. So an addition must be given in a presentment before the coroner, since outlawry lies thereon; and it is taken as an indictment. 2 Leo. 200.

(*k*) By his name of dignity, as Garter. 2 Hawk. c. 25. s. 69. Cro. Eliz. 224. 542. Bac. Abr. Indictm. (G 2.)

(*l*) Where the defendant is engaged in several occupations, he may be described by either of them. 2 Inst. 668. 669.

(*m*) 1. A trader may be sued either by his degree or trade. Str. 556. 816. Ld. Raym. 1541. — 2. Though if he be a gentlemen by birth, he should be described as a gentleman, and not by his art or mystery. 2 Inst. 668. 669. — 3. So a gentleman, though a husbandman, shall be sued as a gentleman. 14 H. 6. 15. Theo. Dig. l. 6. c. 15. s. 5. 2 Inst. 669. — 4. So a viscount shall be sued by that name, and not by the name of lord. Dal. 42. Vide infra.

(*n*) 1. Baker. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 2. Brewer. Ibid. Brogger. 9 H. 6. 65. Theo. Dig. l. 6. c. 15. s. 3. — 3. Broker. Ibid. — 4. Butcher. Bro. Add. 42. 2 Hale, 177. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 5. Carpenter. Bro. Add. 15. 59. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 6. Chapman. Dy. 46. — 7. Chopchurch. 9 H. 6. 65. Theo. Dig. l. 6. c. 15. s. 3. — 8. Clerk. 2 Leon. 185. — 9. Cook. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 10. Carrier. Dy. 46. — 11. Dyer. Ibid. — 12. Fishmonger. Ibid. — 13. Hostler. Bro.

Add.



And his reputed degree is sufficient: as, if he be called gentleman, where he was only yeoman in truth. R. 6 Co. 67. 2 Inst. 668.

But if he be called yeoman, spinster, &c. where in truth he is a gentleman (*q*), and so reputed, the indictment shall be quashed. 2 Inst. 667. 668. (*r*)

But an addition of office is not sufficient, unless he be indicted in respect of his office; for it is uncertain, being competent to all degrees, as farmer (*s*), butler (*t*), servant (*u*). 2 Inst. 668.

Nor an addition of citizen; for it does not shew his degree, or mystery. 2 Inst. 668. (*x*)

Nor of vagabond, heretick, and the like. (*y*) 2 Inst. 668.

Add. 55. Bac. Abr. Misnomer, (B 3.) — 14. Husbandman. 2 Inst. 168. Bro. Add. 39. 2 Hawk. c. 23. s. 114. Bac. Abr. Indictment, (G 2.) Misnomer, (B 3.) — 15. Mercer. 5 Edw. 4. 3. Theo. Dig. l. 6. c. 15. s. 2. 2 Inst. 168, 169. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 16. Miller. Bro. Add. 39. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 17. Parish Clerk. Bro. Add. 52. 62. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 18. Parson. 2 Leon. 183. — 19. Point-maker. Ibid. — 20. Schoolmaster. 2 Leon. 186. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 21. Scrivener. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.) — 22. Shoemaker. Dy. 46. — 23. Tanner. Dy. 46. — 24. Taylor. 2 Inst. 168. Bro. Add. 15. 39. Bac. Abr. Misnomer, (B 3.) 2 Hawk. c. 23. s. 114. — 25. And all other lawful trades and professions. 2 Inst. 168. Bac. Abr. Misnomer, (B 3.)

(*o*) 1. Labourer, and yeoman, though both good additions for a man, are bad when applied to a female. 1 Chit. C. l. 206. — 2. But she may be described as the wife of A. B. yeoman. Dyer, 46, 47. Cro. Eliz. 750. 2 Hale, 177. *infra*.

(*p*) 1. Though it has been said, that a *gentlewoman* may be sued by the name of *spinster*. Semb. Dy. 88. b. *Supra*, Abatement, (F 26.) — 2. Yet Lord Coke's opinion is the other way; and maintains, that she has as good a right to that addition, as a baroness, viscountess, &c. has to hers. 2 Inst. 668.

(*q*) 1. Or knight, when he is a baronet. Jon. 346. — 2. Though, it is said, that there is no necessity for the addition of a dignity created since the st. 1 Hen. 5.; as if a man be knight and baronet, it is sufficient if he named be knight only. Lat. 169. — 3. A man having a more worthy addition by his office, or from a university degree, may be sued by either; thus a master of arts or doctor of divinity may be sued as clerk. 35 H. 6. 55. Theo. Dig. l. 6. c. 15. s. 13. — 4. So a serjeant of the king's kitchen may be sued by the addition of cook, or gentleman, or esquire. 14 Hen. 6. 15. Theo. Dig. l. 6. c. 15. s. 6. — 5. Giving a name of dignity, which the defendant has not, may be pleaded in abatement; as naming him knight and baronet, when he is not a baronet, or when not a knight. Reg. pl. 287. 1 Vent. 154. — 6. So giving a name of dignity lost by marriage. Vide Dy. 79. b. Ow. 81. — 7. Or giving a title conferred by curtesy only; as marquis to a duke's eldest son. Sal. 451. Semb. Ow. 82.

(*r*) 1. An esquire may be indicted by the addition of gentleman; for all degrees below knights, are names of worship only. 1 Wils. 244. — 2. Indeed gentleman and esquire are convertible terms, and may be used for each other without variance. Bro. Add. 44. Fortes. 354. Bac. Abr. Misnomer, (B 3.)

(*s*) Which addition is at least questionable, being of equivocal signification, and if any act be implied by it, the term *husbandman* is the proper description. 2 Inst. 668. Bro. Add. 10. 2 Hawk. c. 23. s. 116. Bac. Abr. Misnomer, (B 3.)

(*t*) 1. Chamberer. 5 Edw. 4. 52, 53. Theo. Dig. l. 6. c. 15. s. 10. — 2. Chamberlain. Bro. Add. 50. 58. 2 Inst. 688. 2 Hawk. c. 23. s. 117. Bac. Abr. Misnomer, (B 3.) — 3. Chancellor. *Supra* Abatement, (F 26.) — 4. Groom. Bro. Add. 50. 58. 2 Inst. 688. 2 Hawk. c. 23. s. 117. Bac. Abr. Misnomer, (B 3.) — 5. Page. Ibid. — 6. Pantler. Ibid. — 7. Treasurer. *Supra*, Abatement, (F 26.) — 8. But litterman is a good addition. Ibid. 21 Edw. 4. 77. Theo. Dig. l. 6. c. 15. s. 11.

(*u*) 1. Contra, as to servant. Ld. Raym. 968. — 2. Servant of such a one seems to be a good addition. 7 Ed. 4. 10. 9 Edw. 4. 50. Dy. 46. 3 Hen. 6. 31. Theo. Dig. l. 6. c. 15. s. 1. Mod. Ca. 58.

(*x*) Nor burgess. Ibid. 2 Hawk. c. 23. s. 111. Bro. Add. 5. 42. 50. Bac. Abr. Indictment, (G 2.)

(*y*) 1. That is, any other unlawful employment. 23 Edw. 4. 1. 2 R. 3. 2. 9 H. 6. 65. Theo. Dig. l. 6. c. 15. s. 5. — 2. So, common informer. 2 Inst. 168. Bro. Add. 50. 2 Hawk. c. 23. s. 114. Bac. Abr. Misnomer, (B 3.)

If a mercer, &c. be a gentleman, he ought to be named by the highest, viz. gentleman. 2 Inst. 668. 669. (z)

And the addition ought to be annexed to (a) the person indicted; for after an *alias dictus*, it is not sufficient. 4 Ed. 4. 10. a. 2 Inst. 669. (b)

So, A. *uxor* B. spinster; for it may be referred to A. or B. Dy. 46. b.

Otherwise, if it was A. v. E. *nuper* yeoman: for that cannot be referred to the wife, but only to the husband. R. Dy. 47. a. Cro. El. 750.

The addition of the place (c) may be, *nuper*. (d) 2 Inst. 669. 670. (e)

(z) 1. Or he may plead in abatement. 2 Hawk. c. 23. s. 103. — 2. The rule is, that where the defendant is engaged in several occupations, he may be described by either of them, but if a gentleman by birth engage in trade, he should be described as a gentleman, and not by his art or mystery. 2 Inst. 668. 669. 1 Chit. C. L. 208.

(a) In the case of noblemen, the addition of quality precedes that of place, as Edward Duke of Buckingham, late of R.; but in that of a knight or baronet, the place precedes the degree, as A. B. late of G., baronet. 2 Inst. 669.

(b) 1. Theo. Dig. l. 6. c. 14. s. 19. Cro. Eliz. 198. 249. 583. Dy. 88. Staunf. 68. Moor, 554. 2 Leo. 183. 2 Hale, 177. 1 Leach, 469. — 2. For the addition regularly refers to the last antecedent. 1 Leach, 420. Cro. Eliz. 198. 583. 3 Salk. 19. 90. 1 Saund. 14. n. 2 Hale, 177. 2 Inst. 669. 2 Hawk. c. 2. s. 126. c. 25. s. 70. Bac. Abr. Indictment, (G 2.) — 3. And after an *alias*, an addition is unnecessary. 2 Hawk. c. 25. s. 70. — 4. Yet if a man be named A. B. *alias dictus* D., the addition after the *alias* is good. 5 Edw. 4. 141. — 5. So A. B. servant of J. Noke of D., in the county of M. butcher, is not good; for the addition shall be referred to J. Noke. 6 Edw. 4. 3. 9 Edw. 4. 48. Dy. 46. Theo. Dig. l. 6. c. 14. s. 10. — 6. Yet the residence of the wife is sufficiently shewn by stating that of the husband, unless it is expressly proved that they live separate. 2 Inst. 669. 2 Hawk. c. 23. s. 124. Cro. Eliz. 198. 750. — 7. So A. B. who was the wife of N. of D. is good; for the addition shall be referred to the wife, and not to the husband who was dead. 4 H. 6. 4. Theo. Dig. l. 6. c. 14. s. 9. — 8. But where the addition is not proper to the wife, as yeoman, &c. it shall be referred to the husband. Dy. 46. 47. — 9. Where both the name and addition are the same, there should be some further description added for the sake of distinction. 2 Hawk. c. 25. s. 70. — 10. And where several defendants have the same addition, it should be repeated after each. Ibid. — 11. Where a father and son have the same name, and are both indicted, some distinction, as elder and younger, should be adopted. Ibid. 1 Chit. C. L. 211. Salk. 7. — 12. But though it has been said, that where no addition is stated in the indictment as to one of the defendants, it will be quashed as to all. 2 Hawk. c. 25. s. 70. 1 Bulst. 183. Sed vide 2 Hale, 177. — 13. Yet this seems incorrect, because the law regards the indictment in that case, as several against each of the defendants. 2 Hale, 177. Bac. Abr. Misnomer, (G). Indictment, (G 2.) 4 T. R. 536. 537.

(c) But not of the degree; for the description must be according to the present degree, and not as '*nuper armiger*.' 2 Inst. 670. 9 Edw. 4. 2. 22 Edw. 4. 13. 21 Hen. 6. 3.

(d) 1. In practice, where a felony, or other offence, has been committed at A. in the county of B. the usual and better course is, to state the defendant's addition of the same place, viz. J. S. late of A. in the county of B., although his place of abode, may be in another county; because he is considered as having been conversant in the county where the offence was committed; and when this course is adopted, the process of outlawry will go as at common law, and there is no occasion for writs of *capias* into different counties, as is necessary when the indictment states the defendant's addition to be of a county different to that in which the offence is charged to have been committed. 2 Hawk. c. 27. s. 125. 126. 2 Hale, 196. 3 T. R. 502. 1 Chit. C. L. 210. — 2. If, however, the indictment state the defendant's addition to be of the county in which the offence was committed, and then another addition of a different county is stated under an *alias*, one writ of *capias* will in general suffice. 2 Hale, 196. 2 Hawk. c. 27. s. 125. 126. 1 Chit. C. L. 210.

(e) 1. 2 Hawk. c. 23. s. 119. Bac. Abr. Misnomer (B 4.) 4 T. R. 541. — 2. And if he has removed from one vill to another, he may be named either of the latter, or as late of the former. 19 H. 6. 1. 35 H. 6. 9. Theo. Dig. l. 6. c. 14. s. 15. — 3. Hence, late of X. is good, though commorant in Y. 2 Str. 924. — 4. And it is said, that if a man be described as of A. late of B., proof of either allegation may be admitted. 2 Hawk. c. 23. s. 119.

If

If a city or borough be a county, the addition of that only (as of London) is sufficient. 2 Inst. 669. (f)

The addition of a parish is sufficient. 2 Inst. 669. (g)

But if there be two towns in one parish, he ought to be named of one of the towns. (h) 2 Inst. 669. (i)

Or, if there be D. *Magna & Parva*, the addition of D. alone is not good. 2 Inst. 669. (k)

It ought to be plainly expressed that he is of such a place: and therefore, A. *mercator de London* is not sufficient; for perhaps he does not reside in London. 4 Ed. 4. 10. a. (l)

So, A. parson of D.; for he may be parson there without residence. Cont. for non-residence shall not be intended. 2 Inst. 669. (m)

If an indictment gives a bad addition, it will be helped by the appearance of the defendant. 2 Inst. 670. (n)

So,

(f) And, even though they be not co-extensive, he will be presumed to be an inhabitant of both, until the contrary appear. 2 Inst. 669. 2 Hawk. c. 23. s. 120. Bac. Abr. Misnomer, (B 4.)

(g) 1. If it contains no more than one town or hamlet, which will always be presumed until the contrary appear. 2 Inst. 669. 2 Hawk. c. 23. s. 120. Bac. Abr. Misnomer, (B. 4.) — 2. If it includes more than one town or hamlet, the proper place should be specified. 2 Anders. 24. 1 Burr. 337. 338. 1 Chit. C. L. 209. — 3. It seems, however, that a county, as well as a place, must be distinctly laid in the indictment in all cases where process of outlawry would lie against the defendant. Cro. Jac. 167. 2 Inst. 669. 2 Hawk. c. 23. s. 120. — 4. So a county, without a vill, is insufficient. Cro. Jac. 616.

(h) 1. So the addition of a hundred or soken is insufficient, where there are divers villa. Theo. Dig. l. 6. c. 14. s. 20. — 2. So of any great place containing divers villa. 5 Edw. 4. 1 Theo. Dig. l. 6. c. 14. s. 21.

(i) 1. Where a hamlet is parcel of a town, and an inhabitant, therefore, of the former is also an inhabitant of the latter, he may be described as residing in either. 2 Inst. 669. Bac. Abr. Misnomer, (B 4.) 55 H. 6. 30. Theo. Dig. l. 6. c. 14. s. 14. 14 H. 6. 23. Vide 2 Hawk. c. 23. s. 103. — 2. So if he occasionally live in two places, the addition of either will suffice. 2 Hawk. c. 23. s. 103. — So if he reside in one vill, and has a family in another. 19 H. 6. 1. Theo. Dig. l. 6. c. 14. s. 15. — 3. So if a man has a family at G. and dines at W., he may be named of W. Dub. 1 Sid. 325. — 4. And the place where he is *conversant* is a sufficient addition, though neither *commorant* nor *inhabitant* there. Barnes, 162. — 5. And if he live in a place which has a certain name, though it is neither a town nor an hamlet, as the statute uses the general word *place*, it will be sufficient to describe him as of the same. 2 Inst. 669. Bac. Abr. Misnomer, (B 5.)

(k) 1. Rast. Ent. 47. 2 Hawk. b. 2. c. 23. s. 21. — 2. So if the same place be sometimes called North Dale, and sometimes East Dale, but never Dale simply, he may plead, if indicted by the simple addition of Dale, that there is no such town, because a part of the name is not equal to the whole. 2 Hawk. c. 23. s. 121. — 3. But it seems, that if there are two places of precisely the same name, in the same county, and never otherwise denominated, it will be sufficient to allege the defendant to be of the town generally, without any distinction. Ibid. 2 Inst. 669. Rast. Ent. 47. 1 Chit. C. L. 209.

(l) 2 Hawk. c. 23. s. 120.

(m) 1. 7 H. 6. 1. 10 H. 6. 8. Theo. Dig. l. 6. c. 14. s. 7. 2 Inst. 669. — 2. So A. chancellor of the university of Oxford is sufficient, without saying of Oxford. 8 H. 6. 37. Theo. Dig. l. 6. c. 14. s. 13. — 3. So the residence of the wife is sufficiently shewn by stating that of the husband, unless it is expressly proved that they live separate. 2 Inst. 669. Hawk. b. 2. c. 23. s. 124. Cro. Eliz. 198. 750. supra.

(n) 1. For the st. of H. 5. declares, that the proceedings shall be abated 'by the exception of the party;' so that if he appears and pleads in chief, the defect is aided. Cro. Jac. 482. 610. 2 Hale, 175. Ld. Raym. 345. 420. And. 146. 1 Leach, 420. in notis. C. C. C. 54. Bac. Abr. Misnomer, (E). Indictment, (G 2.) — 2. The mode of objecting where the defect is not apparent, is 'by plea only. Andr. 148. 150. —

So, if there be no addition. Per Keeling, 1 Sid. 247.

And an outlawry upon it shall be avoided only by error, or plea, though by the statute it is said to be void. 2 Inst. 670.

It is sufficient if the addition be in English. R. 1 Sid. 101. (o)

If there be an indictment as accessory, it must have the name of the principal. (p)

If the surname be mistaken in an indictment, he shall answer to the felony. 1 H. 5. 5. b. as, Martyn, for Morten. R. Kelg. 12. (q)

Otherwise, if his name of baptism be mistaken. 11 H. 4. 41. b. F. Corone, 88.

So, in treason, or trespass, *quod procuravit quendam ignotum*, is sufficient; for all are principals.

Or, *quod quidam ignotus* in a vizor gave the mortal stroke. R. Kelg. 10. (r)

(G 2.)

3. Where apparent, the court may be moved (before plea) to quash the indictment. 1 Leach, 420. — 4. But defendant cannot demur. And. 148. 150. Cro. Jac. 610. Ro. Abr. 780. — 5. And though Sir William Blackstone lays it down, that judgment may be reversed by writ of error for the want of a proper addition to the defendant's name, according to the statute of additions. 4 Com. 391. — 6. Yet this expression was probably not meant to be taken in its utmost latitude, but limited to judgments upon outlawry.

(o) By st. 4 Geo. 2. c. 26. all writs, process, pleadings, rules, indictments, records, and all proceedings, in any courts of justice within England, shall be in the English tongue, and shall be written in such common hand as acts of parliament are usually engrossed in; the words and lines to be written at least as close as the said acts usually are, and not abbreviated. — 2. And by st. 6 Geo. 2. c. 14., all pleadings, rules, orders, indictments, and informations, &c. may be written or printed in a common hand, and with the like manner of expressing numbers by figures, as have been commonly used in the said courts, and with such abbreviations as are used in the English language.

(p) 1. The receiver of stolen goods may be indicted without naming the principal felon. 2 East, P. C. 781. 3 Camp. 264, 265. — 2. And in treason, or trespass, it is sufficient to say, that defendant procured some one unknown, since all are principals. Supra, in the text. — 3. And where a principal's name is unknown, an averment that it is so, will excuse the mention of it on indicting the accessory. 2 Hawk. c. 25. s. 71. 2 East, P. C. 651. 781. C. C. C. 36. Plowd. 85. Dyer, 97. 286. 2 Hale, 181. — 4. But if the averment is false, an acquittal will be directed. 3 Camp. 264. 265. 2 East, P. C. 781. — 5. So, in an indictment for larceny, though the goods may be laid to be the property of persons unknown, if that is actually the case, yet if the owner be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one rectifying the mistake. 2 East, P. C. 651. 781. 3 Camp. 265. n. 1 Hale, 512. 2 Hawk. c. 25. s. 71. 2 Leach, 578. — 6. If a third person be known as well by one name as by another, the indictment may describe him by either. 2 Hale, 244. 245. Hawk. b. 2. c. 35. s. 5. — 7. Hence an indictment for larceny, laying the stolen goods to be the property of Victory Baroness Tuckheim, by which appellation she had always acted, and was known, was held good, though her real name was Selima Victoire. 2 Leach, 861. 1 Chit. C. L. 215. — 8. See farther below, as to naming third persons.

(q) 1. 2 Hale, 176. Hawk. b. 2. c. 25. s. 69. Burn's J. Indictment. Wms. J. Misnomer. Bac. Abr. Misnomer, (B.) 1 Chit. C. L. 202. — 2. But the contrary has since been determined. 10 East, 83. — 3. Though in surnames as in christian names, names mis-spelt but *idem sonantes*, are not objectionable. Ibid. Hawk. b. 2. c. 27. s. 81.

(r) 1. So in all other cases where names cannot be ascertained. — 2. Hence an indictment is sufficient for assaulting an unknown. Plowd. 85. Dy. 99. 285. 2 Hale, 281. — 3. So for robbing, though the ignorance results from the injured party refusing to disclose his name. Fitz. Ind. 12. 17. 2 Hale, 181. Dyer, 99. Keilw. 25. Plowd. 85. 129. — 4. So for murdering. 1 Edw. 3. 20. 1 Ass. 7. Fitz. Coron. 159. 25 Ass. 94. Fitz. Ind. 10. 2 Hale, 181. Plowd. 85. 129. 9 Hen. 6. 45. Dyer, 99. 285. — 5. So for

(G 2.) Of the time and place.

So it ought to shew the day and year (s) of the offence. (t) St. 95. a. (u) Vide ante, (G 1.)

And

for selling to others by unlawful measure. Str. 497. Vide Id. 186. contra. — 6. Harboursing thieves. 1 Chit. C. L. 212. Str. 186. 497. — 7. But proof that the name was known, will entitle to an acquittal. Vide supra in notis. — 8. The description of third persons that will suffice, is such as whereby they may be distinguished from all others. 1 Chit. C. L. Hawk. b. 2. c. 25. s. 72. 2 Leach, 861. 1 Leach, 248. — 9. And an indictment for forging a draft, addressed to Messrs. Drummond and Co., Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of Mr. Drummond's partners, was held sufficient. 1 Leach. 248. 2 East, P. C. 990. — 10. Persons styled peers by courtesy must be described by their surnames; and though the addition of title under a 'commonly called' is not technical, still it may be given. 2 Leach, 547. 2 Salk. 451. — 11. Before the Union, Irish peers were so accounted. 2 Leach. 547. — 12. Though since the Union they are entitled to all the privileges of English peers, except sitting in the House of Lords in Parliament, or upon impeachments. See the Act of Union. — 13. A repugnancy or absurdity in the description of the party injured, the error will be fatal; as where one is indicted for stealing the goods and chattels of the said J. S., where J. S. has not been previously mentioned. Hawk. b. 2. c. 25. s. 72. 1 Chit. C. L. 216. — 14. Though, where the indictment charged that 'Francis Morris, the goods and chattels abovementioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have; he the said Thomas Morris, then and there, well knowing the said goods and chattels last-mentioned to have been feloniously stolen, taken, and carried away;' the judges determined, that as the indictment would be sensible and good without the words 'the said Thomas Morris,' they might be struck out as superabundant and unnecessary. 1 Leach, 109. — 15. Hence the position must be thus qualified, unless the matter occasioning the repugnancy or absurdity may be rejected. — 16. Mr. Chitty judiciously remarks, that a material error in the name of the persons aggrieved, or in whom property stolen ought to be laid, is much more important than a mistake in the name or addition of the defendant; in that the latter can be objected to only by plea in abatement, the effect of which is to delay the trial merely, whilst the former will afford a ground for arresting the judgment, when the objection is apparent upon the face of the indictment; or if it constitute an error in fact, it will be a ground for an acquittal, at least so far as respects that part of the charge; though if the mistake affects the higher offence only, the indictment may still be valid as to the inferior crime; as where in an indictment for burglariously breaking and entering the dwelling-house of A. B., and stealing therein goods the property of C. D., the name of the owner of the house be mistaken, though the defendant cannot be found guilty of the burglary or capital part of the indictment, yet may he be convicted of the simple larceny. 1 Chit. C. L. 216. 217. Leach, 252. 339. n. — 17. And in like manner a failure in proof of stealing to 40s. value in a dwelling house, will not preclude a conviction for simple larceny. Leach, 339. n. — 18. The surname or some other addition of distinction must be added to the Christian name of third persons. Hawk. b. 2. c. 25. s. 71. Bac. Abr. Indictm. G. 2. 1 Chit. C. L. 215. Sed vide Starkie, C. P. 171. 172. 6 St. Tr. 805. Moor, 466. cited ibid. — 19. But the person to whom forged notes or coins were uttered, need not be named in an indictment for uttering. 2 Taunt. 334. — 20. An indictment for a robbery upon an unmarried woman, in her maiden name, is good, although she marry before the indictment is found. 1 Leach, 536.

(s) 1. It is most usual to specify the year of the king's reign, but it is sufficient if the year be pointed out by other means; thus, in the case of the regicides, no year of any king was laid for the king's murder; but the compassing of his death was laid in January, in the 24th year of Charles the First, and the murder was laid on the 30th of the same month of January. Kel. 11. 1 Stark. 51. — 2. An averment of the day, without the year, will not be sufficient, nor can inference and intendment supply the omission. Supra in the text. 1 Chit. C. L. 217.

(t) 1. In impeachments in parliament, no time need be laid. 16 St. Tr. 17. 19. Lords' Journ. 116. 1 Chit. C. L. 217. — 2. Nor is it necessary to the averment of a negation or omission, supra in the text. 5 T. R. 616. Hawk. b. 2. c. 25. s. 79. Lamb. b. 4. c. 5. f. 492. 1 Chit. C. L. 217.

(u) 2 Hale, 177. Hawk. b. 2. c. 25. s. 77. c. 23. s. 88. Dyer, 164. b. Bac. Abr. Indictm.



And the place. (x) Dy. 69. 1 Sal. 380. R. Lat. 194. St. 95. a. (y)

And by the st. 18 H. 6. 12. if a place be alleged, and there is no such, it is void.

So, if the day of the month be named without the year, it is not good.

Or, if the day be uncertain (z); as, *in festo S. Petri*, when there are two feasts of St. Peter (a).

So the time and place ought to be repeated to every material fact: and therefore, *quod 10 M. apud B. insultum fecit & cum gladio felonice percussit*, without saying, *ad tunc & ibidem* (b) *percussit*, is bad. Dy. 68. 69. (c)

So

Indictm. (G 4.) 4 Blk. Com. 306. Burn. J. Indictm. Williams J. Indictm. 4. Cro. C. C. 35. 1 Chit. C. L. 217.

(x) 1. In an indictment, every fact which is issuable and triable, must be laid with time and place. 5 T. R. 607. — 2. The allegation too of time and place must be positive, and not left to be collected by inference; and an omission in this particular makes the indictment erroneous. 4 M. & S. 214.

(y) 1. That is, some place from the neighbourhood of which a jury may be returned. — 2. Which may be any place of so limited a compass, that all who live in and near it, may reasonably be presumed to have some knowledge of the persons resident, and fact done, within its limits. 2 Hawk. c. 23. s. 92. 1 Starkie, 58. — 3. Hence a burgh. Cro. Eliz. 866. — 4. Castle. 2 Ro. Abr. 612. 613. 614. Co. Litt. 125. — 5. Forest. Co. Litt. 125. 2 Ro. Abr. 618. — 6. Hamlet. 2 Hawk. c. 23. s. 92. 6 Rep. 14. — 7. Manor. Co. Litt. 125. 1 Sid. 226. — 8. Parish. 6 Rep. 14. Burr. 333. — 9. Town. 2 Hawk. c. 23. s. 92. — 10. Ward. Yelv. 159. 1 Sid. 178. Cro. Jac. 222. — 11. Or any place known out of a town. 2 Inst. 319. Cro. Eliz. 200. — 12. So *de vicinato civitatis*. 2 Hawk. c. 23. s. 92. 2 Ro. Abr. 622. 623. Cro. Jac. 307. 308. 2 Hale, 262. — 13. But not from London; where the offence should be laid either in a parish or in a ward. 2 Hawk. c. 23. s. 92. c. 25. s. 83. 7 Hen. 6. 36. Burr. 333. 9 Rep. 66. Leach, 928. 1 Stark. 59. n. — 14. Nor from a liberty. 1 Sid. 326. — 15. Nor the scite of a manor. 2 Rol. Abr. 618. — 16. Nor a weald. 1 Sid. 88. 2 Rol. Abr. 617.; though Mr. Starkie adds, *qu. et vide* 2 Hawk. c. 23. s. 93. — 17. But a place named generally, will be taken for a vill, unless the contrary be pleaded. Salk. 59. 69. 1 Inst. 125. Burr. 333. Cro. Eliz. 200. 2 Hawk. c. 23. s. 92. — 18. Though the place must be precisely laid in the indictment, it is not necessary to prove the offence to have been committed there; but it is sufficient to shew by evidence, that it was committed at any other place in the same county; nor is it necessary to prove an offence to have been committed in any particular place, unless the place itself be of the essence of the crime, or a situation has been especially described. 1 Stark. 61. Burr. 333.

(z) 1. Laying an offence on an impossible, as a future, day, vitiates. Moor, 555. 2 Hawk. c. 25. s. 77. Rastal, 263. 1 T. R. 316. — 2. So laying the same offence on different days. 2 Hawk. c. 25. s. 77. 2 Hen. 7. 7. 1 Stark. 56. — 3. So upon such a day, as makes the indictment repugnant to itself. 2 Hawk. c. 25. s. 77.

(a) Each of which is distinguished by an addition. 2 Hale, 178.

(b) 1. But these words, being equivalent to a repetition, are sufficient. Dyer, 28. 69. 4 Rep. 41. Keilw. 100. Godb. 65. 66. 2 Hale, 178. Str. 901. East, P. C. 346. Comyns' Rep. 480. — 2. Which nicety, requiring a repetition of time and place to every distinct material fact, is, according to Lord Hale, *in favorem vitæ*. 2 Hale, 178. — 3. And does not appear to hold, in cases of misdemeanor, provided the averments are connected by conjunctions with that in which time and place are expressed. 2 Hale, 178. Cro. Jac. 41. 345. Dyer, 69. C. C. C. 35. Burn's J. Indict. — 4. Wherefore, it is sufficient in an indictment for a forcible entry, to state an entry and dispossession, without a second allegation of time and place. Cro. Jac. 41. — 5. Where, in order to constitute the offence, connected acts must be shewn to have been done *at the same time*, a mere repetition of the same day, year, and place, would not be sufficient; for it would not expressly appear that the acts were done at the same time. 1 Stark. 55. Leach, 597. — 6. In such case, therefore, the words 'then and there' must be adopted. Thus, in an indictment upon the 6 G. 1. c. 28. for feloniously assaulting a person with intent to spoil his cloaths, where the assault and spoiling must be shewn to be continuous, the repetition of the day and place is insufficient,

So the reference ought to be to a time (*d*) or place (*e*) certain : as, if it says, *quod percussit apud A. in comitatu prædicto*, where two counties are mentioned before, though one was in the addition only. R. 1 Rol. 223. (*f*)

But the hour is not necessary in an indictment, though it is in an appeal. 2 Inst. 318. Mar. pl. 127. (*g*)

So

ficient, because it does not appear that the acts were not upon different hours of the day; but the words 'then and there' fix them to have been effected together. 1 Leach, 529. Comyns' Rep. 480. 1 Chit. C. L. 221.—7. If the indictment allege, that the defendant feloniously, and of malice aforethought, made an assault, and with a certain sword, &c. then and there struck, &c. the previous omission will not be material, for the words 'feloniously and of malice aforethought,' previously connected with the assault, are by the words 'then and there' sufficiently applied to the murder. 1 Chit. C. L. 221. 222. 4 Rep. 41. b. Dyer, 69. a. Godb. 65. 66. 1 East, P. C. 346.—8. And in like manner, where in an indictment for poisoning it was alleged that the prisoner did *wilfully*, feloniously, and of malice aforethought, mix poison with other ingredients, with intent that the same should be afterwards eaten by the deceased, and with the intent aforesaid, did *then and there* deliver the same to the deceased, it was decided by the judges to be sufficient, without the addition of the words *feloniously and of malice aforethought*, to the allegation of the delivery of the poison. 1 East, P. C. 346.—9. But where an indictment for rescous, set forth that a third person at a certain time and place committed a felony, for which the officer took and arrested him, and in his safe custody then and there had and kept him, it was considered doubtful whether it was not insufficient, because no time of the arrest was alleged in the same sentence, and it was not clear whether the time of the custody could by force of the conjunction be applied to the arrest. Dyer, 164. Vide 3 P. Wms. 484. 497.—10. The word *immediatè* being joined to the averment of *ad tunc et ibidem*, weakens its force and effect, and renders it an insufficient allegation, where time is a constituent part of the offence.—11. Hence, when on an indictment for a highway robbery, the special verdict found the forcible assault, and then in a distinct sentence, that the prisoners 'then and there *immediatè*' took up the prosecutor's money; the averment was held insufficient to fix the prisoner with the offence of robbery, in that the word 'immediatè' has great latitude, has not any determinate signification, and is frequently used to import 'as soon as conveniently could be done.' 1 Chit. C. L. 220. R. T. H. 114. 115. Comyns, 480. 1 Leach, 529. Dougl. 212.

(*c*) The word 'being' has not the force of a conjunction, and taken by itself, refers to the present time only; and therefore an indictment that the defendant on such a day entered upon land, *being* the prosecutor's freehold, does not affirm that it was so at the time of entry. 1 Chit. C. L. 220. Bac. Abr. Indictm. (G 1.) Cro. Jac. 214. 639. Ld. Raym. 1467. 1468. 2 Rol. Rep. 225.

(*d*) A. was indicted, for that, on the first and second days of May, he made an assault upon B., and a certain cloak of the said B., then and there found, feloniously took, &c.; the indictment was held bad, because two days had been before mentioned. 2 Hale, 178.

(*e*) Stating the defendant to be late of W. and laying the offence to be 'at the parish aforesaid,' is not sufficiently certain. 5 T. R. 162.

(*f*) So, with respect to time, it is insufficient to allege, that the defendant on the first day of May, and also on the second day of May, made an assault upon the prosecutor, and *then and there* feloniously took, &c. because two days having been mentioned before, it is not evident to which of them the felonious taking relates. 2 Hale, 178.

(*g*) 1. In appeals, the statute of Gloucester required that even the hour should be specified, whence it appears, that it was not essential at common law to state the hour even in appeals, in which as great, and in some respects greater certainty was expected than in indictments. 1 Stark. 52.—2. In an indictment, however, for burglary, it certainly is necessary to aver that the offence was committed in the *night-time*, and it is usual to allege the hour; and in one case an indictment was holden to be defective for omitting it. 1 Stark. 52. Burn's Just. tit. Burglary. 2 East, P. C. 513. 2 Hale, 179. Hawk. b. 2. c. 25. s. 76. in notis. Bac. Abr. Indictm. (G 4.) in notis.—3. But the hour need not be proved as laid. Ibid.—4. In an indictment for breaking into a house in the day-time, the offence must, for the purpose of ousting the defendant of his clergy, be averred to have been committed in the day-time. 2 Hale, 179. Bac. Abr.

So it is sufficient, if the time be ascertained by the caption (*h*):

25

Abr. Indictm. (G 4.) Cro. C. C. 35. 1 Chit. C. L. 219. — 5. Since, however, it is, in general, unnecessary to name any hour, an imperfect mode of stating it, forms no ground of objection. 1 Bulst. 203. 1 Chit. C. L. 219.

(*h*) 1. Where an inferior court, in obedience to a writ of *certiorari*, from the king's bench, transmits the indictment to the crown-office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a *schedule*, is annexed to the indictment, and both are sent to the crown office. And the history of the proceedings, as copied or extracted from the *schedule*, is called the *caption*, and is entered of record immediately before the indictment. 1 Stark. 220. — 2. The following is the form of a caption given by Lord Hale: "Norfolk. — At a general sessions of the peace holden at S. in the county aforesaid, on the fifth day of October, in the twenty-fifth year of the reign, &c., before A. B., C. D., and their fellow justices of our said lord the king, assigned to keep the peace of our said lord the king, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the same county committed, by the oath of E. F., G. H., &c. good and lawful men of the said county, sworn and charged to inquire for our said lord the king and the body of the said county, it is presented, &c." 2 Hale, 165. 1 Starkie, 221. — 3. The caption is no part of the indictment itself. 1 Saund. 250. d. n. 1. 2 Hale 165. — 4. Its end and purpose being to shew that the court before whom the indictment was found had jurisdiction, and proceeded regularly. 2 Sess. C. 316. Andr. 138. — 5. A demurrer, however, will lie for its omission or any deficiency therein. 3 Salk. 188. 1 T. R. 319. — 6. It appears then, upon resolving the precedent given above into its component divisions, that a caption consists of seven parts: 1°. *The county in the margin*; 2°. *The court before which the indictment was found*; 3°. *The place where that court was holden*; 4°. *The time at which the indictment was presented*; 5°. *The description of the members of the court*; 6°. *The description of the jurors, or those who made the presentment*; 7°. *The conclusion of the caption*. — 7. And first, *The county in the margin*: This expresses the county in which the indictment was presented; but does not seem absolutely necessary, provided the county be stated in the body of the caption. 2 Hale, 165. 166. Burn's Just. Indict. IX. — 8. Though the usual practice is to state it in both. 1 Chit. C. L. 327. 328. — 9. The county must be stated in the body; though an incorporation by reference, namely by referring to the county in the margin, as thus, 'in the county aforesaid,' will do. 1 Chit. C. L. 328. 1 Saund. 308. n. 1. Cro. Eliz. 490. 3 P. Wms. 439. 327. accord. Cro. Eliz. 606. 738. 751. semb. contra. — 10. Secondly, *The court before which the indictment was found*: This is requisite that the proceedings may appear to have been taken under a competent authority; to which end the court must be so described, as that it may appear to be a court of competent jurisdiction. 4 Rep. 41. Plowd. 76. 77. Cro. Eliz. 193. 2 Rol. Rep. 82. Summ. 207. Ld. Raym. 710. — 11. But where the proceeding is in the ordinary course of judicial administration, the original constitution or foundation of the court's authority need never be detailed. 4 Burr. 2085. — 12. If a session be holden by virtue of several commissions, as of gaol delivery, oyer and terminer, and the peace, and the record be made up as upon all three commissions, the caption will be good, if the justices had authority to take the indictment by one of those commissions though not by the others. 2 Hale, 166. 1 Starkie, 222. — 13. To state that an inquest was taken, of a dead body, before J. S., not describing him as *coroner*, is defective; and so likewise is it, though he be described as *coroner*, without shewing that he acted in that capacity for the district in which the inquisition was taken. 2 Hawk. c. 25. s. 119. Cro. Eliz. 193. 2 Rol. Rep. 82. Bac. Abr. Indict. I. — 14. But '*coroner in the county*' is sufficient. 2 Hawk. c. 25. s. 119. 4 Rep. 41. Bac. Abr. Indict. I. — 15. A caption setting forth that the indictment was taken '*ad magnam curiam cum leta tentam*,' is sufficient, though '*ad magnam curiam et ad letam*,' would be good, for *cum leta* does not describe any court possessing jurisdiction. 1 Salk. 195. 2 Hawk. c. 25. s. 124. 2 Keb. 139. Bac. Abr. Indict. I. — 16. So it would be sufficient to allege that it was taken at a court-leet holden with a court-baron; though it would be otherwise if both courts had jurisdiction, and their modes of proceeding were different. 1 Salk. 195. 2 Hawk. c. 25. s. 124. Bac. Abr. Indict. I. — 17. Nor need the caption of an indictment taken at a court-leet shew how the court was constituted, as whether by grant or by prescription. 1 Salk. 200. 2 Hawk. c. 25. s. 125. Bac. Abr. Indict. I. — 18. Though this appears to be necessary where the indictment has been taken

taken by virtue of a special commission. Fost. 3. the caption. 1 Stark. 222. — 19. To describe the indictment as having been taken at the general sessions of the peace of the county, is sufficient. 1 Sid. 247. 2 Hawk. c. 25. s. 120. Bac. Abr. Indict. I. — 20. But the contrary to allege it to have been taken at a sessions in the county. 1 Keb. 329. 635. 668. 2 Keb. 128. 133. 1 Lev. 304. Cro. Eliz. 490. Bac. Abr. Indict. I. 2 Hawk. c. 25. s. 120. — 21. Though possibly the caption may be supported by reference to the venue in the margin. Ibid. 1 Chit. C. L. 328. — 22. To state that the indictment was taken before I. S. steward, not shewing to whom, or in what court he was such, is defective. 2 Hawk. c. 25. s. 119. Bac. Abr. Indict. I. — 23. Thirdly, *The place where the court before which the indictment was found was holden*: It must be shewn, that the indictment was taken at some place within the county or division for which the jurors are returned; for otherwise they would have no authority to inquire. 1 Starkie, 224. 2 Hale, 166. — 24. This may be done by reference to the county in the margin; thus 'in the county aforesaid.' Supra. — 25. And an omission, or uncertainty of statement in this particular, will vitiate. 1 Chit. C. L. 330. Cro. Jac. 276. 2 Hale, 166. 2 Hawk. c. 25. s. 128. Bac. Abr. Indictm. I. — 26. As where the town where the session was holden is stated, not adding 'in the county aforesaid.' Cro. Eliz. 137. 606. 738. 751. 2 Hale, 166. 2 Hawk. c. 25. s. 128. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 330. — 27. If a statute enjoins that the sessions be holden at a particular place, 'and not elsewhere,' the caption must shew that they were holden there. 2 Hawk. c. 25. s. 128. 1 Starkie, 225. — 28. A coroner's inquest was stated to have been taken at Cossam, before W. S. the queen's coroner, within the liberty of her town of Cossam aforesaid; and this was holden to be sufficient, without expressly shewing that Cossam was within the liberty of the town of Cossam. 5 Rep. 120. 1 Starkie, 225. 2 Hawk. c. 25. s. 128. Bac. Abr. Indict. I. — 29. Where the place is in Yorkshire, not the county at large, but one of the three ridings must be specified. 2 Hale, 166. Cro. Jac. 256. 257. 1 Chit. C. L. 330. Id. vol. 4. — 30. So likewise where in Lincolnshire, one of the three divisions of that county. Ibid. — 31. Fourthly, *The time at which the indictment was presented*: The day and year of the presentment must be specified. 2 Hawk. c. 25. s. 127. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 330. 4 Rep. 48. — 32. And the practice usually states the indictment to have been then presented in the present tense; though Mr. Starkie questions whether this be absolutely necessary. 1 Starkie, 224. referring to 1 T. R. 316. 320. — 33. An improper, uncertain, or impossible day will vitiate. — 34. *Improper*, as where the caption of an indictment states, that the court was adjourned from 4th October, 1785, to Thursday 6th 'July aforesaid,' instead of 'October aforesaid,' and then proceeds with, 'and on the said Thursday, the 6th day of October aforesaid;' here, since it cannot be intended that July means October, it will appear that the court was holden upon a day (6 October), to which it had not been adjourned. 1 T. R. 316. — 35. So where the sessions were alleged to have been holden *ad festum Epiphaniæ*, instead of *Epiphaniæ*, for *Epiphanius* is a Saint in the Roman Calendar; and therefore, it appeared, that the sessions were holden at a time different from that appointed by the statute. Str. 698. 1 Starkie, 224. — 36. *Uncertain*; as where the day of the week only is mentioned. 4 Rep. 48. 2 Hawk. c. 25. s. 127. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 330. — 37. Or the year laid as the year of the king, without stating what king. 2 Keb. 582. 2 Hawk. c. 25. s. 127. Williams' J. Indict. IV. 1 Chit. C. L. 330. — 38. So the caption will be invalid, if the time be set forth in any figures but Roman. 2 Keb. 128. 1 Mod. 78. 2 Hawk. c. 25. s. 127. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 330. — 39. If the indictment be taken at an adjourned sessions, it should be shewn when the original sessions began. Str. 865. 1 Starkie, 224. 2 Sess. Cas. 17. 20. 1 Barnard. 327. 328. 2 Hawk. c. 25. s. 127. n. 22. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 331. — 40. The year of the Lord need not be stated in addition to that of the king; and an error in the mode of stating it will be aided on the ground of surplusage. 1 Mod. 78. 2 Hawk. c. 25. s. 127. Bac. Abr. Indict. I. Williams' J. Indict. IV. 1 Chit. C. L. 331. — 41. Fifthly, *The description of the members of the court*: The caption ought to notice the authority of the justices to hear and determine divers felonies, &c. Str. 442. 2 Hawk. c. 25. s. 121. 2 Hale, 166. 1 Starkie, 221. 1 Vent. 33. 1 Saund. 263. n. — 42. Though, says Mr. Chitty, if the justices of the peace, before whom the indictment was found, necessarily, as such, had jurisdiction over the offence, the statement of the authority in the caption seems unnecessary; thus in the case of an indictment at sessions for a forcible entry. 1 Chit. C. L. 332. citing Cro. Jac. 634. — 43. He adds, that it should seem also sufficient to allege, that the justices were assigned to hear and determine offences of the same nature as that for which the indictment was found, without stating the whole of their power. 1 Chit. C. L. 332. — 44. Formerly, it



it was deemed necessary to describe the justices either as the king's justices, or as justices of the public peace; but it has since been holden to be sufficient to describe them as justices of the peace. 2 Hawk. c. 25. s. 122. 1 Starkie, 221. — 45. It need not be shewn by whom the justices were appointed. 4 Burr. 2084. 2085. — 46. But it is not sufficient to describe them generally as justices of the peace, &c. without either naming them or shewing for what division they are justices; and where in their description as justices *assigned* to keep the peace, &c. the word *assigned* was omitted, the caption was holden to be defective. 1 Saund. 263. 1 Starkie, 221. 222. 2 Hale, 166. — 47. It is likewise a rule to set forth the title of their authority, as that they were 'justices of the peace,' &c. 'justices of gaol-delivery assigned, &c. to deliver the gaol,' 'to hear and determine,' 'to keep the peace,' &c. 2 Hale, 166. — 48. The justices' names too must be given; and though it is not necessary to mention all, yet so many should be named, as are enabled by their commission to take an indictment. Ibid. Cro. Eliz. 738. — 49. Thus the caption of an indictment at the sessions of the peace must name two at the least. 2 Hale, 166. — 50. Under a commission of oyer and terminer, four at the least. 1 Saund. 249. n. — 51. But though no sessions can be held unless before one of the quorum, it need not be stated that any of them were such. 2 Hale, 167. 2 Hawk. c. 25. s. 124. 4 Burr. 2084. 2085. — 52. It is sufficient if *in fact* one of the quorum was present. Ibid. — 53. Lord Hale, however, doubts this, in the case where an act expressly requires that the offence shall be heard and determined before two justices of the peace, one of whom is of the quorum. 2 Hale, 167. — 54. And this is the usual course in the return of orders made by two justices concerning illegitimate children, upon the 18 Eliz. c. 3., the provisions of which are express. Ibid. — 55. If any mistakes arise in relation to the names of the justices, the court may order them to be amended. 4 East, 174. — 56. Sixthly, *The description of the jurors, or those who made the presentment*: The caption must shew that the indictment was found by twelve jurors of the county, city, or place, for which the court was holden. 1 Starkie, 223. Ld. Raym. 434. 2 Hale, 167. 2 Keb. 160. 3 Keb. 807. Cro. Eliz. 654. 1 Saund. 248. n. — 57. Their names need not be inserted in the *caption*. 1 Saund. 248. n. 249. n. 2 Str. 702. — 58. And the practice of the crown-office is to omit them. 1 Saund. 216. n. — 59. Though they must appear in the *schedule*. 1 Saund. 248. n. 2 Hawk. c. 25. s. 126. — 60. It must appear that the presentment was upon oath. 2 Hawk. c. 25. s. 126. 2 Hale, 167. Ld. Raym. 710. 3 Salk. 187. — 61. And therefore that they were sworn; in which is implied that they were charged, so as to aid the omission of that term. 2 Hawk. c. 25. s. 126. — 62. It has been holden in some instances, that the words 'present upon their oath,' supply the place of the words 'sworn and charged.' 1 Keb. 629. 2 Hawk. c. 25. s. 126. — 63. And Mr. Starkie adds, that probably this would now be holden sufficient in all cases. 1 Starkie, 224. Vide Ld. Raym. 710. 3 Salk. 187. — 64. Nor need the term 'impanelled' be used, being a necessary implication. 3 Salk. 191. Gilb. L. & E. 242. 1 Chit. C. L. 334. — 65. And though it has been holden necessary to allege, that they were then and there sworn. 2 Hawk. c. 25. s. 126. — 66. Yet Mr. Chitty says, that they are not now usual. 1 Chit. C. L. 334. — 67. The county or division for which they are sworn and charged, is also stated. 2 Hawk. c. 25. s. 126. — 68. And formerly it was requisite to describe them as good and lawful men. 2 Hale, 167. 1 Keb. 629. Cro. Eliz. 751. Cro. Jac. 635. 1 Chit. C. L. 333. — 69. But now it is considered to be unnecessary, since this is a necessary intendment of law. 1 Starkie, 224. 2 Keb. 366. 2 Hawk. c. 25. s. 16. 126. Bac. Abr. Indict. I. Burn's J. Indict. IX. Williams' Just. Indict. IV. 1 Chit. C. L. 333. — 70. The caption, however, must state that they are 'of the county aforesaid,' or other vill or precinct for which the court had jurisdiction to inquire; and the omission of these words will vitiate the indictment. 1 Chit. C. L. 333. Cro. Eliz. 677. 2 Keb. 160. 2 Hale, 167. 2 Hawk. c. 25. s. 16. 126. Bac. Abr. Indictm. I. Burn's J. Indict. IX. Williams' J. Indict. IV. — 71. Seventhly, *The conclusion of the caption*: The ancient form of concluding the caption was 'It is presented that,' &c. but the better and present form is 'It is presented in manner and form following, that is to say, Middlesex to wit, the jurors for our lord the king,' &c. and then to copy the whole of the indictment verbatim. 1 Stark. 354. 1 Chit. C. L. 334. — 72. And where the county or division is mentioned in the margin of the indictment, and the place mentioned in the body of the indictment is referred to the county in the margin by the words in the county aforesaid, it seems to be necessary to introduce the indictment according to the latter method; since otherwise the indictment would appear to be insufficient, for referring the place mentioned in it to the county aforesaid, no county having been previously mentioned. 1 Starkie, 225. 226. 1 Saund. 308. n. Vide 1 Chit. C. L. 226. referring to Cro. Eliz. 606. 738. 751. — 73. Regularly, however, the county mentioned in the margin is not an essential part of the record, unless



as, 1<sup>o</sup> *M. ult.* without the year; for that appears by the caption. (i)

So, 10 *die post Pasch' ult'*. (k)

So, *Octab. Trin. &c.* which shall be intended 8<sup>o</sup> *die*, not 4<sup>o</sup> *die post*.

So *diversis vicibus* (l) *inter* such a day and such a day, is sufficient in an information. (m) R. 2 Lev. 71. (n)

So,

unless it be made so by an express reference to it in the body of the caption, or of the indictment itself. 2 Hale, 165. 166. — 74. If two or more indictments are affixed to the same schedule, and it is intended to describe them as several and distinct, they should not be stated as several *indictments*, but as *bills*; for it is only after they have been presented that they become entitled to the former appellation. *Ld. Raym.* 592. *Salk.* 376. 1 *Chit. C. L.* 334. — 75. *Lastly*, a defective caption may be demurred to; as from an apparent defect in the jurisdiction of the inferior court; or the court may in their discretion quash it. 2 *Hawk. c. 25. s. 146.* 1 *T. R.* 316. 1 *Leach*, 425. 1 *Chit. C. L.* 335. — 76. And on a demurrer to the indictment, the court will look into the whole record. 2 *Leach*, 425. — 77. Since, however, the caption is an act merely ministerial, it is amendable so as to make it agree with the original record; and at any time, notwithstanding former opinions that the amendment could be made only during the term in which the return is made. 1 *Saund.* 249. n. 4 *East*, 175. 176. — 78. And Mr. Starkie concludes his review of the cases by observing, that upon the authority of the cases mentioned it would probably be holden, that the caption of an inquisition before a coroner, or even the inquisition itself, is amendable in matter of form after it has been filed, either in the same or in a subsequent term. 1 *Starkie*, 251. 252. — 79. Though, he adds, according to Serjeant Hawkins, it has been holden, that the caption of an inquisition cannot be amended at any time after it has been filed, any more than the body, 2 *Hawk. c. 25. s. 97.*

(i) 1. 2 *Hawk. c. 25. s. 78.* — 2. So it seems to follow, that an indictment laying the time on the *utis* of Easter, which will be taken for the eighth day after the feast, if it can be ascertained by the style of the sessions before which the indictment was taken, is valid. *Hawk. b. 2. c. 25. s. 78.* *Bac. Abr. Indictm. (G 4.)* *Burn's J. Indictm. Williams' J. Indictm. IV.* 1 *Chit. C. L.* 218.

(A) So Thursday after the day of Pentecost in such a year. 7 *H. 6.* 39. 1 *Stark.* 51.

(I) 1. Where an offence is made up of several acts done at various times, they may be averred to have been done at the same time. *Leach*, 655. *Fost.* 8. — 2. Thus overt acts of treason done at different periods. *Fost.* 8. — 3. So where, under an indictment upon 7 *Geo. 3. c. 50. s. 1.*, it appeared that a bank-note had been divided, the parts sent at different times, and secreted at different times, by the defendant; the indictment, laying the acts of secretion upon one and the same day, was held good. 2 *Leach*, 575.

(M) 1. The word *until* is capable of either an exclusive or inclusive, and will be taken in that in which, from the context, it appears to have been used. 5 *East*, 244. — 2. And, therefore, where, in an information upon the statute of the 33 *Geo. 3. c. 52. s. 62.*, prohibiting officers of the East India Company, *residing* in India, from receiving presents of the natives, the defendants were charged that from a certain day *until* the 29th of November, 1795, they held certain offices under the Company, and during all that time resided in the East Indies, and during that time, to wit, on the said 29th day of November, 1795, received certain presents; it was decided, that the context shewed that the word *until* was to be taken inclusive of the 29th of November. 5 *East*, 244. — 3. If, however, it had not been capable of receiving an inclusive construction, the words under the first *videlicet* 'until the 29th of November 1795,' could not have been rejected as surplusage; for that can never be done where the allegation is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a *scilicet*, and inconsistent with a subsequent allegation. *Ibid.* 1 *Chit. C. L.* 223. 224. — 4. And in like manner the word *to*, when applied to *time*. 5 *East*, 255. — 5. The words *from* and *unto* when applied to *place*, are construed exclusively. 2 *Ro. Abr.* 81. *Leach*, 596. 597. *Burr.* 376. 3 *T. R.* 513.

(N) 1. 4 *Mod.* 101. *contra.* *Vide etiam* 2 *Hawk. c. 25. s. 82.* — 2. And the court in deciding that a conviction for having killed ten deer, between the 1st of July and the 10th of September, was good, distinguished between convictions and informations or indictments. *Ld. Raym.* 581. *Vide* 10 *Mod.* 335. — 3. Mr. Starkie's opinion agrees with the text. 1 *Stark.* 51. n. (8.) — 4. If an indictment charge a man with keeping a common gaming-house on divers days, and only one day be particularly specified,

So, the precise day is not necessary (*o*); for he may be found guilty if the offence was at a former or a subsequent day. R. 2 Inst. 318. (*p*)

And if the offence be proved at a day before or after the time alleged in the indictment, it will be well. (*q*) R. upon an indictment for high treason. Kelg. 16. (*r*)

Though it was eleven or twelve years before. Kelg. 16.

So, in every indictment for treason (*s*), felony, &c. R. per all the judges. 3 Inst. 230. Syer.

And if the offence was at a day after the time in the indictment, the jury may find the very day of the fact, to ascertain the forfeiture; or if they find the party guilty generally, a lessee, &c. may falsify as to the time, though not as to the offence, for avoiding the forfeiture. R. 3 Inst. 230.

So to a neglect or non-feasance (*t*) no time is necessary; for the present time shall be intended: as, *quod non escuriavit fossam, &c.* (*u*)

specified, it will be good; though but one penalty can be inflicted. 10 Mod. 338. Hawk. b. 2. c. 25. s. 82. 1 Chit. C. L. 218.

(*o*) 1. Unless some time be limited for the prosecution, or time itself be material to the constitution of the offence, *the averment of time* is altogether formal. 1 Stark. 50. — 2. Still, however, laying an impossible or future day will vitiate, the same as an omission of time altogether. Rast. Ent. 263. Moore, 555. 1 T. R. 316. Hawk. b. 2. c. 23. s. 88. c. 25. s. 77. Burn's J. Indictm. 5 East, 244. 1 Chit. C. L. 225. — 3. So a repugnancy in the allegation of time. 5 East, 244. — 4. As, that the offence was committed on two different days. 1 T. R. 316. Hawk. b. 2. c. 25. s. 77. — 5. Nor will a verdict cure the defect.

(*p*) 1. In an indictment for homicide, as well the day of the stroke, as of the death, should be expressed. 2 Hale, 179. — 2. And where the time is material, as of the death in case of homicide, or where the time for prosecution is limited; the time, as averred in the indictment, should appear to be within the limit; but it is not necessary expressly to aver, that the death happened, or that the offence was committed, within the temporal limit. 1 Stark. 55. 5 East, 259.

(*q*) Though the time laid in an indictment is definite in allegation, it is indefinite in proof. The forms of law require that the person who charges another must bring himself within the limits prescribed by the law; and for that reason some certain time must be laid in the indictment. 3 M. & S. 548.

(*r*) 1. And therefore, upon a second indictment varying from the time of the first, an acquittal on the first may, by proper averments, be pleaded. 2 Inst. 318. 2 Inst. 230. 2 Hale, 179. — 2. So, in an indictment for burglary, though it is necessary to state at or about what hour of the night it happened, it is not necessary that the evidence should strictly correspond with the allegation. 2 East, P. C. 515. — 3. And if an unnecessary allegation as to time be introduced and not proved, it may be rejected, and the defendant be convicted. — 4. And, therefore, if in an indictment for firing a barn, the offence be laid to have been committed in the night-time; the allegation is immaterial, and the indictment, though intentionally framed upon the 22 & 25 Car. 2. c. 7., will be considered as a valid indictment upon the 9 Geo. 1. c. 22. 2 East, P. C. 1021. 1055.

(*s*) 1. Foster, 8. — 2. It is said, however, to be the better course, though, after all, quite optional, to state the time as correctly as may be; especially in *treason*, since there the forfeiture of lands relates to the time when the offence was committed, so as to avoid subsequent alienations, and since the day laid in the indictment, will, after a general verdict, be considered as correct. 1 Hale, 161. 2 Hale, 179. 3 Inst. 330. Bac. Abr. Forfeiture, (D). 1 Chit. C. L. 224. 225. — 3. If a person be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that a distinct larceny was committed on a prior day. 2 Leach, 708.

(*t*) 1. And. 139. Hob. 251. 2 Leon. 167. 1 Hawk. c. 10. s. 5. — 2. Or to the allegation of any personal disqualification. 2 Hawk. c. 25. s. 84. 112. 2 Hale, 180. 1 Stark. 62.

(*u*) 2 Hawk. c. 25. s. 79. Lamb. b. 4. c. 5. f. 492.

So

So the place (*x*) is sufficient, without the (*y*) county (*z*), if the county be in the margin. (*a*)

So the time or place (*b*) need not be repeated to circumstances. Mar. pl. 127. 2 Rol. 226. (*c*)

And it is sufficient, that it be coupled to a time precedent in an indictment for a trespass: as, an indictment for a forcible entry, *quod* 1<sup>o</sup> *M. intravit & ipsum disseisivit*, without saying, *adtunc & ibidem disseisivit*, is sufficient. R. 2 Cro. 41. (*d*)

If a mortal wound be given, upon which the party dies at another day, the death ought to be alleged at the last day. (*e*)

By the st. 2 & 3 Ed. 6. 24. If the stroke be in one county and the death in another, the indictment may be in the county where the death was.

And an accessory in one county to an offence in another, may be indicted where he was accessory.

If a robber in one county fly with the goods into another, he may be indicted of the felony there, but not of the robbery.

(*x*) 1. *Communis strata, sive alta regia via*, denote the same place, and are not uncertain. Str. 44. — 2 The *termini à quo et ad quem* of a way are unnecessary. Ibid.

(*y*) At the parish of A., near the highway, and dwelling houses, is sufficient for a nuisance, without saying in the town or village. 1 Burr. 333.

(*z*) The place must appear to be within the county. 2 Hale, 180.

(*a*) 1. And a reference be made, as by the words 'in the county aforesaid.' 2 Hale, 180. 3 P. Wms. 439. — 2. Otherwise the averment will be defective, for want of a county. 3 P. Wms. 439. 2 Hale, 165, 166. 2 Hawk. c. 25. s. 128. Cro. Eliz. 101. 137. 184. 606. 618. 750. Sid. 345. 3 Wils. 340. — 3. If the offence be laid to have been committed in a city which is a county of itself, but the jurisdiction of the latter is not co-extensive with the former, the offence should be laid within both. Andr. 162.

(*b*) The rules relating to the averment of time, apply for the most part to the averment of place; where the time must be repeated upon the allegation of subsequent acts, so must the place. 1 Stark. 61. 2 Hale, 180. 5 T. R. 620.

(*c*) 1. Nor to a mere conclusion of law; though a defective averment in this respect will vitiate. 2 Hawk. c. 25. 1 Stark. 61. 2 B. & P. 127. 2 Leach, 942. — 2. Though the general rule is, that unnecessary averments, not intimately connected with the circumstances which constitute the crime, will be rejected as surplusage. 2 Leach, 593. Vide infra in notis. — 3. Upon which subject the distinction is settled to be, that if the averment be connected with the charge, it must be proved; if wholly immaterial, as if the averment be totally unconnected, it need not be proved. 2 Leach, 594. Vide infra in notis.

(*d*) 1. But a different rule often obtains in indictments for capital crimes, and this in *favorem vitæ*. — 2. Thus in murder the terms *adtunc et ibidem* must be repeated to the stroke, though an averment of time and place is antecedently subjoined to the assault. 2 Hale, 178. Hawk. b. 2. c. 23. s. 88. Cro. Eliz. 739. 1 Chit. C. L. 220. — 2. So in an indictment for robbery, these words must be connected with the stroke for the robbery, and not merely with the assault. 1 Chit. C. L. 220. 2 Hale, 178. Hawk. b. 2. c. 23. s. 88. Cro. Eliz. 739. Supra in the text.

(*e*) 1. It is frequently necessary to assign distinct periods of time to distinct events. — 2. Thus, in homicide, to the event of the death, as well as of the stroke; of the stroke, because the escheat and forfeiture of lands relate thereto; of the death, because it must have happened, and therefore must appear to have happened, within a year and day after the stroke. 2 Hale, 179. 2 Inst. 318. Hawk. b. 2. c. 23. s. 90. c. 25. s. 77. Bac. Abr. Indictm. G 4. Burn's J. Indictm. 1 Chit. C. L. 222. — 3. And a repugnancy as to time in the averment, at the conclusion of an averment deducing the inference from the premises, 'and so the defendant feloniously murdered J. S.;' will vitiate. 4 Rep. 42. Hawk. b. 2. c. 23. s. 88. Bac. Abr. Indict. (G 4.) — 4. An indictment for a rescue, the day and year, as well of the rescue as of the arrest, must be averred. Hawk. b. 2. c. 25. s. 77. Dyer, 164. b. 1 Chit. C. L. 223. accord 2 Balst. 208. contra.

## (G 3.) Of the offence. — What shall be uncertain.

So an indictment ought to shew the certainty of the offence; and therefore, an indictment for murder or felony, must shew all (*f*) the circumstances (*g*) of the fact in certain (*h*): as, by whom. (*i*)

In

(*f*) 1. If there is any description in the negative, the affirmative of which would excuse the defendant, the *onus probandi* is thrown upon him, and therefore it need not be detailed by the prosecutor. 1 Sid. 303. 2 Hawk. c. 25. s. 112. 5 T. R. 84. — 2. Hence an indictment against the receiver of stolen goods, proceeding upon the statute 5 Ann. c. 31., is good, though it does not show that the principal could not be taken so as to be prosecuted and convicted. Ld. Raym. 1370. Post. 373. contra. — 3. So on indicting the receiver of stolen property, under 22 Geo. 3. c. 58. s. 1., for a misdemeanour, it need not be averred that the principal has not been convicted. 8 T. R. 83.

(*g*) 1. The crime must be charged with a precision and certainty intelligible to all; and with every essential requisite to the offence. 1 T. R. 63. — 2. Every circumstance, therefore, necessary to the offence must be alleged; and positively, without any periphrasis or intendment. 2 East, 35. — 3. Insomuch, that an indictment will be defective where all the facts charged *may be* true, and yet the defendant be innocent. Dougl. 153. — 4. In an indictment, two introductory facts were averred in circumstance precisely similar, but which very consistently might, as alleged, have happened upon different occasions. Afterwards the *gravamen*, or offence, is stated, to which one (but no matter which) of the previous facts was a necessary circumstance and appendage, and it referred to one of these facts, connecting itself with it, but to which of the two was uncertain. For this uncertainty, the indictment was holden to be erroneous; since, for any thing that appeared, there had been two complete offences, and from an indictment in this form, it could never be known for which of the two the defendant had been tried; insomuch that, upon being a second time indicted for the same offence, he would be disabled from pleading the former prosecution in bar. 4 M. & S. 214. — 5. Stating a breach of duty to consist in not having commenced and prosecuted a war 'with all possible vigour and decision,' is too indefinite, since thereby the defendant is not apprised what is meant to be proved. 5 T. R. 607.

(*h*) 1. See the first note to (G 1.) *supra*. — 2. It is necessary, says Mr. Starkie, to specify the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence. 1°. In order to identify the charge, lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief, for another, without any authority. 2°. And this is farther necessary, that the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds; the offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same offence. 3°. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case. 4°. To enable the defendant to prepare for his defence in particular cases, and to plead in all, or, if he prefer it, to submit to the court by demurrer, whether the facts alleged, supposing them to be true, so support the conclusion in law, as to render it necessary for him to make any answer to the charge. 5. Finally, and chiefly, to enable the court, looking at the record after conviction, to decide whether the facts are sufficient to support a conviction of the particular crime, and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender. 1 Stark. 63, 64. — 2. The only instances, he continues, in which general pleading seems to be allowable, are exceptions, from the necessity of the case, where the offence is made up of a number of minute acts, which cannot be enumerated upon the record, without great prolixity and the danger of variance. 1 Stark. 65. 2 Hawk. c. 25. s. 59. 6 Mod. 311. Str. 1246. Burr. 1235. — 3. Thus, in an indictment against a common scold, it is sufficient to aver that she is a common scold; and in an indictment for barrettry, it may be averred, generally, that the defendant is a common barretor. 1 Stark. 65. — 4. So, an indictment charging the defendant with being *æstivator*, is good. 2 Hale, 182.

(*i*) 1. The deceased must be named. 2 Hawk. c. 25. s. 71. Staunf. 181. h. 2. c. 18. — 2. Un-

In what manner committed. (*k*)

Upon what part the wound was given; upon the face, arm, &c. 4 Co. 41. a. R. 5 Co. 121. b.

And of what depth or breadth the wound was, when there was no amputation. 4 Co. 42.

If it says, *quod suffocavit, &c. et quâ suffocatione obiit*, without saying, *de quâ, &c.* it is bad. 1 Rol. 137.

So an indictment, *quod dedit plagam circiter pectus*, or, *super brachium*, without saying, *dextrum*, or, *sinistrum*, is bad. 4 Co. 40. b. R. 5 Co. 121. b. (*l*)

So an indictment for larceny ought to shew (*m*) the (*n*) value (*o*) of the goods (*p*), to distinguish grand, or petit larceny. (*q*)

If

— 2. Unless not known. 2 Hale, 181. Dyer, 99. 285. Plowd. 85. 129. 2 Hawk. c. 23. s. 78. c. 25. s. 71. Bac. Abr. Indictment (G 2.) Burn's J. Indictment. C. C. C. 36. — 3. And the reason why he should be named, if known, is, that the party charged may be enabled to vouch for his acquittal. Staunf. 181. b. 2. c. 18. — 4. It has been holden, that an indictment for an assault upon John, parish priest of D., in the county of C. is sufficient, for it is such a description of the person that it can apply to one only. 2 Hawk. c. 25. s. 72. — 5. But otherwise the description by the name of baptism only, is insufficient. 11 Hawk. 172. — 6. The person may be described by the name by which he is usually known. Leach, 861. 1006. 2 Hawk. c. 25. s. 72. — 7. Any repugnancy or inconsistency in the description of the person injured, will vitiate the indictment; as where the defendant is charged with stealing the goods *prædicti* J. S., no such person having been previously mentioned. 2 Hawk. c. 25. s. 72. — 8. For though in civil actions the word *prædictus* has been rejected as surplusage, yet this is said to have been done by virtue of the statutes of jeofails, which, it is well known, do not extend to criminal cases. 1 Stark. 173. — 9. And it may be laid down as a universal rule, that any variance from the name laid in the indictment will be fatal upon the trial. 1 Stark. 173.

(*k*) 1. In order that the court may see that the means and manner amount in law to the crime imputed. 1 Starkie, 113. — 2. But where the means are indifferent, provided the end be accomplished, such means may be described in general terms. 1 Starkie, 129. — 3. So a party may plead in general terms what is peculiarly within the knowledge of his adversary: hence an indictment against a baker for mixing improper articles with his bread may state generally, that the loaves contained divers noxious materials, without specifying what those materials were. 3 M. & S. 11. — 4. And where a crime is made up of several independent facts, a general description is sufficient; for example, in the cases of a scold, of barratry, and of keeping a gaming or disorderly house. 2 T. R. 586. — 5. But otherwise where it consists of a single fact; thus, in obtaining money under false pretences. 2 T. R. 586.

(*l*) 1. The description usually given to the party injured, of being in the peace of God and the king, is unnecessary. 4 Rep. 41. 2 Hawk. c. 25. s. 73. — 2. It seems to have been borrowed from the Treuga or Pax Dei, and the Pax Regis described by Dr. Robertson, in Note XXI. to his View of the Progress of Society in Europe, from the subversion of the Roman Empire to the beginning of the Sixteenth Century.

(*m*) It is essential to the crime of larceny, that the party must have feloniously stolen property, and that the property stolen must belong to some one. Hence that the defendant did so steal, and that the property did belong to some one person, must appear in the indictment. This too must appear in the body of the indictment, and not merely in the conclusion, since the conclusion is merely to be taken as the regular legal inference from the premises that have gone before; a mere consequence drawn from other previous matter; and, therefore, being such, can never supply a deficiency in the body. 3 M. & S. 539.

(*n*) The owner's name, if known. Vide infra, (G 5.) in notis.

(*o*) 1. Vide infra. — 2. In general, if the property be correctly described in species, a variance from that description upon the trial, as to value, (weight, magnitude, or number,) will be immaterial, unless the variance either affect the nature of the crime, as well as the degree of the offence, or the magnitude of the penalty. 1 Stark. 187. —



If it be a live thing, it is said *pretii*; if dead (*r*), *ad valentiam*. (*s*)

So

3. And there is a distinction between cases, where, to constitute the offence, the value must be of a certain amount, but where the excess beyond that amount is immaterial; and those where the offence, or its defined measure of punishment, depends upon the quantity of that excess: for, in the first class, if that amount be proved, which is sufficient to constitute the offence charged, a variance from the amount averred is immaterial; but in the second the amount or quantity must be proved precisely as it is laid, and any variance will be fatal. 1 Stark. 187, 188. — 4. Thus in an indictment for a highway robbery, a variance from the value laid is wholly immaterial; for there the value of the property affects neither the nature of the offence, nor the measure of punishment. 1 Stark. 188. — 5. In an indictment under st. 12 Ann., for stealing in a dwelling-house to the amount of 40s., the property must be proved to be of the value of 40s., but the excess is immaterial. 6 T. R. 265. — 6. So under an indictment framed upon the statute 17 G. 3. c. 26. s. 7. for taking more than ten shillings in the hundred pounds for brokerage, it is necessary to prove that the defendant took more than ten shillings in the hundred pounds, for in that the offence consists; but the quantum of the excess is immaterial, and need not be proved as laid in the indictment. 1 Stark. 188. — 7. And the same in the case of extortion. Ld. Raym. 149. 1265. — 8. But in the case of usury, where the judgment depends upon the quantum taken; the usurious contract must be averred according to the fact; and a variance from it in evidence would be fatal, because the penalty is apportioned to the value. 6 T. R. 265. 1 Stark. 188.

(*p*) 1. So their genus. 2 Hawk. c. 28. s. 74. 496. 3 M. & S. 539. — 2. Therefore, to say *bona et rattalla* is insufficient, since that is a description indefinite, and applicable to every kind of goods. 3 M. & S. 545. — 3. And with at least the same certainty as in trespass for goods. Hale, 183. — 4. And where the statute upon which the indictment proceeds, uses a generic and also specific terms, the latter must be employed. Leach, 123. — 5. But otherwise, it is sufficient to describe the goods stolen by their generic name, without defining the particular species; thus, it is sufficient to say sheep, without distinguishing whether ewe or lamb; so handkerchief, without distinguishing whether linen or silk; so printed books, without giving their titles. 3 M. & S. 539. — 6. And the reason seems to be, because the defendant must always know what he has taken or embezzled. 3 M. & S. 555. — 7. So if a statute make a class of property the subject of larceny, which at common law was not so, the property is, *quoad* the form of describing it in an indictment, placed upon a footing with other chattels; and therefore the same and no greater degree of certainty required in the description of the one will suffice in that of the other. 3 M. & S. 539. — 8. For example, bank notes are by the 2 Geo. 2. c. 25. made the subject of larceny, and an indictment under 39 Geo. 3. c. 85. for embezzling bank-notes, describing them as 'divers, to wit, nine bank-notes for the payment of divers sums of money, to wit, the sum of 9*l*. of lawful money,' is sufficient, without setting forth the individual description of each note: embezzlement under the act is a larceny, and the property stolen is described by its generic term, which in larceny is sufficient. 3 M. & S. 539.

(*q*) Lamb. 497. 2 Hale, 183.

(*r*) 1. Animals usually found wild, must be described either as reclaimed or dead, or shewn to have been deprived of their natural liberty, as fish are in a stew, trunk, or close pond. Staunf. 25. 3 Inst. 109, 110. East, P. C. 607. 611. 3 Salk. 189. 6 Mod. 183. — 2. And may then be called the goods and chattels of the prosecutor. Staunf. 25. 3 Inst. 109. 3 Salk. 189. 6 Mod. 185. Lamb. 274. 1 Hawk. c. 53. s. 39.

(*s*) 1. According to the ancient authorities. Lamb. b. 4. c. 5. f. 497. 2 Hale, 187. — 2. It seems, however, that they may be used indifferently. 2 Hale, 183. Cro. Jac. 130. 2 Hawk. c. 25. s. 75. — 3. In larceny, value, being an essential, must be expressed, unless in the case of current coin. 1 Hale, 534. 1 Stark. 187. — 4. And in grand larceny, must exceed one shilling. 2 Hale, 183. — 5. But where value is not an essential, as on indicting for a trespass, it has been questioned whether it need be averred. 2 Hawk. c. 25. s. 75. Vide Dalton, c. 181. Lamb. b. 4. c. 5. f. 496, 497. 2 Hale, 183. — 6. Mr. Starkie, however, observes, that there seems to be this material distinction between writs in civil proceedings (in analogy to which the question was raised) and indictments; that, in the former case, the damages are to be assessed by a jury, and therefore it is not so requisite to set out the precise value upon the face of the record; but in criminal cases the punishment is frequently inflicted at the discretion of the court, which ought, therefore, to be judicially informed of

So an indictment for an escape, or breaking prison, ought to shew for what crime he was taken, (*t*) or committed. St. 95. a. (*u*)

For a contempt in not executing a warrant, it ought to shew the nature and tenor of the warrant. R. 1 Vent. 305.

An indictment for extortion ought to shew in what instance committed. Mod. Ca. 32, 33. (*x*)

What fee was due (*y*), or that nothing was due. R. 3 Leo. 268. (*z*)

An indictment for ingrossing (*a*) *magnam quantitatem* (*b*) *straminis et fœni*, without saying how much, is bad. R. Cro. Car. 381. (*c*)

So, for erecting *diversa* (*d*) *cottagia*. Sho. 389. (*e*)

Or, for stopping *quandam partem regie viæ, aquæ cursus, &c.* Sho. 389.

Or, for an assault upon several of the king's subjects, between such a day and such a day. Per Holt, Sho. 390. (*f*)

For saying or publishing such words, *aut* (*g*) *similia*. Bro. Action sur Case, 112.

Quod

of the circumstances and magnitude of the offence. 1 Stark. 187. — 7. Where several articles have been stolen, not the aggregate, but the value of each article must be given. 2 Hale, 183.

(*t*) 1. And that an offence had actually been committed by the party arrested. 3 P. Wms. 497. — 2. A prisoner cannot be convicted on the 16 Geo. 2. c. 31. for facilitating an escape, if it appear either by the indictment or on evidence that the commitment was for suspicion only. The act makes the offender guilty where the prisoner 'was committed to, or detained in, any gaol for treason or felony expressed in the warrant of commitment or detainer.' Leach, 97.

(*u*) 2 Str. 1226. Hawk. b. 2. c. 25. s. 57. Bac. Abr. Indictm. (G 1.)

(*x*) 1. Vide Sidf. 91. Keb. 357. Ld. Raym. 1265. — 2. It being a rule that misconduct in office must be particularly described. — 3. And, therefore, charging a constable with having improperly and negligently conducted himself in the execution of his office, is insufficient. Str. 2.

(*y*) 1. Since to aver (expressly or by implication) that the whole fee was extorted, when something was really due, would be contrary to the fact. — 2. In such case, therefore, the sum really due must be alleged, and how much the defendant took. Salk. 680. Ld. Raym. 1265. 3 Lev. 268. Str. 73. 1 Stark. 143. — 3. Nor, as it seems, will a variance be material, provided it is proved that the sum actually taken exceeded that alleged, and proved to be allowed by law. Stark. ibid. 6 T. R. 265. Ld. Raym. 1265. West, Pr. Sec. 111.

(*z*) Unless the law will intend that nothing was due; which it will intend where the taking is manifestly unjust and unlawful; as where the taking any fee for performing a particular duty is wholly prohibited by a statute. 1 Stark. 145.

(*a*) So for stealing '*magnam quantitatem straminis, et diversos cumulos tritici — duas centenas casei*,' not adding any substantive to *centenas* ascertaining the weight. 2 Hawk. c. 25. s. 74.

(*b*) 1. Quantity should be ascertained by an averment of number, weight, or measurement. — 2. As in indictments for selling such a quantity by unlawful or short measures or weights. 2 Leon. 38. Salk. 687. Str. 497.

(*c*) So for engrossing a great quantity of fish, geese, ducks, &c. 1 East, 582. Str. 497. 2 Hawk. c. 25. s. 74. 1 Sid. 317. accord. 6 Mod. 42. contra.

(*d*) Vide infra, (G 5.)

(*e*) 2 Rol. Abr. 85.

(*f*) Supra, (G 2.)

(*g*) 1. 5 Mod. 137. Salk. 342. 371. 8 Mod. 32. Str. 747. 900. — 2. Where however several circumstances are mentioned disjunctively in a statute, any one of which is sufficient to oust the offender of his clergy, it is sufficient to charge the defendant *disjunctively* in the indictment; and therefore it was holden to be sufficient, in an indictment for a highway robbery, to aver in the words of the statute, that it was committed in *or near* the highway; the words being descriptive only of the manner. 1 Stark. 211. 1 Hale, 535.

*Quod fabricavit, seu fabricari causavit, &c.* R. 1 Sal. 342. 371. (h)

*Quod cepit extorsire pro quolibet equo 2d. pro quibuslibet 20 ovis, &c.* R. 4 Mod. 103. (i)

So, *quod A. existens servus, sive deputatus, took, &c.* is bad. R. Rol. 263.

*Quod cum* there was such an order, &c. for it should be positive, that there was. R. 1. Sal. 371. (k)

*Quod exoneravit tormentum dans (l) plagam*, without saying, *percussit.* R. 5 Co. 122. b.

*Quod nesciens potum fore venenatum bibit*, without saying expressly, *venenum bibit.* R. 4 Co. 44. b.

That he refused bail, without saying that any was offered. R. Mod. Ca. 3 2, 33. (m)

That he made *panes non habentes debitum pondus*, without saying, what is due weight. R. Sal. 687. (n)

*Quod exercuit quasdam diabolicas artes, Anglicè, witchcraft.* R. Lat. 156.

*Quod dixit (o) diversa scandalosa (p) verba* of such a magistrate, without saying, what words. R. 1 Rol. 79. (q)

That

(h) *Quod sepem levavit vel levare causavit*, in the case of a nuisance. Str. 900. — 2. For conveying, or causing to be conveyed, a pauper. B. R. H. 570.

(i) 1. *Quia male et negligenter se gessit in executione* of the office of constable, is too general. Str. 2. — 2. So *de scriptis, bonis et catallis, de D. decipiebant et defraudabant.* Str. 8. — 3. So *diversas quantitates cervisiarum.* Str. 497.

(k) 1. 2 Hawk. c. 25. s. 60. 3 Mod. 53. Ld. Raym. 1563. Burr. 400. — 2. Since 'whereas' signifies 'it being so,' and therefore takes that for granted, which should have been asserted to exist, depriving the defendant of the opportunity of traversing; for a party cannot be put to prove the existence of what he never asserted.

(l) 1. Bulst. 124. Vide Ld. Raym. 1169. — 2. For a participle asserts nothing, and as a party cannot be put to prove the existence of what he never asserted, the defendant cannot traverse a fact, introduced by a participle.

(m) Kingston and eight others were indicted for a joint contempt in disobeying an order of sessions, directing the payment of certain costs by commissioners, of whom the defendants were nine. The first count alleged that notice of this order had been served upon four of the defendants named in the indictment, and also upon a fifth commissioner, who was not included in the indictment, and then charged those four and two others jointly with the contempt, in refusing to obey the order. Upon general demurrer the count was holden bad, since it charged six with the contempt, four only having been personally served. 8 East, 41.

(n) And how much was wanting.

(o) So a libel must be set out in the terms in which it was published. Ld. Raym. 414. Salk. 417. 3 Mod. 71. 6 T. R. 162.

(p) So in an indictment for blasphemous or seditious words, they must be stated, that the court may judge whether they be seditious or blasphemous. Str. 498. 686. 1 Stark. 114.

(q) 1. 2 Str. 699. — 2. '*Calumniatrix, et communis et turbulenta pacis perturbatrix et lites rixas et pugnas movit et incitavit, et quondam J. A. verbis contumeliis et opprobriis abusa fuit in domo ipsius J. A.*' is too general. Str. 849. — 3. So is a 'common and turbulent brawler, a sower of discord among her quiet and honest neighbours, so that she hath stirred, moved, and incited, divers strifes, controversies, quarrels, and disputes, amongst his majesty's liege people.' Str. 1246. — 4. None but common scolds are indictable by such general words. Ibid. — 5. So in an indictment under 6 & 7 W. 3. c. 11. for profane cursing and swearing, it was (for now the 19 Geo. 2. c. 21. gives a general form of conviction) necessary to set out the particular oaths and curses; because what is a profane oath or curse, is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so. 1 Stark. 114. Str. 497.

(r) 1. That

That he took a servant without a testimonial, it ought to shew a former service. Skin. 343. (r)

That he inticed A. from his service, it ought to say, *quod reliquit*. R. Mod. Ca. 99. 101. (s)

That he inticed a servant to take the goods of his master, it ought to say expressly, that he took them. R. Mod. Ca. 289. (t)

So where an indictment is founded upon a contrivance, a fact in pursuance of it ought to be alleged. 1 Sal. 380. (u)

If there be an indictment for refusal of an office, it ought to shew an election by good authority. 5 Mod. 96.

If for a *rescous*, it ought to shew the writ, and also the warrant. R. 2 Mod. Ca. 357. (x)

An

(r) 1. That fact not being a necessary implication. — 2. So an indictment for selling, as two chaldron of coals, a quantity deficient in so much of that quantity which by law the bushel ought to contain, is not equivalent to a charge of selling by false measure. 5 Burr. 1697. — 3. So likewise, supposing it to be an indictable offence in a miller to return to his customers, as and for the produce of their own grain, a different meal, musty and unwholesome, it must be so upon the ground that he delivered it as and for the food of man, and so appear in the indictment against him. An averment that he delivered it, does not, *ex vi termini*, import that he delivered it for that purpose. 4 M. & S. 214.

(s) 1. This case went upon the principle, that a mere solicitation to commit a crime, not followed by any act, is not an indictable offence. — 2. But the contrary is now settled to be law. 2 East, 4.

(t) 1. See the last note. — 2. So that the contrary is now settled law; and therefore lately an indictment for soliciting and inciting one A. a servant of B. to take, embezzle, and steal, a quantity of his master's goods, was supported. 2 East, 4.

(u) 1. So an indictment on 33 Hen. 8. c. 1. for procuring by false tokens, must specify them. Str. 1127. — 2. So an indictment on 30 Geo. 2. c. 24. for obtaining money by false pretences, must specify the pretences. 2 T. R. 581. — 3. As to the averment of falsehood, see 2 East, 30. — 4. An indictment, however, charging an endeavour, against 57 Geo. 3. c. 70., to entice, not specifying the means employed, is sufficient. 1 B. & P. 180. — 5. Mr. Starkie has established the following rules upon the subject of illegal solicitations, attempts, and endeavours. — 6. That in general it is essential that the particular means and manner should be set out, in order that the court may see that they amount in law to the crime imputed. 1 Stark. 113. — 7. And the exceptions to this rule consist of cases, where the means are either perfectly indifferent, provided the criminal object be accomplished, or where they are made up of a number of circumstances, which cannot well be described upon the record without the aid of a general term of art. Ibid. — 8. The sufficiency of the first class of exceptions (where the means are indifferent, provided the end be accomplished) he rests upon this, that the adequacy of the means of procurement is a mere question of fact for the cognizance of the jury; and since any means are sufficient to render the procurer criminal, it would afford no further information to the court to set them out. 1 Stark. 132. — 9. That where the offence consists in the mere solicitation, or other attempt to procure the commission of a crime, which is not afterwards perpetrated, here, since the offence rests in tendency only, a greater degree of particularizing appears to be necessary in stating the means, for by those alone can the defendant's criminality be tried, since their adequacy is not shewn upon the record by an averment that they did produce the criminal effect. 1 Stark. 133. — 10. That, however, there are many instances in which, though the crime rests in tendency only, it may be described by general words, without specifying the means; this happens when the offence is a conclusion of fact arising from a variety of circumstances incapable of any precise definition. 1 Stark. 134. — 11. The endeavour, attempt, or solicitation, is in general made up of a number of petty circumstances, which cannot be set out upon the record. 1 Stark. 136.

(x) 1. In an indictment for obstructing an officer in the execution of process, it must distinctly appear that he was authorised to execute it, and therefore that he was

An indictment *pro contrafact' monetum ad instar pecun' domini regis* ought to show, *ad instar* what pieces, viz. groats, shillings, &c.

(G 4.) And not supplied by *innuendo*.

So words uncertain cannot be supplied by an *innuendo*: as, an indictment for treason for saying, We have had two wicked kings (*innuendo* Cha. I. and Cha. II.) if they (*innuendo* the people) would stand to their principles, we should conquer our enemies (*innuendo* the king and all his loyal subjects,) is bad; for an *innuendo* cannot determine the sense of the words. R. 3 Mod. 53. (y)

(G 5.) What is a sufficient certainty.

But certainty in an indictment to a general intent, is sufficient. Co. L. 303. a. 5 Co. 121. a. (z)

an officer of the court. This fact is not apparent from an averment that the judges of a court of record for the town and county of P., by their writ issued out of the said court, directed to A. and B. serjeants at mace of the said town and county, did command them, &c. 5 East, 304. 1 Smith, 555. — 2. And the act of obstruction must be shewn. Str. 699. — 3. Where, upon such an indictment, a general verdict is given for the crown, whence it appears that the officer was not authorised to execute the process, it will be intended that the assault was for preventing what would have been an unlawful proceeding, and the judgment, therefore, will be arrested *in toto*. 5 East, 304. 1 Smith, 555.

(y) 1. Few subjects have occasioned more discussion, than the *innuendo* in pleading; and various descriptions of its nature and office have been given. The following is submitted to be its office, and the reason why it cannot add to what has gone before. — 2. It performs the office of an interpreter, giving to words or signs a definite meaning, which without it would be ambiguous. — 3. Being a participle, it asserts nothing; and *for that reason* cannot supply a deficiency; but for that only, since it is immaterial in what part of a count an averment is introduced. — 4. And that a participle asserts nothing appears from considering its nature. Every complete verb is expressive of an *attribute*; of *time*; and of an *assertion*. If we take away the *assertion*, and thus destroy the verb, what remains is a *participle*: a participle, therefore asserts nothing. See Hermes, b. 1. c. 10. — 5. Now, in order to define an ambiguous expression, it is sometimes necessary to refer to and identify it with extrinsic collateral circumstances, and as, in such a case, those circumstances form a constituent branch of the case, their existence must be averred; not in the *innuendoes*, for these we have seen are not modes of assertion, but in other parts of the record. — 6. And hence Mr. Starkie's most correct definition of an *innuendo* in its ordinary sense — an averment which explains the defendant's meaning by reference to antecedent matter, (that is) matter which has antecedently been averred. 1 Stark. 109. — 7. But the conclusion, that since this is the proper office of an *innuendo*, if it go beyond it, and materially enlarge the sense of the words which it is intended to explain, by introducing new matter, it will vitiate the indictment, must be thus qualified, that the new matter is introduced participially, since new matter may be introduced in the same sentence with the *innuendo* by an adjunct thereto in an appropriate form; thus, though to an accusation 'he has burnt my barn,' an *innuendo* 'meaning his barn full of corn,' would, without antecedent averments, be, if left to itself, defective; yet there can be no objection against adding thereto, 'which the jurors aver the said A. & B. were then and there discoursing of.' — 8. Farther, it is a rule, that where new matter improperly introduced under an *innuendo* is superfluous, the sense being complete without it, the *innuendo* may be rejected as surplusage. 9 East, 93. 1 T. R. 65. 1 Starkie, 111. — 8. But that if any use be made of the *innuendo*, it cannot be rejected, nor will the defect be aided by verdict. *Ld. Raym.* 256. 1 Starkie, 111.

(z) Vide supra (G 1.) in notis.

And



And therefore, an indictment for felony, *quod cepit bona cujusdam ignoti*, is sufficient. St. 95. b. (a)

Or, an horse, &c. of such a value, without mentioning any owner. (b)  
Quod

(a) 1 Keilw. 25. 2 East, P. C. 651. 781. — 2. So an indictment for harbouring thieves unknown, is sufficient from the necessity of the case, and the fair presumption which exists that their names cannot be ascertained. 1 Chit. C. L. 212. Str. 186. 497. — 3. So an indictment stating that the defendant *cum viginti septem aliis engrosset*, has been holden to be sufficient. Cro. Car. 380. — 4. And so in all cases where the name is not known. Supra. — 5. But a false averment of ignorance will induce an acquittal. Supra. — 6. And though indictments have formerly been allowed, which charged the defendants with suffering divers bakers to bake, &c. against the assize, for distraining divers persons without cause, without specifying their names; yet according to later authorities such indictments are insufficient. 2 Hawk. c. 25. s. 71. Bac. Abr. Indictment, (G 2.) Bro. Indictm. 21. 2 Rol. Abr. 80.

(b) 1. *Personalty*: The owner's name of the stolen property should be given. 1 Hale, 512. 2 Hale, 181. 2 Hawk. c. 25. s. 71. Leach, 578. — 2. Or averred to be unknown. Ibid. — 3. Which, being the fact, is sufficient; whence, it is judiciously observed, that though the st. 26 G. 2. c. 19., provides that a person stealing part of a wreck, may be indicted and convicted, though the owner cannot be ascertained; yet that, it seems, an indictment at common law, stating such goods to be the property of an unknown, would have been sufficient. 1 Stark. 192. — 4. If however the owner's name be known, the allegation will vitiate. 2 East, P. C. 651. 781. 3 Camp. 265. n. 1 Hale, 512. Hawk. b. 2. c. 25. s. 71. 2 Leach, 578. 1 Chit. C. L. 213. Vide Staunf. 181. b. 2. c. 18. — 5. Where goods are stolen from a special proprietor, they may be described as his or the general owner's property. 1 Hale, 513. East, P. C. 653. Leach, 395. 1 Stark. 190. Summ. 67. Moore, 543. — 6. Church goods stolen during a vacancy may be described as *bona ecclesiæ*, but otherwise not. 7 Edw. 4. 14. Fitz. Ind. 15. Staunf. 95. 2 Hawk. c. 25. s. 71. — 7. So those of a chapel stolen during a vacancy, may be described as *bona et catalla capellæ tempore vacationis*, but otherwise as *bona et catalla capellæ in custodia præpositorum*. 2 Hale, 181. — 8. Grave cloaths and coffins should be called the property of the personal representative. 12 Rep. 112. 2 Hale, 181. — 9. Or not being ascertainable, of an unknown. East, P. C. 653. — 10. And an indictment against a thief, that he found a dead body and stole from it certain property, is good, without calling the property the goods and chattels of any one. 2 Hale, 181. Bac. Abr. Indict. (G 2.) 1 Chit. C. L. 214. — 11. Parish goods should be described as belonging to the parishioners, in custody of the churchwardens. Cro. Eliz. 145. 179. 2 Hale, 181. — 12. The cloaths of a child may, it is said, either be alleged to belong to himself or his father; but the latter seems most correct. 1 Stark. 191. 12 Rep. 113. 1 Sid. 129. East, P. C. 654. — 13. If goods be stolen from the custody of one in possession as executor, the indictment may lay the goods either as the executor's as such, or without naming him executor. 2 Hale, 181. Bac. Abr. Indict. (G 2.)

1. *Realty*: Where an act becomes criminal either solely, or in a greater degree, from having happened in a dwelling-house, or other building; the owner's name must be specified. — 2. Christian and surname. Leach, 286. 379. — 3. And a variance will be fatal. Leach, 104. 272. 286. 351. 1 East, P. C. 415. 2 Hale, 244, 245. Moore, 466. — 4. Hence it must be specified in indictments for *arson*. 11 Rep. 29. Cro. Car. 576. Leach, 258, 261. — 5. *Burglary*. 1 Hale, 550. 2 East, P. C. 514. Leach, 896. Vide Leach, 390. — 6. *Stealing in a dwelling-house* to the amount of 40s. Leach, 286. 379. — 7. *Stealing from lodgings*. Leach, 577. 617. — 8. And where several inhabit several rooms of a house, part of which house is also occupied by the owner, the house must be averred to be the dwelling-house of the owner, though the offence be committed in the several tenement of another occupier; but if the owner does not occupy any part, each separate tenement may be laid to be the dwelling-house of the tenant. Leach, 104. 272. Cowp. 2. 2 East, P. C. 499. — 9. On the contrary, where neither the act is made criminal, nor its criminality heightened, from its having happened in a dwelling-house or other building; the owner's name need not be specified, nor if specified and mistaken, will the variance signify. — 10. As in robbery. Pye's case. 1 Stark. 178. Johnstone's case. Ibid. — 11. Maliciously shooting at another. Ibid. Sed vide 1 Leach, 351. 1 East, P. C. 415. 2 Hale, 244. 245. — 12. And a church is a building within the meaning of 4 G. 2. c. 32., nor need an indictment for stealing

*Quod percussit super sinistram partem lateris*, is well; for *latus* is a known part. R. 2 Cro. 95.

So *dans plagam, seu contusionem*, is well. R. Mar. pl. 127.

*Quod languebat a 15<sup>o</sup> die ad 16<sup>m</sup> diem*, without saying, to what (c) hour in the same day. Mar. pl. 127.

Indictment *quod fecit libellum ad tenorem et effectum sequentem*. R. 1 Sal. 324. 417.

*Quod fabricavit* a lease with the mark of B. *cujus tenor sequitur*, though the mark is not shewn. R. 1 Sal. 342.

*Quod fabricavit scriptum obligatorium*; though it does not say that it purports to be an obligation. R. 1 Sal. 342.

*Quod fecit libellum in quo continetur, inter alia, &c.* R. Sal. 417.

*Quod ipse et 20 alii ingrossaverunt*, without saying, *et quilibet eorum ingrossavit*; for they might join. Cro. Car. 380.

*Quod scienter recepit felones*; though it does not say, that he knew them to be felons. R. 2 Lev. 208. (d)

*Quod A. existens* such an officer of such age, &c. *fecit, &c.* without saying, *tunc existens (e)*; for where this word relates to the person, and is not collateral, it shall have a general construction. R. 2 Rol. 226. (f)

That A. knowing B. was indicted for forgery, concealed a witness against him; it is sufficient that B. was indicted. (g) R. F. g. 122 263. (h)

So surplusage does not vitiate an indictment. R. 4 Co. 41. a. R. 5 Co. 121. b. 2 Mod. Ca. 327. (i)

Nor

stealing lead affixed thereto, state the person in whom the property of freehold was vested. Leach, 318. 2 East, P. C. 595.

(c) Vide supra (G 2.)

(d) 1. Upon an indictment for attempting to seduce a soldier, under 37 Geo. 3. c. 70., the word *advisedly* was considered as containing a sufficient averment of knowledge. Leach, 790. 1 Starkie, 155. — 2. So that an averment of knowledge is virtually included in the assertion, that the defendant *endeavoured* to seduce. Ibid.

(e) 1. Where it is necessary to aver the situation or character of the defendant at the time of the act or omission, it seems to be settled that it is sufficient to aver that he *being such* did the act. 1 Starkie, 151. 2 Hawk. c. 25. s. 112. Cro. Jac. 610. 2 Mod. 128. Moor, 606. 2 Lev. 229. Ray. 378. Keb. 352. — 2. An indictment against a parishioner for not performing his highway duty, A. B. and C. D. *being surveyors*, is sufficient, without saying by whom or upon what day they were appointed. 2 Burr. 832. — 3. So an indictment charging that defendant kept a common, ill-governed, disorderly house, and for his profit unlawfully procured certain ill-disposed persons of ill-fame and dishonest conversation to frequent, and the said persons in the said house to remain, *fighting of cocks, boxing, playing at cudgels, and misbehaving themselves*, is sufficient. 2 Burr. 1232. — 4. So A. *being* a loose, idle, lewd, and disorderly person, is a sufficient averment. 2 Burr. 864. — 5. So *scirus*. Str. 204.

(f) Charging against 37 Geo. 3. c. 70., an endeavour to incite A. to mutiny, *bring* a soldier, imports that he knew him to be a soldier. 1 B. & P. 180.

(g) The objection to this mode of introducing facts is, that it is done participially, as already explained in the notes to (G 3.) & (G 4.)

(h) 1. Vide supra, (G 3.) — 2. The decision is equivalent to what is now settled law, that a mere solicitation to commit a crime, though not followed by any act, is an indictable offence.

(i) 1. Upon which subject the rule is, that if the defective averment might, without detriment to the indictment, have been wholly omitted, it shall be considered as surplusage, and disregarded. 1 Stark. 234. 2 Hawk. c. 25. s. 87. 1 Mod. 78. — 2. Thus, in an indictment for arson, an allegation that the offence was committed in the night-time, need not be proved. East, P. C. 1021. — 3. So if an indictment for robbery

Nor false Latin: as, *præfata reginæ*. R. 5 Co. 121. b. (k)

So inducement to an offence does not require so much certainty: as, in an indictment for an escape, *debito modo* (l) *commissus*, or, by what authority, is not necessary. R. 1 Vent. 170.

Indictment *quod A. et B. super C. insultum fecerunt, &c.* though as to B. it is found *ignoramus*. R. Cro. Car. 464. (m)

So an indictment need not ascertain more than shows the offence, (n) not that which aggravates it (o): as, if it be for taking fish out of his pond, it need not name the number or quantity. Per 2 J. Twisd. cont. 1 Lev. 203. (p)

Neither needs there more certainty than the words of the statute (q) import. R. 2 Rol. 226. (r)

If

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robbery from the person aver it to have been committed on the highway, or in the dwelling-house of a person named, it would be unnecessary to prove these allegations, for they form no part of the legal description of the offence, and might have been wholly omitted without any injury to the charge. 1 Stark. 254. 235. — 4. But a material allegation, which is sensible and consistent in the place where it occurs, and which is not inconsistent with any antecedent matter, cannot be rejected merely because it is inconsistent with a subsequent material averment. 1 Stark. 256. 5 East, 244. — 5. And if a matter be alleged which might have been omitted altogether, but which shews that the complaint is ill founded, it cannot be rejected as surplusage. 1 Stark. 257. East, P. C. 229. Plowd. 84. Bac. Abr. Indict. 556. 4 Rep. 42. 2 Hawk. c. 23. s. 89. 1 Saund. 287. Infra, Pleader, (C 29.)

(k) Indictments must now be framed in the English language. Vide supra.

(l) It seems that an indictment against a magistrate for granting an ale-licence, after it has been refused at a general meeting of justices for the division, alleging that the meeting was *duly* held, not shewing the manner in which, is sufficient 4 T. R. 451.

(m) Vide supra, (A) in notis.

(n) 1. In an indictment for a breach of duty in disobeying orders, it need not be averred that the orders were in force when the defendant is charged with neglecting them; since, if then revoked, it is matter of defence. 5 T. R. 607. — 2. So where commissioners are empowered to issue a written notice only under certain formalities, and they are indicted for non-payment of the costs of an appeal from such notice, the indictment need not aver an observance of those forms, since as against themselves all will be intended right. 8 East, 41.

(o) 1. Matters which aggravate the crime need not be detailed, unless they change the nature of the offence. 1 Str. 139. 140. Fost. 194. — 2. And the distinction seems to be, that where such matters cannot be made the subject of a distinct charge, they may be shewn in evidence; where they may be made such, they must be the subject of a distinct proceeding. 1 Str. 140.

(p) 1. The indictment, in this case, charged the defendant with stealing *quosdam pisces*; and it was not directly adjudged that it was good, but merely that the defendant ought to plead to it. 2 Keb. 178. 1 Lev. 203. Andr. 162. 2 Hawk. c. 25. s. 74. — 2. And the rule seems to be well settled, that the number of the several individual things stolen, be expressed. 1 Stark. 185. 2 Hale, 182, 183. — 3. In an indictment, however, for counterfeiting the king's coin, though it is necessary to specify the kind of coin, yet not the number. 2 Hale, 127. — 4. And an indictment for embezzling a sum of money, need not shew of what monies the sum was made up. 3 M. & S. 539.

(q) 1. An indictment founded upon a statute must strictly follow the words of the act, and state all the circumstances enumerated by the statute in defining the offence. 2 Hale, 170. 193. 535. Fost. 423, 424. Staunf. 130 1 Leach, 267. — 2. And therefore an indictment upon 7 Geo. 2. c. 21. was holden to be defective for not stating the assault to have been made with an offensive weapon, or that a demand was made of money or goods. 1 Leach, 267. — 3. With respect to provisos and exceptions, the rule is laid down by Lord Hale, that where an offence is made felony, or otherwise punishable by act of parliament, though the indictment must take in the circumstances which, in the body of the act, make up the offence, yet if, by proviso in the same statute, or by any subsequent statute, some cases or circumstances are excepted

excepted out of the act, the indictment need not mention them, and qualify the offence so as to exempt it out of the proviso; but the party shall have the benefit of the proviso by pleading not guilty, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of that statute. 2 Hale, 170. Poph. 93. 94. 1 Jones, 157. 1 Lev. 26. 1 Starkie, 209. — 4. Which holds, even where the proviso is noticed in the purview of the statute. Poph. 93. 94. 2 Hawk. c. 25. s. 113. 1 Starkie, 209. — 5. As to the terms and phrases used in the statute, Mr. Starkie lays down the general rule to be, that the defendant must be brought within all the material *words* of the statute; for many of these have been holden to be so peculiarly descriptive of the offence, that they cannot be dispensed with. Fost. 424. Cro. Jac. 607. 1 Starkie, 211. — 6. Which rule applies equally to offences created by a statute, and to common-law offences for which the offenders are by a statute either subjected to a new punishment, or deprived of a common-law benefit: in the former case, if such a material word be omitted, the offender cannot be punished at all; in the latter, he is liable to the common-law penalty only. 1 Starkie, 212. Leach, 22. 556. — 7. Hence, in an indictment upon 5 Eliz. c. 9., the term 'wilfully' must be inserted; because the term 'wilful' in the statute is a material description of the offence. Leach, 71. — 8. So an indictment on the black act for shooting at another, must charge the offence to have been done wilfully and maliciously, as well as feloniously, since as the legislature has, by the special penning of the act, used both the words 'wilfully' and 'maliciously,' they must be understood as a description of the offence. Leach, 493. — 9. In some instances, however, the use of the identical words used by the legislature has been dispensed with, and their place holden to be supplied by expressions deemed to be equivalent. Thus it has been holden, that the words 'wilful murder,' might be supplied by laying the killing to be of malice aforethought. 1 Stark. 213. — 10. So that the words in an indictment 'excite, move, and procure,' were equivalent to the words of the statute, 'counsel, hire, or command.' And. 195. 1 Stark. Ibid. — 11. Upon this case Mr. Justice Foster observes, I take this to be good law, though I confess it is the only precedent I have met with where the words of the statute have been totally dropped; and I the rather incline to this opinion, because I observe that the legislature, in statutes made from time to time concerning accessories before the fact, hath not confined itself to any certain mode of expression, but hath rather chosen to make use of a variety of words, all terminating in the same general idea. — 12. But, subjoins Mr. Starkie, if the words of the statute may be abandoned in describing an accessory before the fact, and can be supplied by equivalent words, there seems to be no sufficient reason, why the doctrine of substitution should not extend to other cases. The reasoning used by Mr. Justice Foster seems carried a great length, and to support it, two steps are necessary: first, the words of a whole class of statutes are construed to be descriptive of an accessory before the fact; and, secondly, it must be contended, that such an accessory may be described in the language of the common law, without reference to the terms of the statute. It appears indeed that the part of the report, from which the above extract is taken, was not delivered in court; so that the dictum which has been cited, does not bear the same stamp of authority with a position publicly and judicially advanced by so able a judge. 1 Starkie, 214. — 13. Great difficulty, he continues, exists in drawing the precise line, which shall ascertain at once the latitude which ought to be permitted in the description of offences for the purposes of justice, and that wholesome caution and strictness, which ought to be observed for the avoiding of confusion, and the exhibiting of the defendant's guilt with certainty upon the face of the record; in order that substantial justice may not be frittered into empty form on the one hand, and that the life and liberty of the subject may not be placed in jeopardy by ignorance or carelessness on the other. But at all events, where an indictment is founded upon a statute, reason and convenience seem to require, that the terms and expressions used by the legislature as descriptive of the offence, should be adopted in framing that indictment; the insertion of others does not seem justifiable on any principle, for a substituted word or phrase can never so directly and pointedly support the charge as the one used by the legislature. 1 Starkie, 214, 215.

(r) 1. But it constantly happens, that a description, closely following the words of the statute, is not in itself sufficiently minute and specific. As where the indictment is founded on 33 Hen. 8. against obtaining money by means of false tokens, or upon 30 Geo. 2. c. 24. against obtaining money or goods by false pretences; in these and numerous other instances, it has been holden to be necessary to specify the false tokens, the false pretences, and other means by which the offence has been committed, upon the face of the record. 1 Starkie, 200. — 2. And therefore, says Mr. Starkie, it may be assumed that there is no difference between common law and statutable offences, as far as regards the general rules according to which the expanded description



If it be for forging a cocquet for 5 *sarcinis lini*, it is sufficient. Mod. Ca. 87.

So, *contra formam statuti*, helps any uncertainty not material. 2 Rol. 227. (s)

(G 6.) Ought to have proper terms of law.

So an indictment ought to make use (*t*) of terms proper (*u*) or peculiar (*x*) to the offence (*y*): as, an indictment for treason ought to say, *proditoriè*. (*z*)

And

description of the offence should be expressed upon the record; except, indeed, in those instances, (and the exception confirms the observation,) where the legislature has peremptorily directed that some general form of words shall be used. Ibid.

(s) 1. The rule here alluded to is, that if the statute, whereon an indictment is founded, be particularly recited, the general conclusion *contra formam statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which omission would otherwise have been fatal; for that, since the statute is particularly recited, and the defendant is charged with having committed the offence against the form of it, and it is impossible that he could have so done, if any circumstance expressly required by the statute had been wanting, the offence may be said to be as fully set forth in the very words of the statute, as if such words had been repeated in the allegation of the offence. 1 Starkie, 210. Savil. 33. Vide, 2 Hawk. c. 25. s. 114. Rol. 81. — 2. But this reasoning, says Mr. Starkie, appears to be defective; for if the omission of one material circumstance could be supplied by the recital, why might not the omission of a second, and where could the line be drawn? The principle once admitted would lead to the conclusion, that an indictment would be sufficient which barely recited the statute, and then averred that the defendant at such a time and place transgressed it. It would also be left to the jury to say, whether the fact omitted, on the record, but proved in evidence, was a fact, the doing of which could be an ingredient in the offence, which is a pure matter of law, and ought to appear judicially to the court. And besides this, there could be no averment of time and place annexed to the circumstance omitted. Now, if the circumstance had been averred, it must have been averred with time and place, and if the omission of time and place to the averment would have vitiated the indictment, it can scarcely be contended, that the omission of the averment altogether would impugn the indictment. 1 Starkie, 210. 211.

(t) But, unless where a precise mode of description is prescribed in an indictment, it is immaterial in what part of it the necessary allegations are found. 2 East, 35.

(u) 1. The averment that the act was *unlawfully* done, is no case essential, unless it be part of the description of the offence, as defined by some statute; and the same holds of the words *wrongfully*, *unjustly*, *wickedly*, *wilfully*, *corruptly*, *to the evil example*, *falsely*, *maliciously*, and such like. 1 Stark. 73. 74. 2 Ro. Ab. 82. Sty. 392. 2 Wm. Saund. 242. — 2. Charging an act to have been done unlawfully and injuriously, includes the presumption that there existed any necessity for the defendant's doing it. 4 M. & S. 73. — 3. Though it is still open to him to shew in evidence that there did Ibid. — 4. And it seems that, whether an offence be of common law or statutable origin, if a *prima facie* illegality be shewn, the indictment will be sufficient, it being in general unnecessary to negative any excuse or justification, the affirmative of which would be an answer to the charge. 1 Starkie, 159. 3 T. R. 84. Ld. Raym. 1370. 1 Sidf. 303. 2 Hawk. c. 25. s. 112. — 5. But the rule, says Mr. Starkie, of Hawkins, that 'if there be any description in the negative, the affirmative of which would be a good excuse for the defendant, the proof of it lies on him, and need not be stated in the indictment,' is too general, for it has been holden, by great authorities, that a negative description must be averred, where it is an essential ingredient in the offence. 1 Starkie, 160, 161.

(x) But, except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use. 5 East. 244. 1 Smith, 437.

(y) 1. Though for many of these terms sufficient reasons can be given, others there are which may not so readily be traced to their original; unless we consider them as invented by the lawyers of old, to confine the conduct of a cause to themselves; or as the



And *contra ligeancie sue debitum*. R. 3 Lev. 396. Ca. Parl. 186. 4 Mod. 165. Skin. 442.

So an indictment for felony ought to say, *felonice*. St. 26. a. (a)

For murder, it ought to have the word, *murdravit*. Dy. 261. a. (b)  
Or, *murderavit*. Per Coke, 1 Rol. 137.

For burglary, the word *burglariter*, or *burgulariter*. R. 4 Co. 39. b. Vaux. (c)

the offspring of chance, made sacred by time and habit; or ascribe them to a zeal for that system and method, which ennoble even the meanest art, and give it the air of science and wisdom. But from whatever source they sprung, it seems proper to preserve them, to avoid as well the possibility of error, as the disputes that may arise on every innovation. And, however untenable upon principles of reason, it is sufficient that they are warranted by precedent; for, observed long ago by Mr. Justice Staunford, upon the question whether an averment by the term *licet* was sufficient, "if it was the usual form to allege it by *licet*, then I would hold with it." And after instancing certain cases in which the omnipotence of custom over reason was conspicuous, he concludes, "wherefore we ought to adhere to the usual form; but in this case it was not the usual form to allege the election under the word *licet*, as you may see in the book of entries; wherefore since he was not tied down to any usual form, but was at liberty to take such words as were proper for the matter, and has not done so, we ought not to hold with the words more than they will warrant." And, again, upon another occasion, though at the first an avowry was held bad, for want of being averred; yet afterwards, says the reporter, the prothonotaries searched their precedents, and told the justices that the common usage was to make the avowry without averment; with which the justices were satisfied. — 2. Mr. Starkie, in his Criminal Pleading, p. 69. 70., has the following judicious observations: "The law distributes crimes into three great classes; treasons, felonies, and misdemeanours inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is, therefore, one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him, that he may be excluded from those which the law withholds, and that the court may be authorised, after conviction, to inflict the appropriate measure of punishment. A strict adherence to such language, may, in some cases, appear too nice and critical to serve the ends of justice: yet it seems founded upon many strong and substantial reasons. For instance, by successive decisions, the legal value and weight of a term or phrase of art is ascertained, and should a doubt arise as to its meaning, reference for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent would be wholly lost.

(2) 1. But if the treason itself be laid to have been so committed, every overt act need not be so laid. 4 St. Tr. 701. Salk. 655. 1 East, P. C. 116. — 2. Petit and inferior treasons are usually alleged to have been committed *felonice* as well as *proditori*. 1 Stark. 71. Fost. 329.

(a) 1. If a statute enacts that specified facts shall amount to the crime of having feloniously stolen another's property, by stating those facts, without more, the crime of larceny is sufficiently charged; it is not indeed *totidem verbis* charged, that he feloniously stole another's property, but that is charged which the law has declared shall be equivalent thereto. 3 M. & S. 559. — 2. Hence, too, such statement warrants the conclusion, 'and so the jurors say, that the prisoner feloniously did steal.' Ibid.

(b) 1. 1 Hale, 450. 466. Yelv. 205. 4 Com. 307. — 2. So the offence must be alleged to have been committed of the defendant's malice aforethought. 1 Stark. 71. — 3. Where the death arises from any wounding, beating, or bruising, it has been said, that the word *struck* is essential. 2 Hale, 184. 1 Bulst. 124. 2 Inst. 319. 2 Hawk. c. 23. s. 82. Cro. Jac. 635. 5 Rep. 122. 1 Stark. 72. — 4. And that the wound, or bruise, must be alleged to have been mortal; nor can its omission be supplied by the averment which is in all cases necessary, that the party died of the stroke. 1 Stark. 72. Leach, 112. 2 Hale, 186. 1 Hawk. c. 23. s. 82. Kel. 125.

(c) In an indictment for burglary, the essential words are, 'feloniously and burglariously broke and entered the dwelling-house in the night time;' and the felony intended to be committed, or actually perpetrated, must also be stated in technical terms. 1 Hale, 549. 1 Stark. 73.

And

And *burgaliter* is not sufficient. 4 Co. 39. b. 40. a. (d)

For a rape, it ought to have the word, *rapuit*. (e) St. 96. a. (f)

An indictment for barrettry ought to say *communis barrectator*.

For scolding, *communis rixatrix*; for *calumniatrix*, is not sufficient. Mod. Ca. 11. (g)

So an indictment (h) ought to conclude, (i) *contra pacem*. (k) R. 2 Cro. 527. Cro. Car. 584. R. per 3 J. Mod. Ca. 128. (l)

If an offence be in another reign, *contra pacem nuper regis et regis nunc*. R. Yel. 66. (m)

If

(d) 1. In case of simple larceny, the words 'feloniously took and carried away the goods,' or 'took and led away the cattle,' are essential. 1 Hale, 504. 2 Hale, 184. 1 Stark. 73. — 2. So in an indictment for robbery from the person, the words 'feloniously, violently, and against the will,' are essential; and it is usual, though it seems to be unnecessary, to allege a putting in fear. 1 Stark. 73. 1 Hale, 554. Fost. 128. 3 Inst. 68. — 3. Though it has been held, that *violenter* is not an essential term of art. East, P. C. 783. 1 Stark. 73. — 4. Piracy must be alleged to have been done feloniously and piratically. 1 Hawk. c. 37. s. 6. 10. — 5. Vide supra in notis.

(e) Nor will the omission be aided by the words *carnaliter cognovit*. 1 Hale, 628. 2 Hale, 184. 1 Inst. 190. 2 Inst. 180. — 2. Which also are essential. 1 Hale, 632. 3 Inst. 60. Co. Lit. 157. 2 Inst. 190. — 3. And it is usual to aver that the rape was against the will of the female. 1 Stark. 72.

(f) In an indictment for an unnatural crime, the descriptive words of the statute taking away clergy, must be used, and it is not sufficient to say *contra naturæ ordinem rem habuit veneream et carnaliter cognovit*. 1 Stark. 72. East, P. C. 480. 3 Inst. 59.

(g) 1. And an indictment for being a common scold must, it is said, be laid, *ad commune nocumentum*. Str. 688, 1246. sed quære, et vide infra. — 2. In an indictment for maintenance, the word *manutenuit* should be inserted. 1 Stark. 73. — 4. And the word 'riot' seems to be required in all indictments to that offence. Ibid. Wils. 325. — 5. In the case of mayhem, the words 'feloniously, and did maim,' are essential. 3 Inst. 118. 2 Hawk. c. 25. s. 15. 16. &c. c. 25. s. 55. — 6. So *extorsive* in the case of extortion. Salk. 680. Ld. Raym. 1265. — 2.

(h) As well under a statute as at common law. 2 Hale, 188.

(i) 1. In *homicide* it is necessary, and in *perjury* usual, for the jurors to draw the legal conclusion, descriptive of the crime charged, from the premises, and aver it formally upon the indictment. 1 Stark. 195. — 2. But the conclusion *ad commune nocumentum* of the king's subjects, in the cases of nuisance and some other offences, though usual, is not necessary. Ibid. 2 Hawk. c. 25. s. 59. Sed vide Str. 688. 1246. contra. — 3. Although the conclusion of an indictment is a deduction of law, yet, when a necessary form, it constitutes so material a part of the indictment, that any defect therein vitiates. 3 M. & S. 553.

(k) 1. '*Domini regis*;' since *contra pacem* alone, is insufficient. 2 Hale, 188. — 2. And one general conclusion is sufficient, though the indictment contains several counts. Ld. Raym. 585. 1 Stark. 198. — 3. Though the contrary seems to have been the opinion in 2 T. R. 581. — 4. And also that in an indictment for offences against a statute, each count should conclude *contra formam statuti*. Ibid.

(l) 1. The necessity of these words not being taken away by 37 Hen. 8. c. 8. 2 Hale, 188. — 2. But they are neither necessary nor proper in cases of mere omission or neglect. 1 Vent. 108. 111. — 3. Or where the offence rests in tendency, or partakes of the nature of a civil proceeding. 1 Stark. 196. 2 Hawk. c. 25. s. 92. 1 Keb. 360. 367. to 372. 390. Rast. 409. 412. Salk. 380. — 4. Though, if used, they are surplusage. Salk. 380.

(m) 1. Upon this subject Mr. Starkie, premising that the offence either is confined wholly to a preceding reign, or, having been committed in a preceding reign, is continued into the present, or having been begun in a preceding reign, is consummated in the present, or is confined wholly to the present; lays down the following rules. — 2. Where the offence is confined wholly to a preceding reign, it must be laid against the peace of the late king. 3 Burr. 1901. 1 Stark. 197. — 3. Though, if it conclude also against the peace of the present king, the latter branch of the conclusion may be rejected as surplusage. Cro. Jac. 377. 2 Hale, 179. 1 Stark. 197. — 4. If a man be indicted for erecting a weir in one reign, and continuing it in a second, and conclude

If founded upon a statute it ought to conclude, *contra formam statuti*. (n) R. 1 Sal. 370. R. 2 Rol. 38. (o)

And, *contra formam statuti*, is bad, where there are several statutes in the case. (p) R. 2 Cro. 142. (q)

And, *contra formam statuti prædicti* will be bad, where the statute is misrecited. (r) Per Twisd. Ray. 192. Lut. 140.

So, *contra formam statuti*, shall not be rejected, though for part it would be good by the common law. R. 4 Leo. 49. (s)

Or, though the offence was at the common law, and the statute adds a penalty. Mod. Ca. 17. (t)

But by the st. 37 H. 8. 8. The omission of, *vi et armis, viz. gladiis, baculis et cultellis*, does not vitiate. R. 2 Lev. 221. (u)

So the omission of, *contra pacem*, does not vitiate in an indictment for a non-feafance. R. 1 Vent. 108. 111. R. 1 Sal. 381.

Or, *contra pacem nuper regis*, where the continuance of the fact is the offence, and the original of it only inducement. R. Yel. 66.

So, *contra formam statuti*, is not necessary where the offence was by the common law, and the statute adds only a penalty, &c. R. 1 Vent. 13. Sal. 460. 1 Sid. 409. Comb. 371. R. 2 Mod. Ca. 11. (x)

And,

clude that it was erected and continued against the peace of the *then* king, without adding against the peace of the *late* king, it will be defective; for the gist of the indictment is the erecting, which wrong was done in the reign of the former king, and the offence should be laid against the peace of both. 1 Stark. 197. Yelv. 66. 2 Hale, 189. — 5. But, thirdly, if in that case the erection had been made mere inducement, and the continuance of the nuisance had formed the gist of the indictment, the conclusion, *contra pacem regis nunc* would have been good. Ibid.

(n) And semble in *contemptum regis*. 4 Hen. 6. pl. 7. cited 1 Stark. 197.

(o) 1. 2 Hawk. c. 25. s. 117. 2 Hale, 192. 1 Saund. 135. n. (3). 5 Mod. 307. Dougl. 428. — 2. Nor, in default of such an averment, can judgment be given against the defendant. 2 Hawk. c. 25. s. 116. 2 Hale, 192. 251. 1 Saund. 135. n. (3). Dougl. 428. — 3. And the rule is the same, where an offence at common law is made an offence of an higher nature by a statute, as where a misdemeanour is made a felony, or a felony treason. 2 Hawk. c. 25. s. 116. Salk. 370. 1 Stark. 216.

(p) So *vice versa*. 2 Hawk. c. 25. s. 117. Cro. Car. 187. Yelv. 116. Vide 2 Hale, 173.

(q) 1. As where one statute creates the offence, and another adds the penalty. 2 East, 339. Ow. 135. Cro. Eliz. 750. 2 Hale, 173. Cro. Jac. 142. — 2. And Lord Hale thinks it safer to conclude in the plural, where a statute which has expired is revived by another. 2 Hale, 173. — 3. In the following cases, however, a conclusion in the singular is proper: Where an offence is prohibited by each of two statutes. 1 Sid. 348. Leach, 970. Ow. 135. Vide 2 Hawk. c. 25. s. 117. — 4. Where the statute upon which the indictment is founded is explained by another. 2 Saund. 377. — 5. Or regulated in its operation. Cro. Jac. 187. — 6. Or made perpetual. 2 Hale, 173. 2 Hawk. c. 25. s. 117. — 7. Or revived. 1 Stark. 218. Vide supra. — 8. Or adopted and continued. 1 Saund. 135. n. (3). — 9. Or continued in part. Cro. Eliz. 750.

(r) A public statute ought never to be recited. A private one (without the usual clause declaring it public) must.

(s) 1. 2 Hale, 171. Cro. Eliz. 231. 307. — 2. But the rule seems to be, that where the averment is unnecessary, it will be rejected as surplusage. 1 Stark. 217. Say. 225. Al. 113. 1 Salk. 212. 2 Hale, 191. 2 Hawk. c. 25. s. 115. 116. Cro. Eliz. 212. Ld. Raym. 149. 1163. 4 T. R. 202. 5 T. R. 162. Leach. 664. 1 Saund. 135. n. (3).

(t) Vide supra, the last note, and infra, in notis.

(u) Nor are the words *vi et armis* necessary in an indictment for a riot. Str. 834.

(x) 1. But the offender will be liable to the common-law punishment only. 2 Hale, 190. 1 Saund. 135. 2 Rol. Ab. 82. — 2. Where, however, the offence existed at common law, as declared by a statute, the averment may be omitted. 2 Hale, 189. — 3. So where the offence existed at common law, but the offender is, under particular circumstances,

And, *contra formam statuti nuper editi*, is well, though the statute is misrecited; for then the court will take notice of the statute. Ray. 192. Lut. 140.

So, *contra formam statuti*, is not necessary, where the offence is a breach of duty, though his duty in this particular was prescribed by statute. R. 1 Sal. 381. Per Eyre, Comb. 205. (y)

So, in an indictment for murder, if there be the word, *murdravit, ex malitiâ præcogitatâ* is not necessary. Dy. 69. a. (z)

### (H) When quashed, if deficient.

A defective (a) indictment may (b) be quashed upon motion. (c)

Or a *nolle prosequi* may be entered by the attorney-general. Mod. Ca. 262. (d)

But not (e) in an enormous crime: as, for treason or felony (f); for the court will put the defendant to his demurrer, or plea. Vide Information, (D. 1. &c.)

Nor an indictment for perjury, or forgery, or subornation. 1 Sal. 372. R. 1 Sid. 54. 1 Vent. 370.

Or, for extortion. 5 Mod. 13.

Or, for a nuisance. 1 Sal. 372. 1 Vent. 570. (g), without a certificate that it is removed. Cro. Car. 584. Acc. Sal. 460.

Or, for not repairing an highway, or bridge. 1 Sal. 372. 1 Sid. 140. (h)

circumstances, deprived by a statute of some benefit to which he was entitled at common law, the averment is unnecessary, though it would not be improper. 1 Stark. 216. 2 Hale, 190. 288. 1 Saund. 135. n. Aley. 43. Sty. 86. Ld. Raym. 150. 1 Salk. 212. 2 Hawk. c. 46. s. 43. Kel. 32.

(y) Since an indictment lies at common law for obstructing the execution of a power conferred by statute, it should not conclude with *contra formam statuti*. Doug. 441.

(z) Supra in notis, contra.

(a) 1. As from an apparent want of jurisdiction. Str. 1088.—2. Thus an indictment at the quarter sessions for perjury at common law. Str. 1088. 1 T. R. 316.—3. Of form. Salk. 376. 1 Stark. 283. Andr. 230.—4. Misjoinder of defendants. Str. 623. 921. 1 Stark. 283.—5. Or want of a substantial averment. Andr. 226. 230. Dougl. 153. 1 Stark. 283, 284. Str. 1268.

(b) 1. But it is altogether discretionary. Burr. 1127.—2. And where the prosecutor moves to quash his own indictment, terms may be imposed as a condition. 3 Burr. 1648. 1 Blk. 460.

(c) 1 Starkie, 281. Cro. Car. 584. Pal. 389. Sidf. 54. 247. 1 Keb. 45. 2 Keb. 128. Salk. 372. 4 St. Tr. 134. Str. 602. Burr. 1127. 1 Wils. 325. 1 T. R. 316. 4 T. R. 155.

(d) 1. When an information is filed by the attorney-general *ex officio*, the Court will quash it upon his motion, if there be cause; but if the information be exhibited by a private person, the Court will not quash it upon motion, because the defendant is entitled to costs. Sidf. 152. 1 Starkie, 282.—2. Since informations are preferred for great offences only, and such as are likely to prejudice the commonwealth, the Court, it is said, will not quash one upon the defendant's motion. Vin. Abr. Inf. 415. 1 Stark. 285.

(e) Unless the defect is very gross and apparent. 1 Blk. 275.

(f) If in an indictment for felony, containing several counts, it appear before the defendant has pleaded or the jury are charged, that it is meant to try him for more offences than one, it has been the practice to quash the indictment, lest the prisoner should be confounded in his defence, or prejudiced in his challenge of the jury, since though he might object to a juryman trying one of the offences, he might not the other. If it is not discovered in time, the judge may put the prosecutor to elect between the charges. 3 T. R. 106.

(g) Andr. 220.

(h) 1. Or against overseers for refusing to pay over money to their successors. Str. 1268.—2. Or against a party for not attending a mayor to execute his warrant. Str. 1211.

Or, for enticing away his servant. 1 Sal. 372.

Or, for throwing down fences contrary to the stat. W. 2. 4. R. 1 Sal. 372. (*i*)

Or, for a cheat. R. Mod. Ca. 42. (*k*)

Or, for a disturbance in church. 1 Sid. 54. (*l*)

Or, for a forcible entry. Mod. Ca. 96.

So a motion for quashing shall not be allowed after a recognizance forfeited. 1 Sal. 380. (*m*)

### (I) Process (*n*) upon an Indictment.

By the stat. 25 Ed. 3. 14., on an indictment (*o*) for felony before justices of oyer and terminer, a *capias* (*p*) shall (*q*) be awarded (*r*) to the sheriff,

(*i*) 1 Sidf. 140. et vide 1 Wils. 325.

(*k*) 1. 3 Burr. 1841. — 2. Hence not an indictment for selling flower by false weights, though it appears upon the face of it that the flower-scale was the lighter, which must tend to the prejudice of the seller; and though it does not say where the selling was. 3 Burr. 1841.

(*l*) Cro. Car. 584.

(*m*) 1. Generally, the application should be made before plea pleaded. Leach, 11. 4 St. Tr. 232. 1 Hale, 35. 2 Hale, 295. 1 Vent. 69. Foster, 27. — 2. It may be made upon the last day of term. Burr. 651. — 3. And in case of indictments for high treason or misprision thereof, (except only indictments for counterfeiting the king's coin, seal, sign, or signet,) the 7 Will. 3. c. 3. enacts, that none shall be quashed for mis-writing, mis-spelling, false or improper Latin, unless exception concerning the same be taken and made in Court by the prisoner or his counsel assigned, before any evidence given in open court upon such indictment; nor shall any such miswriting, mis-spelling, false, or improper Latin, after conviction upon such indictment, be any cause to stay or arrest judgment thereupon. But nevertheless any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error in the same manner, and in no other, than as if this act had not been made. — 4. Upon which statute it has been holden, that no such exception can be taken after plea pleaded. 4 St. Tr. 673. 1 Starkie, 286. vide 1 East, P. C. 110. — 5. Where an indictment, removed by *certiorari*, was at issue, and the jury appointed, and the prosecutor afterwards procured a new indictment to be found, alleging the first to be defective, the Court, upon consent of the parties, quashed the first and directed the second to stand in its place. 6 Mod. 262. 1 Starkie, 282. — 6. But if the prosecutor move, the Court will not quash the indictment unless it appear to be insufficient. Dougl. 153. 240. 1 Starkie, 282. — 7. Nor even then unless another has been found which is sufficient. 2 East, 226. 1 Starkie, 282. — 8. And will not quash it, of course, where the defendant has been put to expense. 3 Burr. 1468. Str. 946. 1 Starkie, 282. — 9. And if a second indictment be found for the same offence, pending the first, the Court will not quash the first unless the expenses incurred by the defendant upon the first be paid to him. MSS. 1 Starkie, 282.

(*n*) 1. So denominated because it proceeds or issues forth in order to bring the defendant into court, to answer the charge preferred against him; signifying the writs or judicial means by which he is brought to answer. 1 Chit. C. L. 538. Dalt. J. c. 193. Burn's J. Process. Williams' J. Process. — 2. That proceeding which is called a *warrant* before the finding of the bill, is termed *process* when issued after the indictment has been found by the jury. Ibid.

(*o*) 1. An indictment may be found against a defendant in his absence. His presence is not essential, since, though present, he could not be heard against the bill. 4 Com. 318. — 2. But after indictment found process must issue to bring the defendant into court; for the indictment cannot be tried, unless he personally appears: according to the rules of equity in all cases, the express provision of the 28 Edw. 3. c. 3. in capital ones, that no man shall be put to death without being brought to answer by due process of law. 4 Com. 318.

(*p*) A *capias* may issue against a peer of the realm, in case of treason, felony, or breach of the peace. 2 Hale, 199. Cro. Eliz. 503. 1 Starkie, 260.

(*q*) 1 Unless the defendant is already in custody, or has given bail, or is present in court. — 2. In the first case, he may be brought up and charged with the indictment;



sheriff, and if he return (*s*) *non est inventus*, another (*t*) *capias* (*u*) returnable at three weeks, whereby the sheriff shall be commanded to seize his goods, and if the sheriff return *non est inventus*, and the party does not appear, an *exigent* issues, and the goods are forfeited. Vide Process, (C.) (*x*)

If there be an indictment for a trespass, the process shall be a *venire*, and if the return (*y*) be, that he has sufficient (*z*), a *distringas* (*a*) in infinitum; if the return be *nichil*, &c. there shall be a (*b*) *capias*, *alias*, and *pluries*, and an *exigent* till he appears or is outlawed. Dalt. ch. 193. Vide the stat. 18 Ed. 3. 5. (*c*)

And

ment; in the second he appears under the recognizance; in the third he may be detained by the Court; and bailed or committed as upon a warrant.—3. A detainer, however, is matter of discretion; so that the Court may, if they please, refuse to interfere, and leave the defendant to the taker upon the ordinary process. 4 Burr. 2531.

(*r*) 1. When the king grants an authority of 'oyer and terminer,' the power to issue process is incident: for there cannot be oyer, if the party does not appear gratis, or be brought by process. Infra, tit. Process (A 1.)—2. But it is said that under a commission of 'gaol delivery' only, a *capias* cannot be issued, since then the jurisdiction extends not beyond a delivery of the gaol, to which end an issuing of process is not necessary, and therefore a power so to do, not incident. 2 Hale, 198.—3. Justices of the peace in sessions are empowered by their commission to make and continue processes against persons indicted, until they can be taken, surrender themselves or be outlawed; and the same authority is vested in them by the 5 Edw. 3. c. 11. and 1 Edw. 4. c. 2. 1 Starkie, 259.

(*s*) 1. Where the process is awarded from the King's Bench into any other county, there should be an interval of fifteen days at least between the teste and return of every process; but where the process is awarded into the same county where the court sits, this is not necessary. 2 Hawk. c. 27. s. 16. 1 Starkie, 259.—2. Where it is awarded by the justices of oyer and terminer and general gaol-delivery, it is made returnable at the next session of oyer and terminer, and goal-delivery. 1 Starkie, 259.

(*t*) If the prosecutor proceed to outlawry after judgment, one *capias* only is necessary. 1 Starkie, 273. 2 Hawk. c. 27. s. 111.

(*u*) 1. Upon the return of *non est inventus*, in cases of treason and homicide, the writ of *exigent* issues immediately. 2 Hawk. c. 27. s. 112. 1 Starkie, 260.—2. But in indictments for any felonies but homicide, it appears to be doubtful, whether a second *capias* was not formerly requisite previous to the *exigent*. Fitz. Cor. 184. 234. Exig. 3. 2 Hawk. c. 27. s. 112. 2 Hale, 194.—3. Lord Hale however expressly says, that the process in his time, in case of any felony, was one *capias* and then an *exigent*. 2 Hale, 195.

(*x*) 1. Under which title is explained, in whose name the process shall issue.—2. If out of the king's courts, it must be in the king's name by 27 Hen. 8. c. 24.—3. If it issue from K. B., it must be tested by the chief justice, or senior judge on a vacancy in that office. 1 Chit. C. L. 339. Cro. Car. 393. 2 Hale, 199. 2 Hawk. c. 27. s. 8. Williams' J. Process.—4. If from any other superior court, then by the first in the commission; and here, though a single magistrate may not have authority to determine an indictment, yet it seems he may then authorise the process. 1 Chit. C. L. 339. 2 Hawk. c. 27. s. 8. 1 Starkie, 259.

(*y*) The *venire* may be made returnable immediately by the justices of oyer and terminer, by the king's bench, in the same county, and by justices at the sessions by consent. 3 Salk. 371.

(*z*) That is, that 'he has lands in the county, whereby he may be distrained.' 2 Hawk. c. 27. s. 10.

(*a*) In case of trespass, a *capias* issues upon the return of the *venire*. 2 Hale, 194.

(*b*) Where a *capias* does not lie, as in proceedings against hundredors, corporators, &c. and against peers, except in cases of treason, felony, or breach of the peace, the only mode of proceeding is by *venire* and *distringas*. 1 Starkie, 273. Burns' J. Process, 80. Tidd's Prac. 110.

(*c*) 1. If the defendant appear to an indictment of felony, and before issue joined make his escape, the process against him is by *capias* and *exigent*, as before, unless there had before been an *exigent*, and in that case a new *exigent* shall be awarded. 1 Starkie, 276. 2 Hawk. c. 27. s. 19.—2. If the default be after issue joined and

And after outlawry, the justices of assize, or of the peace, may issue a *capias utlagatum*, as incident to their authority. R. 12 Co. 103.

And though the outlawry be afterwards reversed, the indictment stands in force. Mod. Ca. 115.

By the stat. 5 Ed. 3. 11., justices (*d*) to hear and determine felony may direct their process against the indictee, into any foreign country.

By the stat. 1 Ed. 6. 7., the process shall not be discontinued by a new commission. — So by the stat. 11 H. 6. 6.

By the stat. 8 H. 6. 10., if any, indicted for felony, treason (*e*), or trespass, dwell in another county, the justices of peace of the county, or franchise, after the first *capias* is returned, may direct another *capias* to the sheriff of the county where the party dwells, returnable in three months (if the county court there is held monthly, but if from six weeks to six weeks, then four months) after the *teste*, commanding such sheriff to take him, or if not to be found, to make proclamation in two counties, before the return of the writ, that he appear before the justices of peace where indicted at the day of the return of the second *capias*, and then if he appear not, the *exigent* shall be awarded; but *exigent* and outlawry otherwise is awarded void. (*f*)

And by the stat. 10 H. 6. 6. if such indictment be removed by *certiorari*, such second *capias* shall be made returnable in B. R. &c.

And if the defendant be in the indictment named of a foreign county (*g*) with an *alias dict'* of the same county, yet process goes according to the st. 8 H. 6. 10., for the *alias dict'* is no part of his name, nor shall he be put to answer to it. 1 Ed. 4. 1. (*h*)

And

an issue awarded to try it, then if he has been brought in upon a *capias*, a *capias ad audiendam juratam* shall be awarded against him. Ibid. — 3. But where he has appeared upon the *exigent*, and makes default after issue joined, a new *exigent* should be awarded, and if he appear upon the new *exigent*, he should, according to Lord Hale, plead *de novo*; for, by the *exigent*, it seems both the issue and inquest are without day. 1 Starkie, 276. 2 Hale, 225. — 4. But serjeant Hawkins is of opinion, that though the inquest is put without day by the *exigent*, it is not waived, and that the Court may cause the same inquest to try the same issue, unless the defendant fail to render himself before the return of it. 1 Starkie, 276. 2 Hawk. c. 27. s. 20.

(*d*) 1. The statute recites, that divers persons *appealed* or indicted of divers felonies in one county, or outlawed in the same county, had been dwelling or received in another county, whereby such felonious persons, indicted and outlawed, had been encouraged in their mischief, because they might not be attached in another county. — 2. Now since an appeal could not be taken before justices of the peace, it has been doubted whether *they* were within the meaning of this statute. 2 Hawk. c. 27. s. 3. — 3. But, says Mr. Starkie, they certainly are within the express words of it; and the intention of the legislature would be in part frustrated by an exclusive construction. 1 Starkie, 259. 260. — 4. Independently of this statute, process by writ might be well awarded into any county of England, either by the King's Bench or by justices of Eyre, &c. upon an indictment before them. 1 Starkie, 260.

(*e*) 1. Indictments of felony or treason, originally taken in the King's Bench, are not, it has been holden, within this statute. 1 Starkie, 266.; who adds *quære et vide* 2 Hawk. c. 25. s. 124. — 2. But by 6 Hen. 6. c. 1. a *special* provision is made, that, before any *exigent* awarded, the Court shall issue a *capias* to the sheriff of the county, where the indictment is taken, and *another* to the sheriff of that county whereof he (the defendant) is named in the indictment, having six weeks' time or more before the return; and after these writs the *exigent* shall issue as before. 1 Starkie, 266.

(*f*) *Voidable*, according to the construction. 2 Hawk. c. 27. s. 127.

(*g*) Since the party must have been conversant in the county where the offence was committed, he may be named of the place where the fact was committed, in the indictment, and then the process is to go as at common law. And where a felony is committed at A., in the county of B., the usual course is to allege, that J. S., late of A., in the county of B., &c. 2 Hale, 196. 1 Starkie, 267.

(*h*) But if the description be J. S., *late* of A., in the county of B., *late* of C., in the county

And for the same reason, if he be named of the county where the indictment is taken with an *alias dictum* of the other county, he shall not have process upon that statute. 1 Ed. 4. 1.

By the equity of the said statute, if the indictee be imprisoned in another county, the justices of peace may award an *habeas corpus* to bring him before them.

If a person indicted before justices of peace find surety in Chancery to appear at the return of the writ, he shall have a *supersedeas* to such process. F. N. B. 237. C. (i)

So, if he find surety before two justices of peace, 1 *Quorum*.

By the stat. 4 & 5 W. & M. 22. s. 4. (which continued for three years) on *exigent* in criminal cases before conviction, proclamation shall go to the sheriff of the county, where the party dwells, according to the st. 31 El. 3.

And if a *capias* issue upon an indictment for a misdemeanour before a *venire*, it is error. R. Raym. 275. (k)

But

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county of D.; upon the return of a *capias* in the county of B., a *capias* with proclamations shall issue to the sheriff of D., under the statutes. 2 Hale, 196. 1 Stark. 267.

(i) 1. If a person be apprehensive that an indictment has been found, and that a warrant will be issued to apprehend him for some trivial misdemeanour; and is desirous of preventing an arrest, he may, whether he is under recognizance to appear or not, apply to the clerk of the peace, or search his office to see if any indictment has been found against him, and procure a certificate of such finding, and thereupon attend a judge of the king's bench, or one of the justices of peace at the police offices in town, or a justice of the peace in the county, and produce the certificate, together with two sufficient bail, who will take a recognizance to appear and answer, and grant him a *supersedeas*, which will protect him from arrest. 1 Chit. C. L. 346. Dalt. c. 175. 193. Lamb. 500. C. C. C. 16. — 2. After this has been granted, it is said that no judges' or justices' warrant, or even a *capias*, or *exigent* in proceeding to outlawry, can be of any avail, as the defendant has only to produce it, and it must be respected by the officer. 1 Chit. C. L. 347. C. C. C. 16.; but a *quære* is added by Mr. Chitty.

(k) 1. The 26 Geo. 3. c. 18., reciting that persons who have been guilty of assaulting or obstructing officers of the customs or excise in the due execution of their offices, or of rescuing, or attempting to rescue goods seized by such officers, or of offences against the laws respecting quarantine, being prosecuted for the same by indictment or information in his majesty's court of king's bench, do frequently escape punishment by reason that such persons have not been usually put under any recognizance to answer such indictment or information, unless in cases where some specific pecuniary penalty is imposed, or where the offence having been committed in the county of Middlesex, an indictment for the same has been originally found in the said court of king's bench; for remedy thereof enacts, that whenever any person or persons shall be charged with assaulting or obstructing any officer or officers of the customs or excise, in the due execution of his or their office or offices, or any person or persons acting in his or their aid or assistance, or with rescuing or attempting to rescue by force any uncaptured or prohibited goods, after seizure thereof by such officer or officers, or with any offence against any law respecting quarantine, and the same shall be made appear to any judge of his majesty's court of king's bench, by affidavit or by certificate of an indictment or information being filed against such person or persons in the said court for such offence; it shall and may be lawful for such judge to issue his warrant in writing under his hand and seal, and thereby to cause such person or persons to be apprehended and brought before him, or some other judge of the said court, or before some one of his majesty's justices of the peace, in order to his, her, or their being bound to the king's majesty with two sufficient sureties in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer to all and singular indictments or informations for any of the offences aforesaid; and in case such person or persons shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge or justice of the peace, respectively, to commit such person or persons to the common goal of the county, city, or place, where the offence shall have

But in treason, or felony, if the process be a *venire* (1) and not a *capias*, it is error. Semb, 3 Mod. 265. Sho. 75. By

been committed, or where he, she, or they shall have been apprehended, until he, she, or they shall have become bound as aforesaid, or shall be discharged by order of the said court of king's bench in term time, or by one of the judges of the said court in vacation; and the recognizance or recognizances to be taken thereupon shall be returned and filed in the said court, and shall continue in force until such person or persons shall have been acquitted of such offence, or in case of conviction shall have received judgment for the same, unless sooner ordered by the said court to be discharged.— 2. The 48 Geo. 3., reciting that these provisions have been found beneficial, and that it is expedient to extend the same to other cases, enacts, that whenever any person shall be charged with any offence for which he or she may be prosecuted by indictment or information in his majesty's court of king's bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit, or by certificate of an indictment or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him or some other judge of the same court; or before some one of his majesty's justices of the peace, in order to his or her being bound to the king's majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer to all and singular indictments or informations for any such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge or justice, respectively, to commit such person to the common gaol of the county, city, or place where the offence shall have been committed, or where he or she shall have been apprehended, there to remain until he or she shall become bound as aforesaid, or shall be discharged by order of the said court in term time, or of one of the judges of the said court in vacation, and the recognizance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or in case of conviction shall have received judgment for the same, unless sooner ordered by the said court to be discharged; and that, if upon the trial of such indictment or information, any defendant so committed and detained as aforesaid shall be acquitted of all the offences therein charged upon him or her, it shall be lawful for the judge before whom such trial shall be had, although he may not be one of the judges of the said court of king's bench, to order that such defendant shall be forthwith discharged out of custody as to his or her commitment as aforesaid, and such defendant shall be thereupon discharged accordingly.— 3. The 38 Geo. 3. c. 52. s. 4., enacts, that whenever, in pursuance of this act, any bill or bills of indictment shall be found by the grand jury of the county of any city, or town corporate, against any person or persons, for any offence or offences committed, or charged to be committed, within the county of any city, or town corporate, that it shall and may be lawful for any courts of oyer and terminer, and general gaol-delivery for the county at large, to issue process for apprehending the person or persons against whom such bill or bills of indictment shall be found, if not in custody, in like manner as in cases of indictment found in any such court of oyer and terminer and general gaol-delivery, for offences committed within the county at large.— 4. Independent of these statutes, the practice, in the case of misdemeanours, where no outlawry was even contemplated, was for any judge of the court of king's bench, upon certificate (by the clerk of assize or clerk of the peace, respectively) of indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. 4 Com. 319.— 5. And it is the established usage likewise, upon an indictment found for a misdemeanour during the assizes or sessions, to issue a bench warrant, signed by a judge or at least two justices of the peace, to apprehend the defendant. 1 Chit. C. L. 339, 540. 2 Hawk. c. 87. s. 8. C. C. C. 9. 15. Toone, 61, 62. Cowp. 289.— 6. The practice in issuing the bench-warrants is stated to be, that where the parties are not under recognizance, the prosecutor has a right, during the assizes or sessions, to this process against them, to bring them immediately into court to answer. But that when the parties are under recognizance, no process can be had against them during the assizes or sessions, because it is looked upon in law as but one day, and the defendant has the whole to make his appearance. 1 Chit. C. L. 342. C. C. C. 9. 15. Williams, J. Process. 2 Salk. 607.— 7. In such case, however, the prosecutor may, if the defendant has not appeared, bespeak a bench-warrant during the assizes or sessions, which will be issued at the close thereof.— Ibid.

(1) If the entry is *ideo veniat inde juratu*, when it should be *præceptum est vice-comiti*,



By the st. 26 H. 8. 13. and 5 Ed. 6. 11., process of outlawry, on an indictment for high treason against an offender out of the realm, shall be of the same effect as if resiant in the realm. Vide Utlagary.

If an indictment be removed into B. R. by *certiorari* out of London, or Middlesex, by the course of the court, the defendant must give a recognizance to try it within the said term, or at the sittings afterwards. Mod. Ca. 246.

If it be removed out of another county, the defendant is *sine die*, and if he does not appear, process goes against him till he is outlawed. Mod. Ca. 246.

But now, by the st. 5 & 6 W. & M. 2., it shall not be removed by the defendant, unless he gave recognizance to try it *ut supra*. Mod. Ca. 246.

Yet, if it be removed by the prosecutor, it remains at the common law, and the defendant cannot try it without leave of the court. R. Mod. Ca. 246.

### (K) Confession.

[Vide in JUSTICES.]

If the defendant appears, or be brought in by process, he shall confess, or traverse the indictment.

If he confesses the indictment, he admits himself guilty.

He may confess in person, or by clerk in court. Mod. Ca. 16.

And there shall be judgment against him.

And in an action for the same trespass, his confession shall be evidence against him. 9 H. 6. 60. a.

But where the confession proceeds from fear or ignorance, the judge may refuse the confession. St. P. C. 142.

So a man may *ponere se in gratiam regis*, and pray that he may be admitted by fine. 9 H. 6. 60. a.

And such a confesion does not conclude him. 9 H. 6. 60. a.

And he may give affidavits of a first assault, &c. by the prosecutor, for mitigation of the fine. 1 Sal. 55.

So, after not guilty pleaded, *relictâ verificatione*, he may confess the indictment. Kelg. 11. Vide Justices, (W 3.)

So, *protestando quod non est culpabilis*, he may plead a pardon. (m)

So the attorney-general may enter a *nolle prosequi*. Mod. Ca. 261.

But that does not discharge the crime. R. 1 Sal. 21. Mod. Ca. 261.

And afterwards there may be other process upon the same indictment. Per Holt, 1 Sal. 21. Mod. Ca. 261. Vide Justices, (W 3.)

### (L) Traverse.

[Vide in JUSTICES.]

If he does not confess, the defendant traverses the indictment, and says, not guilty.

*comiti*, it is error. Str. 309. — 2. So if *venerunt* the jury, in the præterperfect tense, instead of *veniunt* in the present. Str. 309. — 3. So if *quiatam*, &c. is left out in the award of the *venire*; for this is an essential part. Ibid. — 4. But though the indictment be *contra formam statuti*, the process need not have that addition. Str. 843. Ld. Raym. 1518.

(m) 1. Which must be described as being under the great seal. 1 B. & P. 199. — 2. The king's sign manual may be given in evidence by the prisoner, on an indictment for returning from transportation; and if not revoked, and the condition be literally, though not substantially complied with, it shall discharge the prisoner. 2 Blk. 799.



Or, *autrefois convict* or *acquit*, &c. (n) Vide Appeal, (G 9. 11.) (o)

But *autrefois acquit* is no plea, if he was acquitted upon a trial in a mistaken county.

Or, upon an insufficient indictment.

*Autrefois acquit* in burglary is good, though there be a second indictment for the goods of another taken in the same house. R. Kelg: 30. 52. (p)

But he may be indicted for felony in taking the goods of another. R. Kelg. 30. 52.

So he may plead *autrefois attain*t for the same or another felony, unless it be in a case where the party without conviction shall not have restitution, or clergy is allowed in the one, but not in the other felony. 12 Co. 100.

So, a pardon. 12 Co. 100. (q)

But a pardon by act of parliament ought to be allowed, though it be not claimed.

If he plead in court he shall be committed till trial, except where he gives security to try it at his own charge. Mod. Ca. 114.

So, if he plead in the office, the plea ought not to be received without such security. R. Mod. Ca. 114. (r)

If he be committed, the prosecution shall be at the charge of the prosecutor. Mod. Ca. 114.

If the defendant appear upon an indictment for treason, or felony, he ought to plead presently.

So, upon an indictment for a misdemeanour, if he does not appear till a *capias*; for he is in contempt. Bp.'s Tr. 31.

Or, if he appear upon the recognizance, though he be not in contempt.

Or, if he appear in his own person, in a case of privilege. (s)

So, if the defendant does not plead till a peremptory rule, he shall give bail to try it the same term. Mod. Ca. 42.

But if he appears upon summons by *venire* or *subpoena*, he shall have an imparlance. Bp.'s T. 31.

So, if he plead presently, he need not try it till next term. Mod. Ca. 42. (t)

The

(n) The plea of *autrefois acquit* must state the record of acquittal. 1 M. & S. 183.

(o) But not another prosecution depending. Dougl. 240.

(p) So the plea of *autrefois acquit* or *attain*t on an indictment for murder, is a bar to an indictment for petit treason for the same fact; *et vice versa*. Foster, 529.

(q) Vide supra.

(r) On an indictment for a mayhem laid *felonice*, the defendant need not be brought to the bar to plead, but his plea may be delivered in the office. 2 Str. 1100. — 2. A plea in abatement must be verified on oath. 3 Burr. 1617..

(s) 1. In an indictment for a misdemeanour, the defendant may plead misnomer by attorney. 10 East, 83. — 2. And such plea, in case of misdemeanour, praying judgment of the indictment, and that he may not be compelled to answer the same, is good. 10 East, 83. 85. — 3. And on issue upon such a plea, in such an indictment, and found against the defendant, the judgment is final. 8 East, 107.

(t) 1. By 60 Geo. 3. and 1 Geo. 4. c. 4., entitled an act to prevent delay in the administration of justice in cases of misdemeanour, sect. 1. reciting, that "Whereas great delays have occurred in the administration of justice, in cases of persons prosecuted for misdemeanours by indictment or information in his majesty's courts of king's bench at Westminster and Dublin, and by indictment at the sessions of the peace, sessions of oyer and terminer, great sessions, and sessions of gaol-delivery, in that part of Great Britain called England, and in Ireland respectively, by reason that the defendants in some of the said cases have, according to the present practice of such respective

tive courts, an opportunity of postponing their trials to a distant period, by means of imparlances in the said several courts of King's Bench, and by time being given to try in such respective courts of session; for remedy thereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, where any person shall be prosecuted in his majesty's court of king's bench at Westminster, or in his majesty's court of king's bench in Dublin respectively, for any misdemeanour, either by information or by indictment there found or removed into the same respective courts, and shall appear in term time in either of the said courts respectively in person, to answer to such indictment or information, such defendant upon being charged therewith shall not be permitted to imparle to a following term, but shall be required to plead or demur thereto within four days from the time of his or her appearance; and in default of his or her pleading or demurring within four days as aforesaid, judgment may be entered against the defendant for want of a plea; and in case such defendant shall appear to such indictment or information by his or her clerk or attorney in court, it shall not be lawful for such defendant to imparle to a following term, but a rule requiring such defendant to plead may forthwith be given, and a plea or demurrer to such indictment or information enforced, or judgment by default entered thereupon in the same manner as might have been done, before the passing of this act, in cases where the defendant had appeared to such indictment or information by his or her clerk in court or attorney in a previous term. — 2. Provided always, and be it further enacted, that it shall be lawful for the said respective courts, or for any judge of the same respectively, upon sufficient cause shown for that purpose, to allow further time for such defendant to plead or demur to such indictment or information. — 3. And be it further enacted, that from and after the passing of this act, where any person shall be prosecuted for any misdemeanour by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery within that part of Great Britain called England, or in Ireland, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively unless a writ of certiorari for removing such indictment into his majesty's courts, of king's bench at Westminster or in Dublin respectively, shall be delivered at such session before the jury shall be sworn for such trial. — 4. And it is hereby declared and enacted, that such writ of certiorari may be applied for and issued before such indictment has been found, in the like cases, in the same manner, and upon the same terms and conditions, as if such writ of certiorari had been applied for after such indictment had been found. — 5. And be it further enacted, that from and after the passing of this act, where any person shall be prosecuted for any misdemeanour by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery within that part of Great Britain called England, or in Ireland, not having been committed to custody or held to bail to appear to answer for such offence twenty days before the session at which such indictment shall be found, but who shall have been committed to custody or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session, he or she shall plead to such indictment at such subsequent session, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of certiorari for removing such indictment into his majesty's courts of king's bench at Westminster or in Dublin respectively shall be delivered at such last-mentioned session before the jury shall be sworn for such trial, any law or usage to the contrary notwithstanding. — 6. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to prevent any indictment, found by a grand jury of any city or town corporate, from being removed, at the prayer of any defendant, for trial by a jury of the county next adjoining to the county of such city or town corporate, pursuant to the provisions of an act passed in the thirty-eighth year of his present majesty's reign, entitled "An act to regulate the trial of causes, indictments, and other proceedings, which arise within the counties of certain cities and towns corporate within this kingdom;" and upon such removal, the defendant shall plead, and the trial shall be had according to the provisions of this act, in like manner as if such indictment had been originally found by a grand jury of such next adjoining county. — 7. Provided also, and be it enacted, that it shall be lawful for the court, at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery re-

spectively

The clerk of the peace shall join issue for the king.

And if the entry be, *Et A. B. similiter, &c.* it is sufficient, though it does not say, that he was clerk of the peace. Cro. Car. 315.

Vide Justices, (W 3.)—Justices of Peace, (D 13.)

### (M) Arraignment and Trial.

[Vide in JUSTICES.]

After plea, the defendant shall be brought to his trial. Vide Justices, (W 1. &c.) (u)

The proceeding after the indictment, by which the defendant is brought to plead and afterwards to trial, is called the arraignment of the prisoner.

Justices of peace as well as Justices of B. R. or goal-delivery, may arraign a prisoner indicted before them.

If no arraignment be entered, it will be error. Semb. 3 Mod. 265. Sho. 131.

But if he have oyer of the indictment, that imports it. Semb. Sho. 131.

After issue upon the indictment, the defendant shall be bound by recognizance to put himself upon his trial.

And if there are two indictments against the same defendant, he shall choose which shall be tried first, not the king. Mod. Ca. 168.

If there be a mistrial, or variance between the indictment and the record, &c. whereby the trial cannot proceed, or is set aside, the recognizance of the defendant shall be forfeited; for there must be an effectual trial. R. Mod. Ca. 168.

If several are indicted for the same offence, there may be a trial against two or three, if the others consent to confess if they are convicted. Mod. Ca. 212. (x)

respectively, upon sufficient cause shown for that purpose, to allow further time for pleading to any such indictment, or for trial of the same. — 8. And be it further enacted by the authority aforesaid, that in all cases of prosecutions for misdemeanours, instituted by his majesty's attorney or solicitor general, in any of the courts aforesaid, the Court shall, if required, make order that a copy of the information or indictment shall be delivered, after appearance, to the party prosecuted, or his clerk in court or attorney, upon application made for the same, free from all expence to the party so applying; provided that such party, or his clerk in court or attorney, shall not have previously received a copy thereof. — 9. Provided also, and be it further enacted, that in case any prosecution for a misdemeanour instituted by his majesty's attorney or solicitor general in any of the courts aforesaid, shall not be brought to trial within twelve calendar months next after the plea of not guilty shall have been pleaded therein, it shall be lawful for the court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days' previous notice shall have been given to his majesty's attorney or solicitor general, to make an order, if the said court shall see just cause so to do, authorizing such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution. — 10. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to any prosecution by information in nature of a *quo warranto*, or for the non-repair of any bridge or highway."

(u) A defendant indicted under 42 Geo. 3. c. 85. cannot put off the trial until the return of the writs for the examination of his witnesses, issued pursuant thereto, without laying a ground whence it may be seen that their evidence is material; but the prosecutor may. 8 East, 31.

(x) If A. be indicted for petit treason, and B. for murder, and they do not challenge, they may be tried together; if they insist upon their challenges, they must be tried separately, for the number of peremptory challenges is different. Fost. 104

If

If there are two indictments against a man for the same offence, (as one by the coroner's inquest, the other by the grand inquest,) the usual course is to try him upon both at the same time. 1 Sal. 382.

Or, if he be tried upon one, though acquitted, he must be tried upon the other, and plead the former acquittal. R. 1 Sal. 382.

If it appear to be only a trespass, he shall be found not guilty; for it cannot be found specially, and a fine for the trespass. R. Kelg. 29.

The indictment shall be read to the prisoner in English, or a tongue which he understands, before he pleads. R. 1 Sid. 85.

By the st. 22 H. 8. 14. a felon may challenge twenty of the jury peremptorily. Vide Challenge, (C 1.)

And for cause, all that he pleases; as, that a juror is infamous.

Or, had not 40s. *per annum*.

Or, had not goods to the value of 40*l.* if it be in a borough, according to the st. 23 H. 8. 13.

Or, was one of his indictors: by the st. 25 Ed. 3. 3.

Vide Justices, (W 1. &c.) — Justices of Peace, (D 14.)

## (N) Judgment.

[Vide in JUSTICES.]

If the defendant be convicted (*y*) upon an indictment by confession or verdict, there shall be judgment against him according to the nature of the offence.

If the defendant be fined, it may be imposed when he is absent; for a *capias pro fine* lies. 1 Sal. 56.

But judgment for a corporal punishment cannot be given in the absence of the defendant. 1 Sal. 56.

Though he be outlawed. R. 1 Sal. 400.

So execution for a felony cannot be awarded against any one absent, though he be outlawed. 1 Sal. 400.

Nor can it be awarded, but in the county where he was attainted. Semb. 3 Mod. 124.

So judgment ought not to be without a demand, *si quid dicere habeat quare judicium non, &c.* Semb. 3 Mod. 265. R. Sho. 132.

And the prisoner shall not tender any matter for stay of judgment, but what arises upon the indictment. 1 Sid. 85.

After judgment given, the court may vary it the same term. 1 Sal. 401. Vide Record, (F).

An indictment in B. R. shall be entered upon the plea roll. 1 Sal. 371.

And if an offence appears in the indictment, for which it may be maintained, it is sufficient, though in other parts it is bad; for here the court sets the fine in proportion to the offence found, and it is not like declarations where entire damages are found, which the court cannot apportion to the good part of the declaration. R. 1 Sal. 384. 5. (z)

(*y*) 1. In cases of infancy, and insanity, and in all cases of justifiable homicide, the jury, *under the direction of the court*, may find a general verdict of acquittal. Fost. 279. — 2. So in homicide by misadventure. Fost. 280.

(*z*) 1. Hence in perjury, one correct assignment will, notwithstanding the rest are defective, warrant a judgment for the crown. *Ld. Raym.* 887. — 2. Hence likewise, in case of separate counts, a defect in one will not vitiate another. 2 Sess. Ca. 32. 96. 2 H. Bl. 131. 1 B. & P. 187. — 3. Unless the latter is, by reference, founded upon the former; as where it refers to a writ set forth therein. 2 Sess. Ca. 96.

Vide Justices of Peace, (D 15.)

As to error upon an indictment, Vide Error, (B).

For more concerning Indictment, Vide Action upon the Case for a Conspiracy, (C 4.) — Action upon the Case for a Nuisance, (D 3.) — Amendment, (2 C 1.) — Appeal, (G 16.) — Barratry, (C). — Battery, (E 2.) — Forceable Entry, (D 3, 4.) — Forgery, (B 2.) — Justices of Peace, (B 104, 105. — D 12.) — Officer, (G 11.) — Parliament, (L 13.) — Rescous, (D 3.)

## INDORSEMENT.

Vide FAIT, (E 2.)

## INDUCEMENT.

Vide PLEADER, (C 31. 43. 82. — E 10. — G 14. 20, 21. — O 15.)

## INDUCTION.

Vide ESGLISE, (L).

## INFANT.

Vide ENFANT — ADMINISTRATION, (E, F). — VOUCHER, (D 2.)

## INFORMATION.

### (A) When it lies.

(A 1.) By the attorney-general. *infra*.

(A 2.) *Ex officio*. p. 557.

(A 3.) By a common informer. p. 559.

### (B) For what offences it lies. p. 560.

### (C) For what, not. p. 561.

### (D) Form of proceeding.

(D 1.) Process. p. 562.

(D 2.) The information ought to be certain. p. 562.

(D 3.) Ought to alledge the offence according to the words of the statute, &c. p. 563.

(D 4.) How the information shall be quashed. p. 564.

(D 5.) Imparlance and plea. p. 565.

(D 6.) Replication, &c. p. 566.

(D 7.) Trial, judgment, &c. p. 567.

### (A) When it lies.

(A 1.) By the Attorney-general.

An information is a declaration of the charge, or offence against any one at the suit of the king. *Terms de Ley*, verb. Information.



The king may proceed against any one for an offence under the degree of treason, or felony (*a*), not only by indictment or presentment, but also by information upon record. R. Sho. 107, &c. 5 Mod. 459.

And that, not only in the exchequer, but also in B. R. and other courts. Sho. 109, 110.

In C. B. where a statute gives an information in any court of record. R. 3 Leo. 48.

An information may be brought by the attorney-general (*b*), *ex officio* (*c*), or by a common informer. Vide the st. 21 Jac. 4.

The entry of an information by the Attorney-General in B. R. is *memorandum quod T. T. miles attornatus domini regis nunc generalis qui pro eodem domino rege in hac parte sequitur in propria personâ suâ venit hic in curiam dicti domini regis coram ipso rege apud Westmonasterium die S. proximo post, &c. Et pro eodem domino rege dat curiam hic intelligi et informari quod, &c.* Clift. 395.

For the exchequer, vide Co. Ent. 372. 376. 378. 381. 384. 387. 390.

But an information by a common informer, and also by the attorney-general, ought to be in the proper county. 3 Inst. 193. 4 Inst. 172. Adm. Cro. Car. 112. Per 2 J. Cro. El. 737. Vide Action, (N 10.)

So, by the st. 21 Jac. 4. information shall not be by the attorney-general, or any other, in the courts of Westminster, for an offence for which a common informer might have an information before justices of assise, *nisi prius*, gaol-delivery, oyer and terminer, or justices of peace at the quarter sessions. 4 Inst. 172. 174. Vide Action upon Statute, (D).

Though it be for offences mentioned in the proviso. 4 Inst. 174.

So debt shall not be brought in B. R. &c. for the penalty of any offence within the st. 21 Jac. 4. if the offence was not in Middlesex. R. cont. 1 Vent. 8. 1 Sid. 400. R. acc. per Holt, and all the judges, — W 3. Vide 1 Sal. 372, 3.

But this st. 21 Jac. 4. extends only to offences inquirable before justices of *nisi prius*, assise, gaol-delivery, oyer and terminer, or of the peace. R. Cro. Car. 112.

By the st. 31 El. 5., an information, where a penalty is given to the queen shall be brought in two years after the offence; if to the queen and the prosecutor (unless on the statute of tillage) in two years after the year allowed to the common informer; or if the statute limits a shorter time, then sooner. Vide Post, (A 3).

And if there be a penalty to the king and the informer, and the common informer does not sue within the year, the king within two years afterwards shall sue for the whole forfeiture. Mod. Ca. 220.

Yet if B. brings an action upon the st. 23 H. 6. for the penalty of 40*l.* for a false return of a burgess to serve in parliament, (the bur-

(*a*) Information will not be granted, when the matter charged, if proved, will amount to a felony, which ought to be tried in the course of common law. Lofft. 253.

(*b*) An information may be filed by the solicitor-general, while the office of attorney-general is vacant. 4 Burr. 2527.

(*c*) Information will never be granted upon the application of the attorney-general, in prosecutions by the crown. 3 Burr. 1564; 4 Burr. 2089.

gess himself, not suing within three months,) he shall not be reputed a common informer. R. 4 Mod. 130. Sho. 354. 3 Sal. 200.

So upon the st. of tillage 5 El. 2. the informer ought not to sue within three years; for the first year is given to him in remainder, the second year to the second in remainder, the third to him in the reversion, and then the informer (any more than the king) is not restrained to any time. Sav. 6.

(A 2.) *Ex Officio.*

So an information may be exhibited *ex officio* by the master of the crown office, as coroner and *attornatus domini regis*. Clift. 395. R. Sho. 106.

But the clerk of the crown ought not to set his hand to an information, without examining the cause. Sti. Pr. R. 270.

And the court will not compel him to file it. Ray. 482.

And now, by the st. 4 & 5 W. & M. 18. the clerk, of the crown shall not, without express order by the court, exhibit, receive, or file an information, &c. before he have a recognizance from the person procuring it, to him against whom it is, in 20*l.* penalty to prosecute effectually, and abide such orders as the court shall direct. (*d*)

Which recognizance the clerk of the crown, or any justice of peace where the cause of the information arises, may take, and when taken or brought to the office, shall be entered on record, and a memorandum

(*d*) 1. Before which statute it was in the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited. 4 T. R. 290. — 2. And the meaning of the statute is, that the clerk of the crown shall file no information without leave, nor issue process thereon without recognizance. B. R. H. 247. — 3. The first proceeding therefore, now is, to obtain a rule nisi. — 4. And service of this rule at the house of defendant is good, unless it appears that he is abroad: Str. 1044. B. R. H. 271. — 5. If five rules are obtained against five several defendants, one joint information cannot be filed against them on these rules, though it is for a joint offence. 3 Burr. 1270. — 6. A rule nisi, for a criminal information against a magistrate, will be granted at any time during the same term in which the fact charged was committed; where it was committed before the term in which the rule is applied, for application must be made a sufficient time before the end of it for the defendant to show cause. 7 T. R. 80. — 7. A motion for a criminal information against a magistrate may be made in the second term after the act complained of provided that no assizes have intervened, and also, that it be made early enough to enable the defendant to show cause in the same term. 13 East, 270. Id. 322. — 8. In order to obtain an information for a private libel charging a specific offence, the party libelled must deny the charge upon oath. Dougl. 284. Unless he is abroad at a great distance, or the charge is of criminal language held in parliament, Dougl. 578. — 9. On applying for criminal information against a magistrate for oppression, the party must swear that he is innocent of the offence imputed to him; thus, if for a conviction of the game laws, where the fact is admitted, he must swear to his qualification, and that he has taken out a certificate. 5 T. R. 588. — 10. It is discretionary with the court, to receive affidavits in support of an application for criminal information, though not made for the occasion, but in a collateral proceeding. 4 T. R. 285. — 11. On the application for criminal information, the court are as the grand jury, and require the same evidence that would warrant a bill; therefore it will not be granted on an affidavit of what a third person, who is himself forthcoming, said. 6 T. R. 285. — 12. Affidavits on motion for leave to file a criminal information, must not be entitled in the cause; those produced on showing cause against the rules, either may or may not; all affidavits, after the rule is made absolute, must be entitled. 6 T. R. 642. — 13. The party applied for time to send to Trinidad for an affidavit of the truth of certain matters in a libel, in order to show cause against a rule for an information for a libel. 3 Smith, 390.

of it filed in an open place of the office, to which all may resort without fee.

And if the defendant plead to issue, and the prosecutor do not at his own costs try it within a year, or procure a *nolle prosequi*, or a verdict be against him, B. R. shall award the defendant costs, unless the judge at the trial in open court certify on record, that there was a reasonable cause for the information; for which costs, if not paid in three months, the defendant shall have the benefit of the said recognizance.

By the same statute, it is declared, that it shall extend only to informations by the master of the crown-office.

And this statute extends to an information by the coroner for any misdemeanor; as, to an information in nature of a *quo warranto*. R. 1 Sal. 376. Carth. 504.

And if any information be filed before a recognizance given, the whole process upon it shall be quashed. R. 1 Sal. 376. Carth. 504.

And after recognizance, the costs shall be paid, if the judge does not certify, &c. which shall be intended of a certificate entered upon the *postea*. Per Holt, Comb. 345.

The court will not grant an information (*e*) for perjury, where the question was such as made the party accuse himself. 1 Sal. 374.

(A 3.) By a Common Informer.—Vide Action by *Qui tam*, &c. in Action upon Statute, (E 1. 2.)

By the st. 18 El. 5. none shall sue on a penal statute but by information, or original. Vide Action upon Statute, (E 1, 2.)

And therefore, an action upon a penal statute in B. R. by bill is error. R. Cro. El. 77.

And is not aided by the st. 18 El. 14. R. Cro. El. 77.

So, where a statute gives a penalty to the king and to him who will sue for it; if the king has not exhibited an information, any common informer may.

And the king afterwards cannot restrain him of a moiety of the penalty. Sti. Pr. R. 270.

And if there be an information *qui tam*, &c. though the attorney-general enters a *nolle prosequi*, the informer may proceed for his part. R. 1 Leo. 119. Cro. El. 583.

So, if the king pardon. Cro. El. 583.

Otherwise, in an information upon the st. 16 R. 2. for a *præmunire*, by the attorney-general and the informer; for there the informer only sues for damages, which are only accessory to the conviction. R. 3 Leo. 139.

So, if the informer dies, the attorney-general may proceed for the king's part. R. Cro. El. 583.

Or, if he release, or will be nonsuited. Cro. El. 583.

Or, if the informer lapse his year. Sav. 6.

But by the st. 18 El. 5. The informer shall exhibit the information in person, and pursue by himself or attorney, and not by deputy.

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(*e*) Where the penalty vests in the crown only, the attorney-general must file it. Str. 1234. — 2. If therefore the suit lapses by time to the crown, the court will not grant an information. Ibid.

So, by the same statute, on an information, the officer who receives it shall make a note of the day, month, and year when exhibited, from which time it shall be accounted of record, and not before: but this extends not to informations for maintenance, champerty, buying of titles, or embracery, or by a corporation, or other to whom a penalty is specially given, or by officers who proceed *ex officio*, or for matters concerning their offices.

By the st. 31 El. 5. an information shall be by a common informer within one year after the offence, (unless on the statute of tillage) or if limited by a statute to a shorter time, then sooner. Vide ante, (A 1.)

By the st. 31 El. 5. and 21 Jac. 4. the information shall lay the offence in the proper county, and if not proved, the defendant shall be found not guilty; and shall not be in the courts at Westminster, where the information may be before justices of assise, *nisi prius*, &c. Vide ante, (A 1.) — Action, (N. 10.)

And by the st. 21 Jac. 4. shall not be received, till the informer swear he believes the offence committed within a year in the same county; which oath shall be entered on record.

But the oath of the informer need not appear upon the information. R. Cro. Car. 316.

By the st. 18 El. 5. if the informer make composition with the defendant before or after process, or before or after plea, or take money of him without order of court, or offend in suing out process, or by other misdemeanour, he shall be set in the pillory, be ever disabled to be an informer, and forfeit 10*l.*, a moiety to the queen, a moiety to the party grieved; of which offences justices of oyer and terminer, of assise, and of the peace at quarter-sessions may inquire, &c.

By the st. 31 El. 5. none, for a misdemeanour prohibited to be an informer by order of court, shall after be admitted to inform on any penal statute, unless he be the party grieved.

If an informer compound an information at the quarter-sessions, he shall be indicted for it, as an offence within the st. 18 El. 5. Adm. 1 Sid. 311.

Though the sessions have not conusance of the offence for which the information is exhibited. Semb. 1 Sid. 311.

By the st. 18. El. 5. if the informer delay or discontinue the suit, be nonsuit, or have a verdict against him, he shall pay costs; for which the defendant may have a *capias fieri facias*, or *elegit*. Vide Costs, (A 6.)

But the court will not oblige him to give security for costs. R. 2 Bul. 18.

Nor grant an information, where an indictment is found for the same offence, though insufficient. 2 Mod. Ca. 187.

### (B) For what Offences it lies.

An information lies (*f*) by the common law for every crime, which tends

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(*f*) 1. In granting informations, the court consider, — 1°. The merits of the person applying: — 2°. The time of application: — 3°. The suspicious state of the case: — 4°. The consequences of granting the information. 1 Blk. 541. Lofft. 65. 147. 275. 393. — 2. Nor will this grant a criminal information, unless the motive is corrupt. 4 T. R. 451. — 3. And where a proceeding admits of two interpretations, they

tends to the subversion of the state: as, for blasphemous words; for religion is the cement of society. R. 1. Vent. 293. Vide Indictment, (D).

For words which justify the murder of Char. 1. in contempt of W. 3. though Char. 1. was dead before. 3 Sal. 198.

So an information lies, where a man omits a thing, which some statute commands to be done, or does any thing prohibited by statute. 2 Mod. 302.

So, if by one clause a statute prohibits a thing, and by another clause gives a penalty; an information lies upon the prohibitory clause. Per Hale, 2 Mod. 128.

So, if a statute makes a thing criminal which was lawful before, an information lies for an attempt to do it: as, where going to France during a war, without licence, is made high treason by the st. — W. 3. an attempt to go to France is a great misdemeanour, for which an information lies. R. Skin. 637.

So, if an officer neglects, or abuses his authority.

As, if a justice of peace (g) commits to the house of correction, without proper cause. 2 Mod. Ca. 45. (h)

### (C) For what, not.

But, where a statute does not only make a prohibition, but also makes a nullity in the act intended to be restrained, no information is necessary: as, where the st. 18 H. 6. 11. prohibits any to be a justice of peace, who has not 40*l.* *per annum*, &c. an information is not necessary; for the statute makes an incapacity, and his office is void. 2 Mod. 302.

So, upon the st. 5 & 6 Ed. 6. 16. which prohibits the sale of offices; for the office is *ipso facto* void. 2 Mod. 302. (i)

### (D) Form

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they will take the defendant's explanation of it, that is, that his intentions were innocent; *secus*, where it admits but of one. 2 T. R. 206. — 4. And though they may think a ground is laid, yet, if under the circumstances the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule on defendant's undertaking so to do. Dougl. 314.

(g) 1. Information will not be granted against justices acting in sessions unless in very flagrant cases. 1 Blk. 432. — 2. Add to warrant a criminal information against a magistrate, his motive must have been corrupt as well as his proceeding illegal. He will be taken to have acted corruptly where he has proceeded in opposition to another magistrate without deliberating in the matter. 2 T. R. 190. 1 T. R. 653. — 3. It lies against him for refusing an ale licence from corrupt motives. 3 Burr. 1716. Id. 1317. Id. 1318. — 4. So as well for granting an ale licence from improper motives as for refusing one. The injury to the community may be greater in the former case than in the latter. 1 T. R. 692. — 5. And, even admitting that it is not an indictable offence, to conspire to pervert the course of justice by tendering evidence, which in law is inadmissible; yet it is criminal in magistrates, after a verdict for the crown on an indictment for not repairing a road, to conspire to influence the judgment of the court in imposing the fine, by falsely certifying that the road is in repair; since custom has warranted the receiving such certificates on such occasions. 6. T. R. 619.

(h) 1. Information lies for unlawfully conspiring to remove an unmarried female under age, out of the hands of her master to whom she was apprenticed without her father's knowledge, for the purposes of prostitution. 3 Burr. 1434. 1 Blk. 140. 439. — 2. So for disturbing a dissenting congregation. 3. Burr. 1683. — 3. So for attempting to bribe a privy counsellor to procure a reversionary patent of an office grantable by the king under the great seal. 4 Burr. 2494. — 4. So where papers have been published to prejudice a cause. Loft. 465.

(i) 1. Information refused against defendants, who, having collected upwards of



## (D) Form of proceeding.

## (D 1.) Process.

By the st. 21 Jac. 4. The same process shall be an information, as in trespass at common law.

And therefore, process lies to an outlawry. 4 Inst. 172.

Yet upon an outlawry, the defendant cannot be fined; for an outlawry for a misdemeanour does not amount to a conviction for the offence. R. Sal. 494.

So, process to an outlawry is intended by the st. 21 Jac. 4. in popular actions, or informations before justices of assize, oyer and terminer, peace, &c. 4 Inst. 172.

So, upon an information in B. R. or C. B. a *subpœna* lies. 3 Leo. 48. Co. Ent. 370. R. 1 And. 48.

So, upon an information in the exchequer, a *subpœna* lies, and afterwards an attachment, proclamation, commission of rebellion, and upon motion a serjeant at arms, with the same costs for a contempt as upon an English bill. Rules and Orders in the Exchequer, Rule 51.

But, by the st. 18 El. 5., no process shall go till an information exhibited, (unless in informations for champerty, maintenance, &c.)

And the clerk shall indorse on it the name of the prosecutor, and the penal statute, on pain of 40s.; a moiety to the queen, a moiety to the party.

And, by the st. 4 & 5 W. & M. 18., all outlawries on informations, except for treason, or felony, may be reversed by attorney, and without giving bail, unless when it is specially ordered by the court.

By Rules and Orders in Exchequer, Rule 48. In an information in the exchequer upon seizure, &c. a short note of the names of the parties, the quality of the goods seized, and the day in which the information was exhibited, shall be entered in a book of the clerk of the office, to be prepared for such intent.

So, in an information upon a penal statute, there shall be an entry of the names of the parties, and the day of the information. Rules and Orders in the Exchequer, Rule 48.

## (D 2.) The information ought to be certain.

An information ought to be certain: And therefore, if an information upon the st. 18 H. 6. 17. for selling a pipe of wine, which does not contain 126 gallons, without a defalcation of the price for the defect in the measure, does not show how much the defect was, viz. a pint, quart, &c. it is not good. R. 2 Leo. 39. Vide Indictment, (G. 1, &c.)

If an information against a ferryman for extortion be, that he took so much *de quibusdam ignotis* between such a day and such a day, *pro quolibet equo*, without showing the certainty of what he carried, and at what time, it is bad. R. 4 Mod. 102. Sho. 389. 3 Sal. 192. 201.

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144. on a brief for sufferers by fire, returned a less sum. 1 Blk. 445. — 2. So against an overseer for procuring a pauper to marry a pauper with child of a bastard, in order to get the bastard settled in the parish where the husband was settled. Cald. 246. 4 Burr. 2106. — 3. If an overseer alter the poor rate, after it has been allowed, but with the approbation of the justices, and deny criminal motives, the court will not grant an information against him. Dougl. 465.

If an information for a false indorsement of exchequer bills says *quod falso indorsavit quasi receptæ essent pro custumis*, it is bad; for it does not show what was indorsed. R. 1 Sal. 375.

(D 3.) Ought to alledge the offence according to the words of the statute, &c.

So an information ought to alledge the offence committed according to the words of the act, which are not supplied by the words, *contra formam statuti*; as, an information for importing goods of a foreign growth in a foreign ship, *contra formam statuti*, is not good, unless it says, that the goods belong to the importer; for then they are not forfeited. R. Hard. 20.

In an information for grubbing up a wood, without saying, that it was a wood at the time of the statute. R. Hard. 105.

If it be by way of recital, *quod cum*, without a positive charge, it is bad. Semb. Sho. 337.

An information for a libel, *cujus tenor sequitur*, will be bad, if it varies in a word. Sal. 660.

(D 4.) How the information shall be quashed.

If an information by a common informer be bad, yet it shall not be quashed upon motion; for the defendant shall have costs, if it be for him. 1 Sid. 152. Vide Indictment, (H).

So an information by the attorney-general for not repairing an highway, where the issue is upon the right of repairing, shall not be quashed upon motion, till it be tried who ought to repair. 1 Sid. 140.

Nor any information by the attorney-general. 1 Sal. 372.

But an information by the attorney-general, or master of the crown-office being *ex officio*, may be quashed by the court upon motion, if there be cause. 1 Sid. 152. (k)

(D 5.) Imparlance, and plea.

If the defendant appears upon recognizance, and information is filed against him, he may imparl till the next term. R. Sho. 56. 1 Sal. 367. Cont. 3 Mod. 215.

So, in every case, where the defendant appears upon the first process, he shall have an imparlance of course. 1 Sal. 367. To the next term, if the information lies in another county than Middlesex. Sal. 514.

If it lies in Middlesex, he shall have the whole term to plead. Sal. 514.

So, in the exchequer upon an information, or *quo warranto*, except informations of seizures, it is sufficient if the defendant, not being taken upon process, pleads in four days of the next term after his appearance, and if he does not there shall be judgment against him by *nil dicit*. Rules and Orders in the Exchequer, Rule 50.

But where the defendant appears upon an attachment, he must plead *instante*. Per Holt, 1 Sal. 367. 3 Mod. 215.

And in the exchequer, if he be taken upon process of contempt, he

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(k) The court will not give leave to quash an information by the attorney-general. He may enter a *nolle prosequi* and file another. Dougl. 239.

shall plead in four days after appearance. Rules and Orders in the Exchequer, Rule 50.

If he be outlawed upon an information, and that be reversed. R. 1 Sal. 371. 514.

Or comes into court upon a *cepi corpus*; for then he was in contempt. Sal. 514.

The defendant to an information may plead not guilty.

Or he may plead, a former information depending for the same cause. Tho. 6. Win. Ent. 537. Hob. 128. Mo. 864. Vide Action, (K 2.) (l)

By the st. 21 Jac. 4. In any information, action, &c. on a penal statute, the defendant may plead the general issue not guilty, or *nil debet*, and give the special matter in evidence.

If the defendant plead and give security to answer for the goods seized, the court in discretion shall make restitution, or not. Hard. 97.

#### (D 6.) Replication, &c.

If the plaintiff reply to the plea to an information in the exchequer, the defendant shall rejoin within four days, otherwise there shall be judgment against him by *nil dicit*. Rules and Orders in the Exchequer, Rule 53.

If the plaintiff demur, the defendant shall join within six days, otherwise there shall be judgment against him by *nil dicit*. Rules and Orders in the Exchequer, Rule 52.

#### (D 7.) Trial, judgment, &c.

By the st. 18 El. 5., no jury shall be compelled to appeal at Westminster on an issue upon a penal statute for an offence committed 30 miles distant, unless on the back of the *distringas* it be noted to be at the request of the attorney-general, which shall be for reasonable cause shown.

Notice of trial in London, or Middlesex, shall be given six days before the trial. Rules and Orders in the Exchequer, Rule 55.

Notice of trial at the assizes shall be given within six days after the end of the term. Rules and Orders in the Exchequer, Rule 55.

Judgment shall be entered upon a rule given, in four days after the return of the *postea*, within term, upon trials in London or Middlesex, and in four days after a trial at bar, if there are so many within the term, otherwise upon the last day of the term. Rules and Orders in the Exchequer, Rule 56.

An information being upon seizure of goods, the record of the judgment and fine upon it shall be finished before the first day of the next term after the recovery, to the intent that the fine be transmitted to the Pipe. Rules and Orders in the Exchequer, Rule 49.

The clerk of assize ought to return the *postea* after trial in an information, or action by *qui tam*, to the proper officer, who shall send a

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(l) 1. Another prosecution depending cannot be pleaded in abatement to any other but *qui tam* informations. Dougl. 240. — 2. If an information be granted, it is of course to stay proceedings in an action for the same cause. 2 T. R. 198. — 3. A party, by applying for a criminal information, waves his right of action, whatever the fate of the motion may be, unless the court specifically give him leave to sue. 2 T. R. 198.

note to the clerk of the estreats in the exchequer, to the intent that the sheriff be charged with the part of the penalty due to the king. Ray 479.

And if the defendant does not appear after conviction and submit to a fine, a *capias pro fine* goes. (m)

If he be taken and give security for his fine a *supersedeas* goes. Crompt. Just. 213.

Vide more of Information, in Action, (K 2.)—Amendment, (2 C 2.)—Guardian, (H 4.)—Officer, (K 13.)—Parliament, (L 12.)—Prærogative, (D 72, &c.)—Quo Warranto, (C 3.)

## INGROSSING.

Vide FINE, (G 2.)—JUSTICES OF PEACE, (B 40, 41.)

## INHIBITION.

Vide PRÆROGATIVE, (D 34, &c.)

## INJUNCTION.

Vide CHANCERY, (D 8, &c.)

## INMATES.

Vide JUSTICES OF PEACE, (B 85.)

## IN MITIORI SENSU.

Vide ACTION UPON THE CASE FOR DEFAMATION, (F 16, &c.)

## INN-KEEPER.

Vide ACTION UPON THE CASE FOR NEGLIGENCE, (B 1, &c.)—JUSTICES OF PEACE, (B 30.)—PLEADER, (2 Q.)

## INNUENDO.

Vide ACTION UPON THE CASE FOR DEFAMATION, (G 10.)—INDICTMENT, (G 4.)

## INQUEST.

Vide ENQUEST.

## INQUIRY (WRIT OF.)

Vide AMENDMENT, (S)—COURTS, (P 14.)—PLEADER, (Z 1, &c.)

(m) The court will not dispense with the personal appearance of the defendant in an information on pronouncing judgment, where the sentence may be corporal. 3 Burr. 1786.

## INQUISITION.

Vide **FORCEABLE ENTRY**, (D. 2, 15.)—**OFFICER**, (G. 12.—K. 12.)—**USES**, (N 16, &c.)

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## INROLMENT.

Vide **BARGAIN AND SALE**, (B 5, &c.)—**FINE**, (G 3.)—**PARLIAMENT**, (G 22.)—**PATENT**, (E)—**POPERY**, (B 11.)

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## INSIMUL COMPUTAVERUNT.

Vide **PLEADER**, (2 G 11.)

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## INSPECTION.

Vide **TRIAL**, (B 1, &c.)

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## INSTITUTION.

Vide **ESGLISE**, (I).

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## INSURANCE.

Vide **MERCHANT**, (E 9, 10.)

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## INSURRECTION.

Vide **VISCOUNT**, (C 2.)

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## INTENDMENT.

Vide **PLEADER**, (C 25.—S 31, &c.)

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## INTENT.

Vide **CHANCERY**, (3 A 1, &c.—3 Z 12.—4 H 7.)—**DEVISE**, (N 24.)—**PLEADER**, (C 46. 58.)

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## INTEREST OF MONEY.

Vide **CHANCERY**, (3 S 1, &c.—3 Y 9.)

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## INTERLINEATION.

Vide **ABATEMENT**, (H 1.)—**FAIT**, (F 1.)

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## INTERLOCUTORY ORDER.

Vide **CHANCERY**, (V.)

**INTER-**



**INTERPLEADER.**

Vide CHANCERY, (3 T.)

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**INTERROGATORIES.**

Vide CHANCERY, (P 5.)

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**INTESTATE.**

Vide ADMINISTRATION, (B 11. — H) — CHANCERY, (3 D 1, &c.)

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**INTIRE TENANCY.**

Vide ABATEMENT, (F 13.)

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**INTRUSION.**

**Intrusion upon the King.**

Vide PRÆROGATIVE, (D 71, &c.)

**Intrusion of Ward.**

Vide GUARDIAN, (H 6.)

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**INVENTORY.**

Vide ADMINISTRATION, (B 7, 8.) — PROHIBITION, (G 19.)

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**JOINDER IN ACTION.**

Vide ABATEMENT, (E 8, &c. — F 4, &c.) — BARON AND FEME, (V, &c.) — CHANCERY, (2 M 1, 2. — 3 V 1, 2.) — PARCENERS, (A 4, 5.)

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**JOINT CONTRACTOR.**

Vide ABATEMENT, (E 12. — F 8.)

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**JOINT-TENANT.**

Vide ABATEMENT, (E 9. — F 5.) — CHANCERY, (3 V 1, &c.) — DEVISE, (H 7. — N 8.) — ESTATES, (K 1, &c.)

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**JOINTURE.**

Vide CHANCERY, (3 Z 1, 2, 3.) — DOWER, (E 1, 2.) — PLEADER, (2 Y 13.)

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**JOURNEYS ACCOMPTS.**

Vide ABATEMENT, (P).

## IRELAND.

- (A) A distinct realm. *infra*.
  - (B) When bound by the laws of England.
    - (B 1.) By act of parliament made here. p. 570.
    - (B 2.) By other laws here. p. 571.
  - (C) Parliament in Ireland. p. 571.
  - (D) Grant by the king concerning Ireland. p. 572.
  - (E) Creation of bishops there. p. 572.
  - (F) Usage there considered in judgments. p. 573.
  - (G) Remedy in England; by error, appeal, &c. p. 573.
- (A) A distinct realm.

Ireland is a realm distinct from England. 4 Inst. 349.

And therefore, treason committed there shall be tried by the st. 33 H. 8. 23. made for the trial of treason done out of the realm. 7 Co. a. Calvin. 1 And. 262.

A fine and nonclaim does not bar him who was in Ireland. Pl. Com. 368. b.

But Ireland is part of the dominion of England, (n) and cannot be severed without act of parliament here. Vau. 300.

(B) When

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(n) 1. As Britain was first peopled from Gaul, so was Ireland probably from Britain; and the inhabitants of all these countries seem to have been so many tribes of the Celtæ, who derive their origin from an antiquity that lies far beyond the records of any history or tradition. The Irish, from the beginning of time, had been buried in the most profound barbarism and ignorance; and as they were never conquered or even invaded by the Romans, from whom all the western world derived its civility, they continued still in the most rude state of society, and were distinguished by those vices alone, to which human nature, not tamed by education or restrained by laws, is for ever subject. The small principalities, into which they were divided, exercised perpetual rapine and violence against each other: the uncertain succession of their princes was a continual source of domestic convulsions; the usual title of each petty sovereign was the murder of his predecessor; courage and force, though exercised in the commission of crimes, were more honoured than any pacific virtues; and the most simple arts of life, even tillage and agriculture were, almost wholly unknown among them. They had felt the invasions of the Danes, and the other Northern tribes; but these inroads, which had spread barbarism in other parts of Europe, tended rather to improve the Irish; and the only towns which were to be found in the island, had been planted along the coast by the freebooters of Norway and Denmark. The other inhabitants exercised pasturage in the open country; sought protection from any danger in their forests and morasses; and, being divided by the fiercest animosities against each other, were still more intent on the means of mutual injury, than on the expedients for common, or even for private interest. 1 Hume, 424, 425. — 2. Besides many small tribes, there were, in the age of Henry the Second, five principal sovereignties in the island, Munster, Leinster, Meath, Ulster, and Connaught; and as it had been usual for the one or the other of these to take the lead in their wars, there was commonly some prince, who *seemed* for the time to act as monarch of Ireland. Roderic O'Connor, King of Connaught, was then advanced to this dignity; but his government, ill obeyed even within his own territory, could not unite the people in any measures, either for the establishment of order, or for defence against foreigners. The ambition of Henry had, very early in his reign, been moved by the prospect of these advantages, to attempt the subjecting of Ireland; and a pretence was only wanting to invade a people, who, being always confined to their own island, had never given any reason of complaint to any of their neighbours. For this purpose, he had recourse to Rome, which

which assumed a right to dispose of kingdoms and empires; and not foreseeing the dangerous disputes which he was one day to maintain with that foe, he helped, for present or rather for an imaginary convenience, to give sanction to claims which were now become dangerous to all sovereigns. Adrian the Third, who then filled the papal chair, was by birth an Englishman; and being, on that account, the more disposed to oblige Henry, he was easily persuaded to act as master of the world, and to make, without any hazard or expence, the acquisition of a great island to his spiritual jurisdiction. The Irish had, by precedent missions from the Britains, been imperfectly converted to Christianity; and, what the Pope regarded as the surest mark of their imperfect conversion, they followed the doctrines of their first teachers, and had never acknowledged any subjection to the see of Rome. Adrian, therefore, in the year 1156, issued a bull in favour of Henry; in which, after premising that this prince had ever shown an anxious care to enlarge the church of God on earth, and to increase the number of his saints and elect in heaven, he represents his design of subduing Ireland as derived from the same pious motives: he considers his care of previously applying for the apostolic sanction as a sure earnest of success and victory; and having established it as a point incontestible, that all Christian kingdoms belong to the patrimony of St. Peter, he acknowledges it to be his own duty to sow among them the seeds of the Gospel, which might in the last day sanctify to their eternal salvation: he expects the king to invade Ireland, in order to extirpate the vice and wickedness of the natives, and oblige them to pay yearly, from every house, a penny to the see of Rome: he gives him entire right and authority over the island; commands all the inhabitants to obey him as their sovereign, and invests with full power all such godly instruments as he should think proper to employ in an enterprize, thus calculated for the glory of God and the salvation of the souls of men. Henry, though armed with this authority, did not immediately put his design in execution; but, being detained by more interesting business on the continent, waited for a favourable opportunity of invading Ireland. 1 Hume, 425, 426, 427. — 3. Dermot Macmorrogh, King of Leinster, had, by his licentious tyranny, rendered himself odious to his subjects, who seized with alacrity the first occasion that offered of throwing off the yoke, which was become grievous and oppressive to them. This prince had formed a design on Dovergilda, wife of Ororic, prince of Breffny; and, taking advantage of her husband's absence, who, being obliged to visit a distant part of his territory, had left his wife secure as he thought in an island surrounded by a bog, he suddenly invaded the place and carried off the princess. This exploit, though usual among the Irish, and rather deemed a proof of gallantry and spirit, provoked the resentment of the husband; who, having collected forces, and being strengthened by the alliance of Roderic, king of Connaught, invaded the dominions of Dermot, and expelled him his kingdom. The exiled prince had recourse to Henry, who was at this time in Guienne, craved his assistance in restoring him to his sovereignty, and offered, on that event, to hold his kingdom in vassalage under the crown of England. Henry, whose views were already turned towards making acquisitions in Ireland, readily accepted the offer; but being at that time embarrassed by the rebellions of his French subjects, as well as by his disputes with the See of Rome, he declined for the present embarking in the enterprize, and gave Dermot no further assistance than letters patent, by which he empowered all his subjects to aid the Irish prince in the recovery of his dominions. Dermot, supported by this authority, came to Bristol; and after endeavouring, though for some time in vain, to engage adventurers in the enterprize, he at last formed a treaty with Richard, surnamed Strong Bow, Earl of Strigul. This nobleman, who was of the illustrious house of Clare, had impaired his fortune by expensive pleasures; and being ready for any desperate undertaking, he promised assistance to Dermot, on condition that he should espouse Eva, daughter of that prince, and be declared heir to all his dominions. While Richard was assembling his succours, Dermot went into Wales; and meeting with Robert Fitz-Stephens, constable of Abertivi, and Maurice Fitz-Gerald; he also engaged them in his service, and obtained their promise of invading Ireland. Being now assured of succour, he returned privately to his own state; and lurking in the monastery of Fernes, which he had founded, (for this ruffian was also a founder of monasteries,) he prepared every thing for the reception of his English allies. 1 Hume, 427, 428. — 4. The troops of Fitz-Stephens were first ready. That gentleman landed in Ireland with thirty knights, sixty esquires, and three hundred archers; but this small body, being brave men, not unacquainted with discipline, and completely armed, a thing almost unknown in Ireland, struck a great terror into the barbarous inhabitants, and seemed to menace them with some signal revolution. The conjunction of Maurice de Pendergast, who, about the same time, brought over ten knights and sixty archers, enabled Fitz-Stephens to attempt the siege of Wexford, a town inhabited by the Danes; and, after gaining an advantage, he made himself master of the place. Soon after, Fitz-Gerald arrived with  
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**(B) When bound by the laws of England.****(B 1.) By act of parliament made here.**

The subjects of Ireland are bound by (o) the express words of the parliament here: as, if a statute speaks of Ireland in express words. 4 Inst. 350. Adm. 7 Co. 22. b. Calvin. Vau. 293. per. Ch. Just. and not denied by the other justices. 1 H. 7. 3. a. R. 1. And. 263. 1 Rol. 17. Vide post, (B 2.)

So statutes made here have been sent to be inrolled in Ireland. 4 Inst. 351.

So a person in Ireland may be naturalized by the parliament here. Vau. 300.

And, being conquered, it is subject to the parliament of England. Vau. 301.

So the parliament of England has power of judicature for all things done in Ireland: and therefore, shall try a peer of England for treason committed there. Dy. 360. b. in marg.

Though he be also a peer there; for being a peer of England he cannot be tried in Ireland. Dy. 360. in marg.

ten knights, thirty esquires, and a hundred archers, and being joined by the former adventurers, composed a force which nothing in Ireland was able to withstand. Roderic, the chief monarch of the island, was foiled in different actions; the prince of Osory was obliged to submit and give hostages for his peaceable behaviour; and Dermot, not content with being restored to his kingdom of Leinster, projected the dethroning of Roderic, and aspired to the sole dominion over the Irish. 1 Hume, 428, 429.— 5. In prosecution of these views, he sent over a messenger to the Earl of Strigul, challenging the performance of his promise, and displaying the mighty advantages which might now be reaped by a reinforcement of warlike troops from England. Richard, not satisfied with the general allowance given by Henry to all his subjects, went to that prince then in Normandy, and having obtained a cold or ambiguous permission, prepared himself for the execution of his designs. He first sent over Raymond, one of his retinue, with ten knights and seventy archers, who, landing near Waterford, defeated a body of three thousand Irish, that had ventured to attack him; and as Richard himself, who brought over two hundred horse, and a body of archers, joined, a few days after, the victorious English, they made themselves masters of Waterford, and proceeded to Dublin, which was taken by assault. Roderic, in revenge, cut off the head of Dermot's natural son, who had been left as a hostage in his hands; and Richard, marrying Eva, became soon after, by the death of Dermot, master of the kingdom of Leinster, and prepared to extend his authority over all Ireland. Roderic, and the other Irish princes were alarmed at the danger; and combining together, besieged Dublin with an army of thirty thousand men: but Earl Richard made a sudden sally at the head of ninety knights with their followers, put this numerous army to rout, chased them off the field, and pursued them with great slaughter. None in Ireland now dared to oppose themselves to the English. 1 Hume, 429, 430.— 6. Henry, jealous of the progress made by his own subjects, sent orders to recall all the English, and he made preparations to attack Ireland in person; but Richard and the other adventurers, found means to appease him, by making him the most humble submissions, and offering to hold all their acquisitions in vassalage to his crown. That monarch landed in Ireland at the head of five hundred knights, besides other soldiers. He found the Irish so dispirited by their late misfortunes, that in a progress which he made through the island, he had no other occupation than to receive the homages of his new subjects. He left most of the Irish chieftains or princes in possession of their ancient territories; bestowed some lands on the English adventurers; gave Earl Richard the commission of seneschal of Ireland; and, after a stay of a few months, returned in triumph to England. By these trivial exploits scarcely worth relating, except for the importance of the consequences, was Ireland subdued, and annexed to the English crown. 1 Hume, 430.

(o) By 22 Geo. 3. c. 53. and 23 Geo. 3. c. 58. all legislative and judicial authority over Ireland was abolished.

(B.2.)

(B 2.) By other laws here.

H. 2. commanded, upon request of the Irish, that his laws in England should be of force there. 4 Inst. 349.

5. Ed. 1. the same command. Ry. F. 2 vol. 78.

So H. 3. sent thither the charter of King John and commanded. *quod leges illas teneant et observent.* 4 Inst. 350. 7 Co. 23. a. 2 Bul. 163. 1 Rol. 17.

And, anno 30 H. 3., reciting, *quod tempore Johannis provisum fuit, quod omnes leges et consuetudines in Angliâ teneantur in Hiberniâ et eadem terra eisdem legibus subjaceat*, the king grants, *quod omnia brevia quæ current in Angliâ similiter currant in Hiberniâ.* 4 Inst. 350. Vau. 294, 296. Pal. 458.

By the st. 10. H. 7. 22. in Ireland, all statutes late made in England cerning the common weal of the same shall be used, &c. in Ireland in all points according to the tenor of the same. 4 Inst. 351.

And therefore, all statutes made in England before 10 H. 7. are of force in Ireland. 12 Co. 111, 112. 4 Inst. 351. (p)

So the king, by patent under the great seal of England, may confirm the presentee of a church in Ireland. Pal. 459.

Or make a dispensation to a bishop in Ireland, to hold a church in England *in commendam.* R. Pal. 458.

So a *scire facias* in chancery in England to repeal a patent under the great seal of Ireland, is good. Pal. 459.

But statutes made in England since 10 H. 7. 22. are not of force in Ireland, except where they extend to Ireland by express words. 12 Co. 112. 4 Inst. 351.

And therefore, the statutes of jeofails do not extend to Ireland, farther than the statutes there made warrant the amendment. 2 Rol. 168.

(C) Parliament in Ireland.

In the time of (q) H. 2. the treatise *de modo tenendi parliamentum* was transmitted by the king in a roll to Ireland, for holding a parliament there. 4 Inst. 12.

And in the time of King John a parliament was held there. 4 Inst. 349.

Anno. 17 Ed. 3., the parliaments in Ireland were regulated according to the institution of parliaments here, and for the same end. 4 Inst. 350, 351.

By Poinings' act 10 H. 7. 4. No parliament shall be held in Ireland, but on the king's lieutenant and council there certifying, under the great seal of Ireland, the causes for it, and the acts to be passed, and that such are expedient, and the king's licence and summons for a parliament thereon. Vide 4 Inst. 352. 12 Co. 110.

And, by the st. 3 & 4 Ph. & M. 4., this may be, on certificate by the lord deputy, justices, or other chief governor. When the causes and acts sent be approved as sent, or with any alterations. And the parliament there holden may pass the acts so sent, or any other that during the parliament shall be sent thence, and approved here, and transmitted thither from hence under the great seal of England. (Vide 12 Co. 110.)

And therefore, previous to a parliament in Ireland, the lieutenant, or

(p) This is Poyning's statute.

(q) See Mr. Gabbett's introduction to his Abridgement.



other chief governor and council in Ireland, ought to certify to the king, under the great seal of Ireland, the causes for the parliament, and the acts to be passed there. R. 12 Co. 110, 111. 2 Rush. 20.

And these acts ought to be affirmed or altered, and transmitted under the great seal of England. R. 12 Co. 111. Jon. 189. 2 Rush. 20.

Then there ought to be a licence under the great seal, and a summons for the parliament there. R. 12 Co. 111. 2 Rush. 20.

The causes and acts transmitted under the great seal of Ireland, ought to be kept in the chancery here. 12 Co. 111.

If the acts transmitted are affirmed without alteration, they ought to be remitted after inrolment in chancery, under the great seal of England. 12 Co. 111.

So, if they are altered, the alteration need not be made in the transcript from Ireland, which remains here; but the act altered shall be inrolled in chancery, and remitted under the great seal of England. 12 Co. 111.

So, after a parliament begun there, any acts may be transmitted from Ireland, and being approved or altered, remitted in the same manner under the great seal of England. 12 Co. 111.

And therefore, if the lieutenant summon a parliament of himself, without licence under the great seal, upon a certificate under the great seal of Ireland, though he has authority by his commission to do it, all proceedings upon it are void. 2 Rush. 20.

The parliament in Ireland try a peer of Ireland for high treason or felony committed there, by his peers. Dy. 360. b.

And he shall not be tried by the st. 26 H. 8. 13. 32 H. 8. 4. 35 H. 8. 2. or 5 Ed. 6. 11. for he cannot be tried by a jury, nor here by his peers. R. Dy. 360. b.

### (D) Grant by the King concerning Ireland.

So the king, by a grant to a borough in Ireland, may enable them to elect members of parliament there.

And a grant to a part of a corporation to elect, vests the interest in the whole corporation. Hob. 14.

So he may make the grant to a borough not corporate. R. Hob. 15.

### (E) Creation of bishops there.

So the king by letters patent creates a bishop there. 2 Rol. 130. Vide Ecclesiastical Persons, (C 2.)

And a patent to an archbishop to a consecration, by which it is said, *eligimus, creamus, &c. A. episcopum de B.* is sufficient, though it is not directed to A. himself. R. 2 Rol. 101. 130.

And if the king writes to the lieutenant and three others there, to take order that A. be made a bishop, and three of them are removed before the coming of the letter, and the other makes such a patent; it is sufficient: for the king's letter is only directory to his council there. R. 2 Rol. 101. 130.

So the king may make a bishop of Ireland by patent under the great seal of England, as well as under the great seal of Ireland. Pal. 459.

But if a bishop be named and invested and installed to the bishoprick, the former bishop being alive and not deprived, his nomination and investiture is void. R. 2 Rol. 131.

And

And though the former bishop afterwards die, the second bishop is not made lawful bishop. R. 2 Rol. 131.

**(F) Usage there considered in judgments.**

Consideration shall be had of the usage there, in the examination of judgments in Ireland: and therefore, if a *venire* be directed to the sheriff of a foreign county for trial in an ejectment there, without any cause alleged, it shall be good, being certified to be the usual course there. R. 2 Rol. 166.

So an ejectment lies of so many acres of mountain, if it be land known there. Semb. 2 Rol. 166.

**(G) Remedy in England.**

**By Error, in Appeal, &c.**

A writ of error lies in B. R. in England, upon a judgment given in B. R. in Ireland. Cro. Car. 511. 2 Bul. 163. 1 Rol. 17. Carth. 460. Vide Pleader, (3 B 3.)

And if the judgment be reversed, a writ shall be directed to the chief justice there, to award execution. R. Cro. Car. 512.

So an appeal lies to the delegates in England, upon a sentence given by the ecclesiastical court in Ireland. Cro. Car. 264.

So an appeal to the parliament of England, upon a judgment in Ireland affirmed by the parliament of Ireland lies, though B. R. cannot correct it, as it seems. 1 Sho. 559. Vide Pleader, (3 B 6.)

So an appeal lies to the house of peers in England, upon a decree in chancery in Ireland, and not to the parliament there. Ca. Parl. 83. Vide Parliament, (L 7.)

So remedy lies in the chancery in England, for a breach of trust, &c. touching lands in Ireland. 1 Ver. 419. Vide Chancery, (3 X — 4 W. 27.)

So an action lies here upon a personal contract touching lands in Ireland: as, upon an obligation, or covenant to grant a rent out of land in Ireland. 1 Ver. 419.

So, upon a contract made there: as, upon an obligation, or covenant given in Ireland. 1 Ver. 419.

So a *scire facias* lies in the chancery here, for repealing a patent in Ireland. 1 Ver. 419.

So the judges in England are the proper expositors of laws made in Ireland. R. 1 Ver. 421, 422. 1 And. 102, 103.

**[ (H) Union of England and Ireland. ]**

[Vide st. 39 & 40 Geo. 3. c. 67.]

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**ISLANDS.**

Vide NAVIGATION, (F 1, &c.)

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**ISSUE.**

Vide AMENDMENT, (O — Z) — APPEAL, (G 13.) — DROIT, (C 5.) — PLEADER, (E 13, 14. — R 1, &c. — S 26. 39. 49.)

JUDGE.

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(A) The fountain of jurisdiction.

The king is the fountain of justice. Vide Courts (A) — Officer, (A 1.) — Prerogative, (D 37.)

(B) Justices cannot make a deputy.

A judicial officer cannot make a deputy. Vide Officer, (D 2.)

(C) Justices, how created.

(C 1.) By writ, &c.

By authority of parliament, though not extant, the chief justice of England (who was before created by patent) shall be created, and since the

the 25 Ed. 1. hath been always created by writ. 4 Inst. 75. 2 Inst. 26 Vide Officer, (A 1.)

The other judges are made by patent. Cro. Car. 1.

And if upon the demise of the king there be a proclamation, that all judges retain their authority, it is not safe to intermeddle till the patent renewed. Cro. Car. 1. [Vide the stat. 1 Geo. 3. 23.]

So, the chancellor, or lord keeper, shall be made by delivery of the king's seal and taking his oath. 4 Inst. 87. Vide Chancery, (B 1, 2)

### (C 2.) By commission.

What commissions the king may grant, vide in Prerogative, (D 29.) Vide post. (G 1, &c.) — Justices of peace, (A 6.)

The commission determines by the death of the king. Cro. Car. 98.

Yet the proceeding of justices after the death of the king, till notice of it will be good. Ibid.

The manner of creation of ancient offices cannot be altered without authority of parliament: as, if the creation used to be by patent, it cannot now be by writ. 4 Inst. 75.

If it used to be granted during pleasure, it cannot be granted for life. 4 Inst. 87. (a)

### (D) Precedence of justices.

If a justice be removed from one bench to the other, he shall have precedence according to his seniority.

So, if a baron of the exchequer be removed to C. B. or B. R. 1 Sid. 408.

As to justices of B. R., C. B., exchequer, and several other courts, vide Courts.

As to justices of assise, vide Assise, (B 21, &c.)

As to justices of peace, vide Justices of Peace.

### (E) Justices in eyre.

#### (E 1.) How constituted.

Justices in eyre were constituted 22 H. 2. Hist. de C. L. 141. 23 H. 1. Dugd. Or. J. 51. Vide Mad. 84. [Vide etiam Wilkins, 329.]

Or, rather had new circuits appointed; for there were justices in eyre 20 H. 2. and before. Mad. 84, &c. 96.

Justices in eyre were constituted by a writ in nature of a commission. 4 Inst. 184.

(a) Before the st. 15 W. 3. c. 2. the commissions of the judges were *durante bene placito nostro*. 4 Inst. 75. By that statute they are directed to be made *quandiu se bene gesserint*; but on the address of both houses of parliament it may be lawful to remove them. And it was held that on the demise of the crown their seats were vacated. Ld. Raym. 747. And therefore it is enacted, — 2. By st. 1 Geo. 3. c. 23. judges' commissions continue during good behaviour, notwithstanding the demise of the king; but they may be removed on address of both houses of parliament; and their salaries shall be paid as long as their commissions continue; on demise of the crown, they shall be paid out of the duties granted for the civil list till further provision, and then out of the monies applicable to such uses.

And now, by the st. 27 H. 8. 24. they must be by letters patent under the great seal. 4 Inst. 184.

### (E 2.) Their authority.

Justices in eyre had jurisdiction of all pleas of the crown. 4 Inst. 184.

And of all actions real, personal and mixt. Ibid.

Of claims of all franchises, and liberties. Ibid.

In every country where justices in eyre came, the authority of every other court in the same county ceased during the eyre. Ibid.

So, the court of C. B. and every other court, except B. R. 4 Inst. 185.

And justices in eyre might proceed upon all pleas depending before others. 4 Inst. 184.

If judgment was given in C. B., &c. the justices in eyre might award execution without a *scire facias*. Ibid.

And a writ was usually directed to the justices of C. B., &c. to send all pleas in the same county before them to be there determined. Ibid. Lit. s. 514.

So, all actions, not determined during the eyre, were adjourned to C. B. Co. L. 294. a.

### (E 3.) And court.

The court before the justices in eyre had the following style; *Placita de jurat. assisis et coron. de itinere A. et sociorum justic' itinerant. apud O. in com. R. tali die, &c.* 4 Inst. 184.

And was held from seven years to seven years. Ibid.

But by the increase of the authority of justices of assise, the authority of justices in eyre ceased. Co. L. 293. b.

### (F) Justices in eyre of the forest.

But justices in eyre of the forest now continue according to the original institution. 4 Inst. 184. Vide Chase, (Q 1. — R 1.)

The king by his commission constitutes a chief justice of the forest *citra Trentam*, and another to be chief justice in eyre of the forest *ultra Trentam*. 4 Inst. 291. 315.

And the king may associate others to him by a patent *Si non omnes*, and a writ *de admittas*. 4 Inst. 315.

And the chief justice, and others associated with him, may determine *omnia placita forestæ*. 4 Inst. 291. 315.

And by *Ch. de For.* 16., *nullus constabularius, &c. teneat placita forestæ*; and therefore, the chief justice in eyre and the others associated to him must, and no other can determine all offences done within the forest, according to the laws of the forest. Manw, 489. 491. 4 Inst. 291.

And the claims of all liberties and franchises within the forest; as, to have a park, warren, leet, &c. to be quit of assarts, purprestures, &c. Manw. 488. 4 Inst. 291.

And if a thing which was done within the forest be before other justices, it must be pleaded to the jurisdiction. Manw. 491.

If a justice in eyre holds his justice-seat, he ought to make a precept to the sheriff, for a general summons of all persons, who ought to appear there, and for making proclamation of the session, returnable forty days afterwards. Manw. 492, 493. 4 Inst. 291.

And another summons to the warden of the forest to summon all the

the officers of the forest, and all those that claim liberties or franchises there. 2 Inst. 291.

Before the st. *de ch. foresta*, all earls, barons, and others, in the county where the forest is, ought to appear at the general summons: but by that st. c. 2. *homines qui manent extra forestam non veniant de cætero*. Manw. 495.

And therefore, all out of the forest, if they have no suit or claim, nor are pledges for others, need not appear. Ibid.

Or, if they have no lands, nor are officers there. Manw. 497.

So, barons of the realm, persons spiritual, women, servants, infants under twelve, sick men, or men above seventy, need not appear upon the general summons, though they are within the forest, if they have no claim, and their free tenants appear. Manw. 498. Cont. Jon. 278.

So, a man may make a claim, or traverse an indictment against him by attorney. Manw. 500.

So, if an officer make a deputy, he may appear by his deputy. Jon. 278.

If an officer of the forest does not appear, his office shall be seized for the king. Jon. 266. Manw. 497.

So, if he does not bring in his rolls. Manw. 506.

So, if a free tenant within the forest does not appear, his land shall be seized into the king's hands. Manw. 500.

If four men and the reeve of any town do not appear, the whole town shall be amerced; but for a default afterwards every one shall answer for himself. Jon. 279.

Every forester upon his appearance delivers his horn upon his knees to the justice in eyre, and pays 6s. 8d. for the re-delivery; and every woodward delivers his hatchet. Jon. 266.

### (G) Justices of oyer and terminer.

#### (G 1.) How appointed.

Justices of oyer and terminer are by a general commission, or assigned for a special purpose. 2 Inst. 419. 4 Inst. 162. Vide ante, (C 2.) — Prærogative, (D 28, 29.)

And ought to be appointed by commission, and not by writ. 4 Inst. 164. H. P. C. 161.

And the commission ought to be in Latin, not in English. R. 12 Co. 31. (b).

And ought to contain the offences within the commission itself, and not in a schedule annexed. R. 12 Co. 31.

But others may be joined by a writ of association, admittance, and *si non omnes*. F. N. B. 111. B. 4 Inst. 165. H. P. C. 161. Vide Assise, (B 22.)

And if any of the commissioners or associates die, there may be another writ of association for others. F. N. B. 111. D.

#### (G 2.) Who shall be.

By the st. 34 Ed. 3. 1. justices of oyer and terminer ought to be named by the court, and not by the party.

And, by the st. 2 Ed. 3. 2. and W. 2. 29., they shall be justices of the one bench, or the other, or justices errant.

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(b) But now all commissions shall be in English. Stat. 4 Geo. 2. c. 26. s. 1.



And therefore, justices of assise are usually provided with a general commission of oyer and terminer.

But justices of peace, though by the st. 18 Ed. 3. 2. 34 Ed. 3. 1. and 17 R. 2. 10. they have power to hear and determine, are not intended by a statute which gives authority to justices of oyer and terminer. 2 Rol. 96. l. 25. H. P. C. 165. (c)

(G 8.) In what cases.

By the st. W. 2. 29. and 2 Ed. 3. 2. commissioners of oyer and terminer for grievous trespasses ought to be of the king's special grace. 4 Inst. 163. Reg. 123.

And the general commission is, for all treasons, felonies, riots, trespasses, and other offences. 2 Inst. 419.

And regularly, it shall be granted, when a great assembly, insurrection, or a heinous trespass is committed. F. N. B. 110. B.

So, it may be granted for a special purpose, as upon a rescous made upon the king's bailiff. F. N. B. 112. A.

Upon a seizure of goods for wreck by malefactors, which are not wreck. F. N. B. 112. C. 4 Inst. 163. Reg. 126.

Upon extortions, or oppressions by under-sheriffs, bailiffs, or other officers. F. N. B. 112. D. 4 Inst. 163. Reg. 126.

Hunting in the parks of a bishop in time of vacation. F. N. B. 112. G. Reg. 125. 127.

Defaults in sewers or walls against the sea. F. N. B. 113. A. Reg. 127. Sewers (A).

Collecting of toll, &c. by misdoers, when due to a corporation. F. N. B. 114. C. 119. F.

Cutting down trees. 4 Inst. 163.

But it ought not to be granted in cases not usual, or allowed by parliament. Ibid. Vide Prærogative, (D 29.)

And it may be superseded, *quia non enormis*. 2 Inst. 419, 420. 4 Inst. 163.

Though it may be afterwards revived by *procedendo* if it appears to be *enormis*. Ibid.

(G 4.) Their authority.

Justices of oyer and terminer have authority of all offences within their commission.

Or, which by statute are to be determined in any court of record, or the king's court of record. 4 Inst. 164. Qu. H. P. C. 161.

Or, which are prohibited by statute, but nothing said, in what court to be punished. Dal. 24. 4 Inst. 164.

They may determine the same day in which the inquiry is taken. Ibid.

And they ought to send a precept to the sheriff for a jury, under hand and seal. Ibid.

But commissioners of oyer and terminer cannot proceed upon an indictment not taken before themselves. Ibid.

So, they cannot assign a coroner to an approver. 4 Inst. 165.

(c) By 12 Geo. 3. c. 27. any person appointed may act as justice of oyer and terminer, or gaol-delivery, in his own county, notwithstanding st. 8 R. 2. and 35 H. 8.

So, the commission of oyer and terminer will be determined, if there be no adjournment. 4 Inst. 165.

So, if a new commission be granted and shewn to them. Ibid.

Or, a new commission be proclaimed, or the sessions held by it. Ibid.

But by the st. 1 Ed. 6, 7. the commission shall not be determined by making or publishing a new commission or association, or altering the names of any of the justices or commissioners. Ibid. (d)

### (H) Justices of gaol-delivery.

By the st. 27 Ed. 1. *de finibus levatis*, justices of assise shall deliver the gaols of all prisoners, within liberties, or without.

And by the st. 4 Ed. 3. c. 2. good and discreet persons shall be assigned to deliver gaols thrice a year, or oftener if need be.

And therefore, justices of assise have usually a commission *ad gaolas in com. A. de prisoner' in eâ existen. hac vice deliberand'*. 4 Inst. 168.

And by some, they may do it *virtute officii*, without commission. H. P. C. 164.

So, others may be associated to them by writ of association, and admittance. 4 Inst. 169.

Or, they may be enabled by a writ *si non omnes*, &c. to act, though some be absent. Ibid.

But if there be a charter to bailiffs and recorder, *cum aliis quos* the king shall appoint, to deliver the gaol, &c. it will be void; for they can act only with others who cannot act but by commission, and so their authority is founded upon the commission, and the charter is void, for the king was deceived. R. 1 And. 296. (e)

### (I) The duty of judges.

(I 1.) They ought to do justice according to law.

A judge ought to act conformably to law, and not according to discretion.

By the st. 20 Ed. 3. 1. All our justices we command to do equal right and law to all our subjects, rich and poor, without regard to any person, or for letter or command from us, or any other, or for any other cause.

By the same statute, justices shall be sworn to take no fee, gift, reward, &c., to give no council, &c. Vide Officer, (I).

(d) The same of justices of gaol-delivery by the same statute.

(e) 1. Justices of gaol-delivery may arraign any man imprisoned in that gaol on an indictment before justices of peace, though not found before themselves, which justices of oyer and terminer cannot do. — 2. They may take a panel of a jury returned by the sheriff without making any precept to him. — 3. They may discharge prisoners by proclamation, may assign a coroner to an approver, and make process against the appellee in a foreign county; may award execution against a prisoner, who had been indicted before justices of peace, and thereupon outlawed; and may deliver the gaol of prisoners committed for high treason. 4 Inst. 169. — 4. They may give judgment of death against any person found guilty of treason, &c. before former commissioners, and reprieved. St. 1 Ed. 7. c. 7. s. 5. — 5. They, as well as justices of oyer and terminer, must send their records and process determined, and put in execution to the exchequer at Michaelmas every year, to be kept by the treasurer and chamberlains in the treasury. 4 Inst. 165. 169.

And therefore, justices of assise are usually provided with commission of oyer and terminer.

But justices of peace, though by the st. 18 Ed. 3. and 17 R. 2. 10. they have power to hear and determine by a statute which gives authority to justifier. 2 Rol. 96. l. 25. H. P. C. 165. (c)

### (G 8.) In what case

By the st. W. 2. 29. and 2 Ed. 3. 2. terminer for grievous trespasses ought grace. 4 Inst. 163. Reg. 123.

And the general commission is, for passes, and other offences. 2 Inst. 4.

And regularly, it shall be granted for a rection, or a heinous trespass is committed.

So, it may be granted for a upon the king's bailiff. F. N. B. 112. C.

Upon a seizure of goods wreck. F. N. B. 112. C.

Upon extortions, or officers. F. N. B. 112.

Hunting in the park. 112. G. Reg. 125.

Defaults in sewers. 127. Sewers (A).

Collecting of toll. F. N. B. 114.

Cutting down trees.

But it is not lawful to sue before the other judges of the same court, unless he be held without him: as, the chief justice of parliament. And, if the entry be *coram* J. Blencowe, &c. 1 Sal. 398.

And, a man in the court of aldermen in London, by custom. 4 Inst. 2 Lev. 200.

That, in an action by A. who is mayor, &c. before himself, it is not binding, if he does not appear by the record to be mayor. 2 Rol. 93. 1 Sal. 398.

### (K) High treason; what shall be.

(K 1.) If one compass the death of the king, queen, or their eldest son.

High treason (h) is the greatest and most heinous (i) offence against the king. St. P. C. 1.

By

(f) If a cause has been argued, and stands over on an *ulterius concilium*, and a new judge is made since the former argument, it must be argued by new counsel; if it stands over for the opinion of the court, and it is argued again only for the information of the new judge, it may be argued by the former counsel. West v. Morris. M. 11 G. 2. Andr. 3.

(g) On an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes cannot vote. 4 T. R. 71.

(h) 1. Treason, *proditio*, in its very name (which is borrowed from the French '*trahir*,' imports a betraying, treachery, or breach of faith. 4 Com. 75. — 2. It therefore happens

The case of justices.

commission of oyer and terminer will be given.

Ed. 6, 7. the commission shall not be given to a new commission or association of justices or commissioners. Inst. 4.

Verdicts, justices of assise shall deliver.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

Verdicts, or without.

the common law, divers offences were treason, which now are

the st. 25 Ed. 3. 2. *Pur ceo que divers opinions ont estre  
doit estre dit treason, en que nemy, (l) le royal re-*

lies : for treason is indeed a general appellation, made use of by only offences against the king and government, but also that which arises whenever a superior reposes a confidence in a sub-whom and himself there subsists a natural, a civil, or even a inferior so abuses that confidence, so forgets the obligations of confidence, as to destroy the life of any such superior or lord. Helst. c. 4. Canuti, c. 54. 61. Mirr. c. 1. s. 7. — 5. arising from the same principle of treachery in private life, it bours it to have conspired in public against his liege or a wife to kill her lord or husband, a servant his lord or ordinary; these being breaches of the feutic faith, are denominated *Petit* treasons. But to attack even majesty itself, it is called, by way of *proditio*; being equivalent to the *crimen læsæ majestatis*; inates it also in our English laws. l. 1. c. 2.

ers, is in proportion to their condition  
our hearts ten times more resentment,

In spite of all that reason and ex-  
judices of the imagination attach to this  
to disturb, therefore, such perfect enjoyment,  
injuries. All the innocent blood that was shed in  
revolution, provoked less indignation than the deaths of  
views of utility, too, strengthen these sentiments; the conse-  
quence being of all the most prejudicial.

That is to say, by the antient common law, there was a great latitude left in the  
of the judges, to determine what was treason, or not so; whereby the creatures  
of tyrannical princes had opportunity to create abundance of *constructive* treasons; that  
is, to raise, by forced and arbitrary constructions, offences into the crime and punish-  
ment of treason, which never were suspected to be such. 4 Com. 75. — 2. Thus the  
*accroaching*, or attempting to exercise royal power (a very uncertain charge) was in  
the 21 Edw. 3, held to be treason in a knight of Hertfordshire, who forcibly assaulted  
and detained one of the king's subjects till he paid him 90l.: a crime, it must be owned,  
well deserving of punishment; but which seems to be of a complexion very different to  
that of treason. 1 Hale's P. C. 80. 4 Com. 76. — 3. Killing the king's father, or  
brother, or even his messenger, has also fallen under the same denomination. Britt.  
c. 92. 1 Hawk. c. 34. — 4. The latter of which is almost as tyrannical a doctrine as  
that of the imperial constitution of Arcadius and Honorius, which determines that any  
attempts or designs against the ministers of the prince shall be treason. 'Qui de nece  
virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam  
et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum,  
cogitaverit: (eadem enim severitate voluntatem sceleris, quâ effectum, puniri jura  
voluerunt) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus  
fisco nostro addictis.' Cod. 9. 8. 5. 4 Com. 76. — 5. So it was treason for a subject  
of this realm to summon another subject to appear before the tribunal of a foreign  
prince. 3 Inst. 7.

(1) 'Les loix de la Chine décident, que quiconque manqué de *respect* à l'Empereur  
doit être puni de mort. Comme elles ne définissent pas ce que c'est que ce manque-  
ment de respect, tout peut fournir un prétexte pour ôter la vie à qui l'on veut, et ex-  
terminer la famille que l'on veut. Deux personnes chargées de faire la gazette de la  
cour, ayant mis dans quelque fait des circonstances qui ne se trouverent pas vraies; on  
dit que mentir dans une gazette de la cour, c'étoit manquer de respect à la cour; et on  
les fit mourir. Un prince du sang ayant mis quelque note par mégarde sur un mé-  
morial signé du pinceau rouge par l'Empereur, on décida qu'il avoit. Manqué de  
respect à l'Empereur; ce qui causa contre cette famille une des terribles, persécutions  
dont l'histoire ait jamais parlé. C'est assez que le crime de lèse majesté soit vague,  
pour que le Gouvernement dégénere en despotisme.' Montesquieu, De l'Esprit des  
Loix, l. 12. c. 7.

*quest des seigniors et commons ad fait declarisment que ensuist.* (Vide 3 Inst. 1.) (m)

(1.) By this statute it shall be high treason, *si home (n) fait compasser (o) ou imaginer (p) la mort no'stre seignior le roy, madame sa compaignie, ou de lour fitz eigne et heire, (q) et de ceo provablement (r) soit attaint de overt fact per gentz de son condition.*

And therefore, in every indictment for compassing the death of the king, &c. besides the compassing, an overt act must be alledged, (s) and proved. H. P. C. 13. (t)

And several overt acts may be alledged of the same species of treason in the same indictment. Kelg. 8. (u)

But

(m) In like manner as the *Lex Julia Majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws, that had before been enacted to punish transgressors against the state. Gravin. Orig. 1. s. 54. 4 Com. 76.

(n) Vide in tit. Allegiance, et infra.

(o) 1. These words 'Compasser ou imaginer' are synonymes; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design into effect. 1 Hale's P. C. 107. 4 Com. 78. — 2. Bracton, propounding the common law upon this subject, says 'Si quis ausu temerario machinatus sit in mortem domini regis.' l. 3. c. 2 — 3. The word 'compasseth', in the statute, was probably borrowed from Britton, or from the editor of the Mirror, who wrote in the time of Edward the First, about forty years after Bracton. The former has it 'grand treson est de compasser notre mort.' The other 'peche de majesty est vers le roy de la terre en trois manieres; 1<sup>o</sup>. Per ceux qui occident le roy ou compassent de faire; 2<sup>o</sup>. Per ceux que luy desheritent del royaume per trahissent un host, ou compassent de la faire; 3<sup>o</sup>. Per ceux avowterors que spargissent le feme le roy, le file le roy eignesse legitime, avant ceo que elle soit mary, en la garde le roy; ou la neece le etant le heire le roy.' Brit. c. 8. Mirror c. 1. s. 4. Eden's P. L. 120.

(p) 1. So the Roman law; 'Eadem severitate voluntatem hujus sceleris, quâ effectum puniri jura voluerunt.' Cod. ad leg. Jul. l. ix. t. 8. l. 5. — 2. Nor did it suffer the crime of high treason to be extinguished, even by the death of the criminal; 'Extinguitur crimen mortalitate, nisi forte quis majestatis sit reus: nam hoc crimine, nisi successoribus purgetur, hereditas fisco vindicatur.' Ff. ad Leg. Jul. Maj. l. xi. , Alienationes, quas fraude vel jure aliquis fecerit, ex eo tempore quo de incundâ factione cogitaverit, nullius esse momenti statuimus.' Cod. ix. 8. 5. 'Nam ex eo tempore quo hanc cogitationem subiit, propter cogitationem dignus est pœnâ.' Cod. ad L. J. vi. Eden's P. L. 118. — 3. The old laws of the Lombards punished as a traitor any man who should conceive a thought against the soul of the king; 'Siquis contra animam regis cogitaverit.' Eden, 119.

(q) 'When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir.'

(r) 'Provablement.' This word is by the editors of the statutes inadvertently rendered '*probably*' notwithstanding the caution of Sir Edward Coke. 'The adverb *provably*,' says he, 'hath a great force, and signifieth a direct and plain proof; which word the king, lords, and commons, did use, for that the offence was, so heinous, and was so heavily and severely punished, as none other the like. The word is not *probably*, for then *commune argumentum* might have served.' 3 Inst 12. Eden's P. L. 121.

(s) 1. If it consists in writing or sending letters, the letters themselves need not be set out. 6 St. Tr. 330. Vide 4 St. Tr. 410. 4 East, 171. 6 East, 426. 1 East, P. C. 121. 124. — 2. So the laying that A. and B. met and proposed the means how to effect the king's death, is sufficient, without alleging the particular means upon which they agreed, which is matter of evidence Ibid.

(t) For as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or overt act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof that he had thought thereof in his waking hours. Plutarch in Vit. 4 Com. 79.

(u) If but one of several overt acts be well laid and proved, that is sufficient. And if it be laid with circumstances not necessary to constitute the act high treason, they need



But by the st. 7 W. 3: 3. no evidence shall be admitted of any overt act not expressly laid in the indictment. (*x*)

An overt act for compassing the death of the king may be, that he actually killed the king. Kelg. 8. (*y*)

Or, was instrumental to his murder. Kelg. 8. 10.

That he knowing of a design to kill the king (though his death does not follow) does an act which shews his approbation. Kelg.

Or, of a design to depose the king; for that is the same with conspiring his death. H. P. C. 11. Dy. 298. b. 3 Inst. 6, 12. (*z*)

Or, to imprison him. H. P. C. 11. 3 Inst. 6, 12.

Or, to get him within his power. H. P. C. 13. 3 Inst. 6, 12.

As, if he levy war for such purpose. H. P. C. 13.

Or, assemble people. H. P. C. 13. (*a*) 3 Inst. 12. (*b*)

So, if he prepare weapons for such purpose. H. P. C. 13. (*c*)

Or, write a letter to second the design. H. P. C. 13.

Or, write a letter to incite a foreign prince to an invasion. H. P. C. 13. 3 Inst. 14. (*d*)

need not be proved, but may be rejected as surplusage. As in the case of treason in levying war, if the overt act be an arraying in hostile manner, and thereby killing divers of the king's subjects; if the arraying in a hostile manner be proved, that is sufficient without proof of the rest. Or if it be that A. and B. met and proposed the king's death, and the particular measure by which they proposed to effect it be not well laid, the latter will not vitiate the rest. 1 East, P. C. 125. 2 Chit. C. L. 66.

(*x*) 1. Unless it conduce to prove one that is laid. 5 St. Tr. 22. — 2. But it seems that no overt act can be given in evidence under any branch of treason, unless it be expressly laid as an overt act of such treason, although it be laid as an overt act of some other treason in the same indictment. 1 East, P. C. 117. — 3. So if the overt act offered in evidence, and not laid in the indictment be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted, notwithstanding the opinion of Lord Hale to the contrary. As in the case of Captain Vaughan, who was indicted for adhering to the king's enemies on the high seas; the overt act laid was his cruising upon the king's subjects in a vessel called the Loyal Clencarty, and the counsel for the crown offered to give in evidence, that he had some time before cut away the custom-house barge and had gone cruising in that vessel; but as that was no proof of his cruising in the Lord Clencarty, the court rejected the evidence. 1 East, P. C. 123.

(*y*) But the actual murder of the king operates in legal evidence, only as an overt act to prove the compassing of his death. Kel. 8. 1 Hawk. 34.

(*z*) 1. It was formerly a doubt, whether the assembling of men with design to depose the king be an overt act of compassing or imagining his death; because there may, as it is said, be a design to depose the king without an intention to take away his life. Bro. Treas. fol. 24. — 2. But it seems to be the better opinion, that the assembling of men with design to depose the king is an overt act of compassing or imagining his death; because if this design be carried into execution, the death of the king will in all probability be the consequence. 3 Inst. 6. 12. H. P. C. 11. 2 Vent. 316. 11 Mod. 522 1 Hawk. 35.

(*a*) Kel. 31. Moor, 621.

(*b*) 1. 1 Hawk. 38. 1 Hale's, P. C. 119. — 2. For all force used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. 4 Com. 79.

(*c*) 3 Inst. 12.

(*d*) Because such excitation has a natural tendency to bring the king's life into danger. 3 Inst. 14. Hale's P. C. 13. Dyer, 238. 1 Hawk. 35.

Or,

Or, declare his design by writing. H. P. C. 13 Vide Kelg. 23. 3 Inst. 14. (e)

So, if he declare his design by express words; for that, which plainly shews the imagination of the heart to put the king to death, is sufficient. R. Kelg. 13. — Cont. 3 Inst. 14. H. P. C. 13. Acc. St. P. C. 2. b. (f)

So, a consultation and advising together of the means to do it, will be an overt act. Kelg. 15. 17. 20. (g)

So, if a man, knowing of the design, meets at the consultations several times, though he does or says nothing; for the meeting shows his approbation. R. Kelg. 17. 21. (h)

Or, knowing of the design, afterwards meets at a consultation. Kelg. 17.

(e) 1. If any words in writing or print are published, which have a direct tendency to alienate the affections of the people from the king, such publication is an overt act of compassing or imagining his death; because this will in all probability be the consequence. Dyer, 298. 2 Rol. Rep. 89. 1 Hawk. c. 36. — 2. So if a book be published in which it is asserted, that it is high time for the people to take the government into their own hands, and that it is honourable and conscientious to throw off all allegiance, and to put the king to death, this is an overt act of compassing or imagining the king's death. Kel. 22, 23.

(f) 1. How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the Fourth, of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the *crown*, being the sign of the house in which he lived; the other, a gentleman, whose favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice, Markham, rather chose to leave his place than assent to the latter judgment. 1 Hale's P. C. 115. 4 Com. 80. Bacon, P. 118, 119. Foster, 202. — 2. But now it seems clearly to be agreed, that by the common law and the statute of Edward the Third, words spoken amount only to a high misdemeanour, and no treason; for they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words, and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And, accordingly, in 4 Car. 1. on a reference to all the judges concerning some very atrocious words spoken by one Pyne, they certified to the king 'that though the words were as wicked as might be, yet they were no treason; for unless it be by some particular statute, no words will be treason.' Cro. Car. 125. 4 Com. 80. — 3. If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason; particularly in the cases of one Peacham a clergyman, for treasonable passages in a sermon never preached, and of Algernon Sidney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence, as overt acts of that treason, which was specially laid in the indictment. 4 Com. 80. Foster, 198.

(g) 1 Hawk. 38. 1 Hale's P. C. 119.

(h) 1. So, if he does any act whatever, whence as through a medium, his liking and approbation may be inferred. 1 Hawk. 56. Kelynge, p. 12. — 2. Though this has been characterised as a dangerous doctrine. Eden's P. L. 121. n. — 3. Among the Romans, the mere concealment of a traiterous confederacy amounted to treason; 'Id quod de prædictis reis majestatis, etiam de satellitibus, *consciis*, ac ministris eorum eadem severitate dicimus.' L. vi. Cod. ad Leg. Jul. — 4. Even the wife on this point was obliged to betray the husband. Nov. cxvii. c. 8. Eden's P. L. 121. n.

So,

So, if a soldier does an overt act of treason by command of a superior officer, it will be treason (*i*): because the command being traiterous, the obedience will be so; for all are principals. Kelg. 13.

If a counsellor read a paper written for his instruction, (knowing the contents,) for promoting the traiterous design. Kelg. 12.

But a conspiracy to levy war is not high treason, nor an overt act or compassing the death of the king, if nothing be done in pursuance of it; for it is a species of another treason. H. P. C. 13. (*k*)

So a calculation of the king's nativity is not an overt act of compassing his death. H. P. C. 11. (*l*)

So killing the king by accident, as by an arrow against a deer, is not treason; for he did not compass it. 3 Inst. 6. (*m*)

Or, by a lunatic, &c. for he cannot compass. 3 Inst. 4, 6. (*n*)

Or,

(*i*) If a feme covert commit high treason by the command of her husband, the command does not excuse her, as it does in the case of some other felonies. Bac. Max. 56, 57.

(*k*) 1. It is laid down by Lord Coke, that a conspiracy to levy war against the king, is not an overt act of compassing or imagining his death; for that as the levying of war is by another clause of the statute declared to be one species of treason, such conspiracy ought not to be deemed an overt act of another species of treason, since that if it should be so deemed, two species of treason would be confounded. 3 Inst. 14. — 2. But again it was resolved by all the judges, that although the persons so levying war may be indicted for the treason of levying war, they may nevertheless be indicted for compassing or imagining the king's death, and that the levying of war may be laid as an overt act of compassing or imagining the king's death. Kel. 20, 21. — 3. And in this case, besides expressly denying what is laid down by lord Coke to be law, it is said that what is there laid down is contrary to the cases of lord Cobham and the earl of Essex, which are cited by his lordship but two pages before; in the last of which it had been holden, that the gathering of men together, with a design to compel the queen to comply with certain demands, was an overt act of compassing or imagining her death. Kel. 20, 21. — 4. Perhaps, however, upon considering the two passages, they will be found to be quite consistent. The design in the cases of lord Cobham and the earl of Essex was to get the queen into the power of the persons assembled; but lord Coke speaks only of a levying war against the king generally; now although the two propositions, that levying of war with a design against the person of the king is an overt act of compassing or imagining his death, and that levying of war against the king generally is not so, are not both law, they are by no means contradictory to each other. — 5. It may however fairly be inferred from two modern books, that both the propositions are law. In one of these it is said to have been resolved by the court of King's Bench at a trial at bar, that a conspiracy to levy war in order to depose the king, which would be the civil death of the king, is an overt act of compassing or imagining his death; but that a conspiracy to levy war against the king generally, is not so, because there may be such a levying of war as is treasonable, without an intention to depose the king. 11 Mod. 322. — 6. In the other, these words are used in treating of that species of treason, which consists in compassing or imagining the king's death; 'it hath been adjudged that levying of war against the king's person, or the bare consulting to levy such war, is an overt act of compassing or imagining his death.' But the book does not say that the levying of war, or the consulting to levy a war, against the king generally, is so. 1 Hawk. c. 38. 5 Bac. Abr. 117.

(*l*) 1. It has been holden, that to publish in writing or print a prophecy of the king's death is an overt act of compassing or imagining his death. 2 Rol. Rep. 88, 89. — 2. But lord Hale says that to prophecy the king's death does not seem to be an overt act of compassing or imagining his death. 1 Hale's P. C. 108.

(*m*) As was the case of sir Walter Tyrrel, who, by the command of king William Rufus, shooting at a hart, the arrow glanced against a tree, and killed the king upon the spot. 3 Inst. 6.

(*n*) 1. But in antient times, it is said, that lunacy was no excuse. 3 Inst. 6. 4 Rep. 124. — 2. Probably upon the principle, that no man could plead or defend stultifying himself. — 3. By the 33 H. 8. c. 20, it was enacted, that if any person shall commit high

## (K 2.) Who shall be king, &amp;c.

The king before his coronation (*o*) is within the st. 25 Ed. 3. 2. H. P. C. 11.

So, a king *de facto*, though he be not *de jure*. H. P. C. 12. 3 Inst. 7. (*p*)

Though the rightful king be afterwards restored. H. P. C. 12. 3 Inst. 7.

So, the queen regnant. H. P. C. 12. 3 Inst. 7. (*q*)

But a king in title only, is not within the statute; as, the consort of the queen regnant. (*r*) H. P. C. 12. 3 Inst. 7. (*s*)

Nor a king *de jure*, who has not possession. (*t*) H. P. C. 12. 3 Inst. 7. (*u*)

high treason, when he is of good and perfect memory, and after accusation or confession thereof shall fall to madness, the treason done by such person shall be tried in his absence; and the offender shall, if found guilty, suffer such pains and forfeitures, as if he had been of good and perfect memory, and had been personally arraigned; and again, that if any person shall be attainted of high treason, and afterwards fall into madness, he shall, notwithstanding such madness, have and suffer execution. This severe law, however, was shortly afterwards repealed. 3 Inst. 4. 6.

(*o*) So before he is *proclaimed*. 3 Inst. 7. 1 Hale's P. C. 101. 1 Hawk. 36.

(*p*) In other words, an usurper that hath got possession of the throne; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public; and, therefore, treasons committed against Hen. VI. were punished under Edw. IV. though all the line of Lancaster had been previously declared usurpers by act of parliament. 4 Com. 77.

(*q*) The term 'king' being used in a generic sense, as descriptive of 'ruler.'

(*r*) The husband of queen regnant may be guilty of high treason against his wife. 3 Inst. 8.

(*s*) 1 Hawk. c. 36.

(*t*) 1. As was the case of the house of York during the three reigns of the line of Lancaster. — 2. And a very sensible writer on the crown-law carries the point of possession so far, that he holds, that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. 7. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. 1 Hawk. c. 36. — 3. But, continues Sir William Blackstone, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration; and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the stat. of Hen. VII. does by no means *command* any opposition to a king *de jure*; but *excuses* the obedience paid to a king *de facto*. When, therefore, a usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim; and, therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. 4 Com. 77, 78.

(*u*) 1. A king who has resigned his crown, such resignation being admitted and ratified in parliament, is no longer the object of treason. 1 Hale's P. C. 104. — 2. And the same reason holds, in case a king abdicates the government; or by actions subversive of the constitution, entirely renounces the authority which he claims by that very constitution; since when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king. 4 Com. 78.

Nor

Nor a vice-roy, ambassador, &c. 3 Inst. 8.

Yet a king driven and kept out of possession by rebels is a king *de facto & jure*, and within the statute; as, king Charles 2. *ab anno* 1648 *ad* 1660. R. Kelg. 15.

So a queen consort is within the st. 25 Ed. 3. 3 Inst. 8.

But not a queen dowager. H. P. C. 12. 3 Inst. 8. (x)

So the second or third son, when he becomes heir apparent, is the eldest son within the st. 25 Ed. 3. H. P. C. 12. 3 Inst. 8. (y)

So, the eldest son of a queen regnant. H. P. C. 12. 3 Inst. 8.

But the heir presumptive is not within the statute; as, the brother of a king, who has no son, or issue. H. P. C. 12.

As, Roger Mortimer 11 R. 2. The Duke of York 39 H. 6. H. P. C. 12. 3 Inst. 9.

(K 3.) If he violate the king's companion, his eldest daughter unmarried, or the wife of his eldest son:

So, by the st. 25 Ed. 3. It shall be high treason, (2.) *Si homo violast (z) la compaigne le roy, ou leign file le roy, nient marrie, ou la compaigne leigne fitz et heire le roy.* (a)

And there must be an overt act of this offence. H. P. C. 16. (b)

There must be manifest proof; not conjectural. H. P. C. 16.

And if the wife of the king, or of the prince consent, it will be treason in her also. H. P. C. 16. 3 Inst. 9. (c)

And every daughter of the king, (d) who is eldest at the time, is within the statute. H. P. C. 16. 3 Inst. 9. (e)

But a queen dowager is not within the statute. H. P. C. 16. 3 Inst. 9. (f)

(K 4.)

(x) If the companion of the king be divorced *à vinculo matrimonii*, it is not high treason to compass or imagine her death; because she ceases to be the companion of the king. 3 Inst. 9. 1 Hale's P. C. 124.

(y) But it has been doubted whether, if the eldest son of the king die during the king's life, leaving issue a son, it be high treason to compass or imagine the death of such son. 1 Hale's P. C. 125, 126.

(z) This word implies mere carnal knowledge, whether with violence or by consent. 3 Inst. 9.

(a) The wife of the second son is not within the statute, though her issue is inheritable in preference to the eldest daughter. Eden's P. L. 124. Hale's P. C. 129.

(b) 1. A conspiracy, although the intention of the conspirators be to bring about the violation of one of the personages comprehended in this clause, does not amount to an overt act of violating; for as the words thereof are '*doth violate*,' an actual violation is necessary to the completion of the offence. 3 Inst. 9. Hale's P. C. 13, 14. 1 Hawk. c. 38.—2. But if there have been a conspiracy to violate, and the intended violation be afterwards perpetrated, the conspiracy is an overt act of every one of the conspirators, of violating; inasmuch as they can be no accessory in high treason. 3 Inst. 9, 10. 138. Hale's P. C. 14. Kel. 19. 1 Hawk. c. 38.

(c) On the 17th of August 1820, the following question was referred by the House of Peers to the judges then in attendance; whether if a foreigner, owing no allegiance to the crown of England, violates, in a foreign country, the wife of the king's eldest son, and she consents thereto, she commits high treason, within the meaning of the act of 25 Edw. III. To which they answered in the negative.

(d) Or queen regnant. 3 Inst. 7. Hale's P. C. 12. 1 Hawk. c. 36.

(e) Therefore if the eldest daughter of the king die during the life of the king or queen, the violation of the next daughter, who thereby becomes the eldest, while she is unmarried, is high treason. 3 Inst. 9.

(f) 1. For the plain intention of this law is, to guard the blood royal from any suspicion



## (K 4.) If he levy war.

So, by the st. 25 Ed. 3. 2. it shall be high treason, (3.) *Si home leve guerre encounter nostre seignior le roy (g) en son realme. (h)*

A man levies war, if he be in actual arms against the king.

If a man, being in arms with divers armed persons in his house, upon a message from the king by any of his council, commanding that he disperse those whom he has in arms with him, and come to the king, refuses, and afterwards continues in arms with armed persons in his house. E. of Essex. R. Mo. 621.

If he goes with a troop of officers and others from his house to a city, and asks their assistance, &c. R. Mo. 621.

If he maintains a fort or castle, against the king's forces. H. P. C. 14. 3 Inst. 10. (i)

And it will be treason, if war be levied in any respect against the king. (k)

As, if it be intended to restrain the king within his house. Mo. 621.

To compel the king to remove any of his servants, though no damage is intended to his person. Mo. 621.

So, if it be intended to make a public reformation, and an actual force is employed for it: as, to make a change of religion. H. P. C. 14. 3 Inst. 9. (l) for it is assuming a royal authority.

To impugn or change (m) the laws or statutes. 3 Inst. 9. (n)

To remove a counsellor, (o) or other magistrate. R. Poph. 122. 3 Inst. 9.

To expulse all strangers. 3 Inst. 9.

picion of bastardy, whereby the succession to the crown might be rendered dubious; and therefore when this reason ceases, the law ceases with it. 4 Com. 81. — 2. In like manner, as by the feudal law, it was a felony, and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord; but not so if he only vitiated his widow. Feud. l. 1. t. 5. 21. 4 Com. 81. Brit. l. 1. c. 22. — 3. So, if one of the personages, whom it would have been high treason to violate during coverture, be divorced *à vinculo matrimonii*, it is not high treason to violate her; because such personage does, after the divorce, cease to be the companion of the king, or of the eldest son and heir of the king. 3 Inst. 7. Hale's P. C. 12. 1 Hawk. c. 36.

(g) A queen regnant is within the clause. 3 Inst. 7. Hale's P. C. 12. 1 Hawk. c. 36

(h) As Ireland, although part of the dominions of the crown of England, is not part of the realm of England, levying of war against the king in Ireland was not a levying of war against him *in his realm*. 1 Hale's P. C. 155.

(i) Bro. Treas. fol. 24.

(k) Which may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances. 4 Com. 81, 82. 1 Hawk. c. 37. 3 Inst. 9. Hale's P. C. 14. Kel. 71. Sid. 358.

(l) Poph. 122. 1 Hawk. c. 37.

(m) An attempt by intimidation and violence, as by assembling a great multitude of people and encouraging them to surround the two houses of parliament, to force the repeal of a law, is a levying of war against the king, and high treason. Dougl. 590.

(n) Poph. 122. Kel. 76, 77. 1 Hawk. c. 37.

(o) A number of persons armed in a warlike manner, went to Lambeth-house with a design to seize the archbishop of Canterbury, who was one of his majesty's privy counsellors. This was holden to be an overt act of levying war against the king. Cro. Car. 589.

To throw down inclosures throughout the whole country. H. P. C. 14. R. Poph. 122. 3 Inst. 9. (p)

To pull down bawdy houses. Kelg. 65. 1 Sid. 358.

To open all prisons. Kelg. 75. 3 Inst. 9. (q)

To enhance the wages of labourers. H. P. C. 14. 3 Inst. 10 (r)

If war be actually levied, all assisting in arms are traitors. (s)

Though they do not know the intent. R. Mo. 621.

Or mistake the intent. R. Mo. 621.

So, all conspirators, though they are not in arms, if others of their conspiracy are. H. P. C. 13, 14. 3 Inst. 9. R. Kelg. 19.

But raising a force to pull down a particular inclosure is only a riot. H. P. C. 14. 3 Inst. 9. (t)

So a conspiracy to levy war, is not treason within this branch of the statute, if war be not actually levied. H. P. C. 13. 3 Inst. 9. (u)

So it is not treason, if a man join rebels *pro timore mortis et recessit quam cito potuit*. H. P. C. 14. 3 Inst. 10. (x)

If he does not aid, or assist, or use any force, though he be present. R. Kelg. 79. (y)

(p) The universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority. 1 Hale's P. C. 132. 4 Com. 82.

(q) 1. 2 And. 4. — 2. But an insurrection with a design to break open one gaol, and set the prisoners therein at liberty, is not an overt act of levying war against the king. Kel. 75. 77. 1 Ventr. 251.

(r) For thereby the offenders take upon themselves the reformation of the law. 3 Inst. 10.

(s) If a number of men, armed with weapons offensive and defensive, are assembled with a treasonable design, this is an overt act in every one of them of levying war against the king, although nothing farther be done. 5 St. Tr. 37. Salk. 635.

(t) 1. This being no general defiance of public government. 4 Com. 82. — 2. So if two subjects quarrel, and levy war against each other, it is only a great riot and contempt, and no treason. Ibid. Hale's P. C. 136. — 3. Five of the judges were of opinion, that the rising of the weavers in and about London to destroy all engine-looms, by the use of which, some persons were enabled to under-sell others who did not use such looms, did not amount to an overt act of levying war against the king. The affair was considered by those judges as a private quarrel between men of the same trade, concerning the use of particular engines, which was thought to be detrimental to those concerned in the rising. Five of the judges were of a different opinion. But the attorney-general proceeded against the insurgents as for a riot only. Fost. 210. — 4. It has been holden by all the judges, that it is lawful for all the king's subjects to arm themselves, without any special commission for so doing, in order to suppress a riot or a rebellion. Poph. 121, 122. 2 And. 67.

(u) 1. For the words of the clause are, 'do levy war.' — 2. But if there have been such conspiracy, and war be afterwards levied, the conspiracy is in every one of the conspirators an overt act of levying war against the king, inasmuch as there can be no accessory in high treason. 3 Inst. 9, 10. 138. H. P. C. 14. Kel. 19. 1 Hawk. c. 38.

(x) But the fear of death, or actual force, is the only excuse for joining with open rebels. If the fear of having houses burnt, or goods spoiled, or of other collateral injury, were a sufficient plea, it might be in the power of any leader to indemnify all his followers. 8 St. Tr. 56. Eden's P. L. 131.

(y) The special verdict found; that a great number of persons armed were assembled, under the pretence of pulling down bawdy-houses; that the defendant was amongst them, throwing up his cap, and hollowing with a staff in his hand; and that whilst he was amongst them, he was knocked down by a party of the king's soldiers, who came to suppress them, and was then taken; but as the verdict did not find any particular act of force committed by the defendant, or that he was aiding or assisting to the riot, the judges all agreed, that this was not an overt act of levying war against the king; because it was possible that he might have been there only out of curiosity. Kel. 73. 79. Ld. Raym. 1585.

So a conspiracy to levy war in one part of a county, if war be levied in another part, does not make him guilty, who does not appear privy or assenting to it. R. Kelg. 19.

(K 5.) Or adhere to the enemy.

So, by the st. 25 Ed. 3. 2. It shall be high treason, (4) *Si home foit aidantas enemies (z) nostre dñt seignior le roy (a) en son realme donnant a eux aid ou comfort, en son roialme, ou per aylours, et de ceo provablement soit atteint de overt fact.*

A man (b) will be adherent to the enemy, if he gives them aid and comfort. H. P. C. 14. 3 Inst. 10.

If he surrender to them one of the king's castles for reward. H. P. C. 14. 3 Inst. 10. (c)

Men, not subjects, who come in an hostile manner into the kingdom, are enemies. H. P. C. 15.

As, the Scots who invaded England in Queen Elizabeth's time; though the king of Scotland was then in amity. H. P. C. 15. 3 Inst. 11. 4 Inst. 152.

And though it was done without his assent. 3 Inst. 11. 4 Inst. 152. (d)

So every one, not within the king's allegiance. 3 Inst. 11. (e)

But a subject in rebellion is not an enemy, and therefore, if a rebel

(x) By enemies are meant, all aliens in notorious hostility. The solemnity of a previous denunciation of war is not always necessary, as in the instance of general letters of marque and reprisals; and sometimes it is impossible, as in the emergency of a sudden invasion. That the persons adhered to were enemies, is a matter of fact proper to be averred, and evidenced by its public notoriety. Bynkershoek, Quæst. Juris Publici, p. 1. et sep. Eden's P. L. 136

(a) A queen-regnant is within the clause. 3 Inst. 7. Hale's P. C. 12. 2 Hawk. c. 36.

(b) A subject of the enemy country, continuing under the protection of England, and practising whilst in England, to the aid and assistance of that enemy country, comes within the statute. Eden's P. L. 137.

(c) 1. The enlisting of a man, and sending him into the service of a state at war with the king, is an overt act of adhering to the king's enemies. 2 Vent. 51.—2. If one of the king's subjects be enlisted into the service of a state at war with the king, and march, this is an overt act of adhering to the king's enemies. Salk. 635.—3. If a man take a commission, to cruise in one of the ships of a state at war with the king, against the king's ships, or against the ships of his subjects or allies, and go on board the ship, this is an overt act of adhering to the king's enemies, although he never commit any act of hostility. 5 St. 5. Tr. 37. Salk. 635.—4. Sending letters of advice or intelligence to the enemy, is an adherence to them. Hensey's case, Bac. Abr. Treason, (G).—5. And any intelligence sent to the enemy in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is high treason, and though it be intercepted. 6 T. R. 529.

(d) As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty. 4 Com. 83. Foster, 219.

(e) 1. If any subjects of a state in amity with the king, are in the service of a state at war with the king, the giving aid or comfort to these is adhering to the king's enemies; for they are to be considered by all states except that of which they are subjects, as the subjects of the state in whose service they are. Salk. 635.—2. If the French king should in time of peace, send an army to one of the seaports of France, with a design to invade any part of the king's dominions, every French subject in that army would be one of the king's enemies. 5 St. Tr. 37

flies out of the kingdom, and A knowing of his treason succours him, he is not a traitor within this branch. 3 Inst. 11. (f)

So, if a subject comes with the king's enemies into the kingdom, he is not an enemy. 3 Inst. 11. (g)

So the prince of Wales, who holds of the king by homage, &c. is not an enemy; for he is within the allegiance. 3 Inst. 11.

In all these cases there must be an overt act proved. H. P. C. 16. 3 Inst. 12.

And by the st. 7. W. 3. 3. There must be proof of the same overt act alledged in the indictment.

And proof shall be by two witnesses to the same overt act, or to several overt acts of the same treason. Kelg. 9.

If there be at Rome a conspiracy to raise a rebellion, and some move to England with that intent, it will be an overt act. Sav. 4. (h)

(K 6.) If he counterfeit the great, or privy seal.

So, by the st. 25 Ed. 3. 2. It shall be high treason, (5.) *Si home counterface (i) le grand ou privie seal (k) le roy.*

Aiders, and consentors to counterfeit the great, or privy seal, are within this statute. H. P. C. 18. 3 Inst. 16.

By the statute 1 M. 8. To counterfeit the sign manual, privy signet, or privy seal is made high treason.

(f) The same acts of adherence or aid, which when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to high treason, *under the description of levying war against the king.* 4 Com. 83. Foster, 216. 3 Inst. 11. Hale's P. C. 14, 15. 1 Hawk. c. 34.

(g) Mere residence in a hostile kingdom, is not, in itself, an adherence, though a refusal to return to the mother-country upon proclamation may be evidence thereof. Hale's P. C. 165.

(A) 1. A conspiracy with an intention to give aid or comfort to the king's enemies, does not amount to an overt act of adhering to the king's enemies; for as the words of this clause are, 'be adherent,' an actual adherence is necessary to the completion of the offence. 3 Inst. 9. Hale's P. C. 15, 14. 1 Hawk. c. 38. — 2. But if there have been such conspiracy, and aid or comfort be afterwards given, the conspiracy is an overt act in every one of the conspirators of adhering to the king's enemies, inasmuch as there can be no accessory in high treason. 3 Inst. 9, 10. 138. Hale's P. C. 14. Kel. 19. 1 Hawk. c. 38.

(i) 1. It is not a counterfeiting unless the counterfeit thing resembled the thing counterfeited. 3 Inst. 15. Hale's P. C. 181. — 2. But it is not necessary, that there should be an exact resemblance between the thing counterfeited and the counterfeit thing. A person had counterfeited the privy seal; but that there might be some difference between the counterfeit and the true privy seal; he had, with design, left out the crown; and he had also left out some letters and inserted others in their stead. This, notwithstanding the difference, was held to be a counterfeiting of the privy seal. 2 Rol. Rep. 50. Hale's P. C. 184. — 3. It is said, that the engraving of a seal, which resembles the great seal, without a warrant from the king, does not seem to be a counterfeiting of the great seal, within the statute of Edward, unless an impression of the engraved seal be affixed to some instrument. Hale's P. C. 185. — 4. And Lord Hale, in speaking of this, mentioned the case of making a tool, or instrument for coining money, which at the time he wrote was not high treason, unless some counterfeit money had been actually coined therewith. Hale's P. C. 185. — 5. But as these cases are not similar, the words of the statute being in the one case 'doth counterfeit the king's great seal,' in the other 'doth counterfeit the king's money,' the case mentioned does not conclude to the point. Bac. Abr. Treason (H).

(k) It has been holden, that the counterfeiting of a great seal, which has not for some time been made use of, is high treason. 1 Hale's P. C. 177.

But fixing the great seal, &c. to a false patent is not treason, though it be misprision. H. P. C. 18. 3 Inst. 15.

Nor fixing the seal by the chancellor, without warrant. H. P. C. 18. 3 Inst. 15. (l)

Nor a conspiracy to counterfeit the seal, if it be not counterfeited. H. P. C. 18. 3 Inst. 15. (m)

So receiving and abetting a counterfeitor of the great seal knowingly, after the fact committed, is not treason, but misprision only. R. 12. Co. 81. (n)

### (K 7.) Or money.

So, by the st. 25 Ed. 3. 2. It shall be high treason, (6.) *Si home counterface money le roy, ou apport faux money en cest roialme counterfait al money d' Anglitterre sachant ceo estre faux, per merchander ou payment faire.* Vide Money.

To counterfeit the proper coin of the realm is within the st. 25 Ed. 3. 2. and was also treason by the common law. H. P. C. 19. 3 Inst. 16.

Though it be not uttered. H. P. C. 20. 3 Inst. 16.

So, to bring in knowingly, coin counterfeited *ad similitudinem monete Angliæ* from a foreign kingdom, and make payment with it. H. P. C. 21. 3 Inst. 18.

By the st. 1 M. 6. To forge or counterfeit gold or silver coin, not the proper money of the kingdom, if current in the realm by consent of the king, is high treason. If current by proclamation. H. P. C. 20.

(l) 1. At common law, a misuse or an abuse of the great seal was in some cases high treason. Thus, if the chancellor had affixed the great seal to an instrument without the proper warrant, for so doing, this could at common law have been high treason; being a misuse of the great seal. 3 Inst. 15, 16. Hale's P. C. 18.—2. So if a man, after stealing or finding the great seal, had affixed it to an instrument, this being an abuse of the great seal from the want of authority to use it, would at common law, have been high treason. 3 Inst. 16.—3. But since the statute of Edward, neither a misuse nor an abuse of the great seal is high treason, because in neither case is there any counterfeiting. 3 Inst. 15, 16. Hale's P. C. 18.—4. So neither is the making of any alteration in, or addition to, what is contained in an instrument, after the great seal has been thereto affixed, high treason; this being only an abuse of the seal. 3 Inst. 15. Kel. 80. 1 Hawk. c. 41.—5. So neither is the taking of the wax, which has been impressed with the great seal from one instrument, and affixing it to another. 3 Inst. 15, 16. Hale's P. C. 18. Kel. 80. 1 Hawk. c. 41.

(m) 1. For the words of the statute are, 'doth counterfeit;' and the offence therefore is not complete, unless there be an actual counterfeiting. 3 Inst. 15. 1 Hawk. c. 41.—2. But if the seal had been counterfeited, every person who was aiding in, or consenting to the counterfeiting, is guilty of high treason; since there can be no accessory in treason. 3 Inst. 16. 188. Hale's P. C. 14. 18. Kel. 19. 1 Hawk. c. 41.

(n) 1. It is in one case said, that where a man had affixed an impression of a counterfeit privy seal to a patent, and had afterwards obtained the great seal to be affixed to the patent, and collected money by virtue thereof; this was, upon the whole circumstances of the case, adjudged to be a counterfeiting of the privy seal. 2 Rol. Rep. 50.—2. But it seems to be the better opinion, that counterfeiting an impression of any one of the three seals, or the sign manual, is high treason, although no improper use be made of the counterfeit thing. The statutes which prohibit the counterfeiting of any one of these seals are entirely silent as to the use that may be made of the counterfeit thing. And Lord Hale lays it down, that counterfeiting the seal is high treason, without saying any thing further. And in the case of counterfeiting the king's money, the counterfeiting has been holden to be high treason, although the counterfeit money were not uttered. Bro. Treas. pl. 27. 3 Inst. 16. 1 Hale's P. C. 184. 214. 1 Hawk. 42. Bac Abr. Treason, (H).



By the st. 1 & 2 Ph. & M. 11. Knowingly to bring into the realm from beyond seas coin counterfeit like money current in this realm, of intent to utter and pay the same, is high treason in the importer, his counsellors, aiders and abettors.

By the st. 5 El. 11. Clipping, washing, rounding, and filing for gain the coin of this realm, or current by proclamation in it, is treason in the actors, their counsellors. and abettors. Vide post, (X 1.)

By the st. 18 El. 1. By any means for gain to impair, diminish, falsify, scale, or lighten the coin of this realm, or current in it by proclamation, is treason in actors, counsellors, and abettors. Vide post, (X 1.)

By the st. 8 & 9 W. 3. 25. (made perpetual by the st. 7 Ann. 25.) No person, unless employed in the mint and for the use of the mint only, or authorized by the treasury, shall knowingly make or mend (or begin or assist in it) any punchion, stamp, dye, or mould of metal, earth, or sand, &c. whereon is impressed, or which will make or impress the figure or stamp of either side of gold or silver coin current, or edging tool or engine not of common use in trade, but contrived for marking edges of money like the edges of money coined in the king's mint. And the offenders, their counsellors, aiders, and abettors shall be adjudged guilty of high treason,

(K. 8.) If he kill the chancellor, treasurer, or king's justices doing their offices.

So, by the st. 25 Ed. 3. 2. It will be high treason, (7.) *si home tuast chancellor, treasurer, ou justices nostre seignior le roy del un bank ou del auter, justices in eyre et d'assise et tous auters justices assignes de oier et terminer esteaunts en lour places fesants lour offices.* (a)

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(a) 1. The statute then proceeds to provide, that because many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time; if any other case, supposed to be treason which is not specified above, doth happen before any justice, the justice shall tarry without proceeding to judgment of treason, until the case be laid before the king in parliament, and it be declared whether it ought to be adjudged treason or other felony. — 2. In consequence of this power, not indeed originally granted by the stat. of Edw. III., but constitutionally inherent in every subsequent parliament (which cannot be abridged of any rights by the act of a precedent one) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard II.: as particularly the killing of an ambassador was made so; which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offence; the most arbitrary and absurd of all which was, by the stat. 2 Rich. 2. c. 3., which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. But in the first year of his successor's reign, an act (1 Hen. 4. c. 10.) was passed, reciting that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason; and therefore it was accorded that in no time to come, any treason be judged otherwise than was ordained by the stat. of king Edw. III. 4 Com. 86. — 3. But afterwards between the reign of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived; all which however were totally abrogated by the statute 1 Mar. c. 1, which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time the legislature has been more cautious in creating new offences of this kind. 4 Com. 87. — 4. And the rule now is, that an offence is not to be adjudged high treason, unless it clearly and without argument or inference fall within the meaning of some act of parliament; for no statute whereby an offence is declared to be high treason, is to be extended by equity. Plowd. 36. 3 Inst. 12. 20. 21. 19 Eliz. c. 1. 21.

Wounding of the chancellor, &c. if death does not ensue is not within the statute. H. P. C. 17. 8 Inst. 18.

Nor killing them, if they are not in the exercise of their offices. H. P. C. 17.

Nor killing any not named in the statute; as, lord steward, &c. H. P. C. 17. 3 Inst. 18.

A judge of the admiralty, or ecclesiastical court. 3 Inst. 18.

Nor a peer in parliament, or a member of the house of commons, though killed in their places. 3 Inst. 18.

### (K 9.) To maintain the authority of the pope.

By the st. 5 El. 1. If any person, after conviction and attainder for the first offence, do again by writing, teaching, &c. wittingly maintain the authority of the bishop of Rome, heretofore claimed in this realm, being under the queen's obeysance, his abettors, &c. to further such authority, &c. Or, if any, within three months after the first tender, do a second time refuse the oath of supremacy prescribed 1 El. 1. he shall be guilty of high treason. Vide post, (K 1.)

So, by the st. 13 El. 2. If any use, publish, or put in ure any bull, &c. from Rome, or absolve or be absolved by colour of such bull, &c.

So, by the st. 23 El. 1. If any withdraw, &c. any from obedience, or to that intent to the Romish religion, or move to be reconciled, or be reconciled to the see of Rome.

So, by the st. 3 Jac. 4. s. 22. If any on the sea, beyond the sea, or in this realm perswade or withdraw any subject from his natural obedience, or reconcile him, or move him to promise obedience to the pope, or see of Rome, or other prince, their abettors, &c. Or, if any be reconciled, &c. unless he return, &c. and in six days submit and take the oaths of allegiance and supremacy.

So, by the st. 27 El. 2. If any jesuit, seminary priest, or other ecclesiastical person, born in this realm and professed, &c. by authority of the see of Rome come into or remain in this realm, unless in three days he submit and take the oath of supremacy and then come not within 10 miles of the queen without licence during 10 years: or, if any brought up in a seminary, &c. do not return in six months after proclamation in London, and in two days after return submit, &c. and take the oath of supremacy.

So, if any pretends authority to absolve, or perswades a subject from his obedience, it will be treason within 23 El. 1. though he does not move any to decline his obedience. R. Sav. 3.

So, if he perswades any, &c. though he has not, nor pretends to have power to absolve. R. Sal. 3.

Vide post, (Y 3.)

### Petit treason, what.

#### (L 1.) To kill a master.

So, by the st. 25 Ed. 3. 2. Petit treason is, *quant un servant tua son maister, ou un feme tua son baron, ou quant home seculer ou de religion tua son prelate a que il doit foye et obedience.*

So, if a servant kill his mistress. H. P. C. 23.

Or, his master's wife. H. P. C. 23. 3 Inst. 20.

Though

Though the servant be departed from his service, but kills upon malice there conceived. H. P. C. 23. 3 Inst. 20.

So, if a son, who has meat and drink from his father, kills him; for he is a servant. H. P. C. 24. 3 Inst. 20.

So, if a man, by the procurement and in the presence of a servant, kills the master, it is treason in the servant, though only murder in the other. H. P. C. 25. Dy. 128. 3 Inst. 20.

So, if the man was procured only to rob the master. Dy. 128.

Or, only to beat the master, and he kills him.

But if the master be killed by the procurement, but in the absence of the servant, the servant is only accessory to the murder. H. P. C. 23. 25.

But being in the same house, though not in the same room, is a presence. H. P. C. 24.

If the servant attempt to assassinate a stranger, but by mischance kills his master, it is treason; for he had a murderous intent.

And a circumstance, which makes a man guilty of murder, makes a servant guilty of petit treason. H. P. C. 24.

But if a servant kills his master without malice, it is only manslaughter. H. P. C. 24.

### (L 2.) Husband.

If a wife kill her husband, it is petit treason. H. P. C. 23.

So, if she intend the death of another, and the husband is killed.

Or, if a stranger kill the husband by her assistance. H. P. C. 23.

Or a servant, by her procurement, though she be absent. H. P. C. 23, 24, 25. 3 Inst. 20. Dy. 332.

If she desires her daughter to give powder to her husband for his recovery, which she does in her absence, whereby the husband is poisoned. R. Kelg. 53.

But if a stranger kill the husband, by the procurement of the wife who is absent, she is only accessory to the murder. H. P. C. 23, 25. Dy. 332. 3 Inst. 20.

If an husband kill his wife, it is only murder.

### (L 3.) Prelate.

If a clerk religious or secular kill his superior, it is petit treason. H. P. C. 24. 3 Inst. 20.

Aiders and abettors to petit treason are within the st. 25 Ed. 3. 2. H. P. C. 24. 3 Inst. 20.

A man for petit treason shall have judgment to be drawn and hanged. H. P. C. 24. 268. 3 Inst. 211.

A woman to be drawn and burnt. H. P. C. 24. 269. 3 Inst. 211. Vide post, (Y 4.)

## (M) Felony (a); homicide.

### (M 1.) Murder.—By whom committed.

*Quodlibet crimen capitale felleo animo perpetratum* is felony. Co. L. 391. a.

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(a) 1. See, for the definition of felony, 1 Russel, 58. — 2. And as to what words in a statute create felony. Id. 58, 59.—3. What offences are indictable. See tit. Indictment.

And anciently high treason was pardoned by this word, felony, but not of late times. Co. L. 391. a.

But petit treason, homicide, burglary, robbery, arson, rape, and larceny are now felonies. Co. L. 391.

Homicide comprehends murder, manslaughter, death by chance, *se defendendo*, or for justifiable cause.

Murder is, when a man sane (*b*) and above the age of discretion (*c*) kills another within the realm, on malice (*d*) prepense. H. P. C. 43. 3 Inst. 47. (*e*)

If a man upon malice kill another it is murder, though he was drunk. H. P. C. 43. (*f*)

Though an infant, if he be above the age of discretion. (*g*)

Or under the age of discretion, if by circumstances it appears that he knew what the action was; as, by excuses, endeavouring to conceal, &c. H. P. C. 43, 44.

So if a man procure a lunatick, &c. to kill. H. P. C. 43.

Though a *feme covert*, by coercion of her husband. H. P. C. 65. (*h*)

But it is not felony in a lunatick during his lunacy. H. P. C. 43.

Nor in a *non compos*. H. P. C. 43.

Nor in an infant, who does not know good from evil. H. P. C. 43, 44.

### (M 2.) Whose death shall be murder.

It is murder, though the man killed be an alien, or denizen. 3 Inst. 50. (*i*)

Or, attainted of high treason, or felony. 3 Inst. 50.

Or, in a *præmunire*. 3 Inst. 50.

Or, abjured.

Or, convicted and under execution for another crime. R. 3 Mod. 68.

But the person must be in *rerum natura*; and therefore, if a woman *privement enseint* destroy the child before it be born, it is not (*k*) murder. H. P. C. 53. 3 Inst. 50.

Or, if another by a stroke given to her, destroy it. H. P. C. 53. 3 Inst. 50.

Yet, if it be born, and afterwards die by means of the potion, or the stroke, it is murder. H. P. C. 53. 3 Inst. 50.

And he, who advises the destruction before the birth, is accessory to the murder. H. P. C. 53, 54. 3 Inst. 51.

By the st. 27 Jac. 27. If a woman delivered of issue, which being born alive would be a bastard, endeavour by burying, drowning, &c. by herself or others, so to conceal its death, that it may not appear,

(*b*) Vide 1 Russell, 10. et seq.

(*c*) Vide 1 Russell, 2. et seq.

(*d*) Fost. 256, 257. 262. 1 Hawk. c. 51. s. 18. 1 Hale 451. 4 Blk. Com. 199.

(*e*) 3 Inst. 51. 1 Hale 424. 448, 449. 1 Hawk. c. 51. s. 3. Kel. 127. Fost. 256. 2 Ld. Raym. 1487. 4 Blk. Com. 198. 1 East P. C. 214.

(*f*) Vide supra, n. (*b*).

(*g*) Vide supra, n. (*b*).

(*h*) As to the culpability of a *feme covert* for crimes committed in company with or by coercion of her husband, see 1 Russell, 25.

(*i*) 1 Hale, 433.

(*k*) But now by 45 G. 5. c. 58. the law is changed.

whether born alive or not, it is murder, unless she prove by one witness at least, that it was born dead. (l)

The killing must be within the realm ; for if a man be killed in *partibus transmarinis*, it is triable by the constable and marshal, and not by the common law. H. P. C. 54. 3 Inst. 48.

Stroke and death upon the high sea shall be tried by the admiral, or by commission upon the st. 28 H. 8. 13. H. P. C. 54.

Stroke upon the sea, and death upon land cannot be punished. H. P. C. 54.(m)

(M 3.) *Felo de se.*

If a man being *compos mentis*, and of the age of discretion, kill himself, it is murder. H. P. C. 28. 3 Inst. 54.

Or, if he give himself a mortal wound, of which he dies within a year and a day. H. P. C. 28.

Or, if he pursues B. with intent to kill him, B. runs away and falls with his knife drawn in his hand, the pursuer falls on the knife, he is *felo de se*. H. P. C. 28. 3 Inst. 54.

Otherwise, if B. stands with a naked weapon for his defence, and A. runs upon it. H. P. C. 29.

(M 4.) What manner of death.

It is murder, if a man upon express malice poison (n) another. H. P. C. 53. 3 Inst. 48.

Or, kill him with a sword, gun, bow, or any other weapon. H. P. C. 53. 3 Inst. 48.

Or crush, bruise, smother, strangle, &c. to death. H. P. C. 53, 3 Inst. 48.

Or, famish. H. P. C. 53. 3 Inst. 48. (o)

Or, set on a dog to kill him. H. P. C. 53. 3 Inst. 48.

Or, by any means maliciously put another to death. (p)

Or, give him a mortal wound, of which he dies within a year and a day. H. P. C. 55. 3 Inst. 47.

Or, maliciously does any act, upon which death ensues within a year and a day.

As, if he lay a sick man in the cold. H. P. C. 53. 3 Inst. 48. (q)

(l) But now, by 43 G. 3. c. 58. the law is changed, and the case is to be governed by presumptions for and against the prisoner, as other cases are.

(m) By the st. 2 G. 2. 21. If any person shall be feloniously stricken or poisoned on the sea or out of England and die in England, or be stricken or poisoned in England and die on the sea or out of England, an indictment found in the county in England where such death, stroke, or poisoning shall happen, shall be as good and effectual in the law, as if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, had happened in that county.

(n) By 43 G. 3. c. 58. administering poison with intent to murder, though no death should ensue, is capital. Vide infra, (S).

(o) See the case of negligence or harsh usage towards an apprentice producing death, 1 Russel; 620.

(p) See as to procuring death through perjury, 1 Russel, 62. 622.—2 By rape, 1 Leach, 96. 1 East. P. C. 226.

(q) A goaler knowing that a prisoner infected with the small pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner who had not had the distemper, and of which fact the goaler had notice, caught the distemper and died of it ; and held murder. Fost. 322. 2 Vide 2, Str. 882. 2 Ld. Raym. 1574. Fost. 322. 1 East. P. C. 331, 332.



Or, expose an infant till the cold, or a kite, &c. kill it. H. P. C. 53.

(M 5.) What shall be malice prepense :—Express malice.

Malice which makes killing to be murder may be express ; as, a precedent menace.

Or, lying in wait.

Or, a precedent quarrel. H. P. C. 48.

So, if two men appoint a time or place of combat and one of them is killed, it is murder. H. P. C. 48.

Or, if without appointment they meet and fight, upon malice. H. P. C. 47.

Though he that is killed gives the first blow. H. P. C. 47.

Though he that kills declines the duel, and was only persuaded to it, by importunity, and to save his honour. H. P. C. 48.

Though he that kills refuses to strike, but offers a pot of ale to the other to touch him ; whereupon B. strikes and A kills him. H. P. C. 48.

Though the quarrel was sudden, and thereupon a duel appointed for the next day. H. P. C. 48. 8 Inst. 51.

Although he that kills, after the first stroke, flies to a wall and then kills the other in his own defence. H. P. C. 42. 47.

Or, if the duel be fought after the passion cools. R 1 Lev. 181.

(M 6.) Though it does not extend to the life.

So, if a man is killed upon malice, it is murder, though the malice did not extend to his life, but only a corporal damage. H. P. C. 49, 50.

As, to beat him. H. P. C. 49.

(M 7.) Though against a stranger.

So, if the malice was against another ; as, if A. with malice aims at B. but kills C. H. P. C. 50.

If A. intends poison for B., but by misadventure C. takes it. H. P. C. 50.

If A. with malice assaults the master, and in the quarrel kills the servant. H. P. C. 50.

If there be a duel upon malice, and C. attempts to part them, and one of them kills him, H. P. C. 50. 22 Ass. 71.

(M 8.) Aiding one who has malice.

So, if the malice be in another person ; as, if one commits murder, all present and aiding are guilty of murder, though they had no particular malice against the person killed. H. P. C. 51.

As, if there be a duel upon malice between A. and B., and C be second to A. who kills B. This is murder in C. H. P. C. 51.

(M 9.) Malice implied :—If a man kills without just provocation.

And in some cases implied malice makes the crime murder ; for the law

law presumes malice, when a man kills another without sufficient provocation. H. P. C. 45. 3 Inst. 52.

As, if he kill another, who distorts his face and ridicules him. H. P. C. 45. R. Cro. El. 778.

Or, who provokes him only by indecent words: as, if a master kill his apprentice that answers him saucily. 10th Oct. 1666, Gray's Case, (cited Comyns's Reports 15, 16.) R. 1 Lev. 180.

Or, with a sword kills a servant, that refuses his command. R. 8 W. 3. Keate. (Reported Comyns's Reports 13.)

Otherwise, if a man gives his servant proper correction, and kills him by an unlucky stroke; that is only manslaughter. Turner's Case.

So, if a man be cutting wood in a park, and the parker ties him to an horse and beats him, whereby the horse runs away and kills the man, it is murder. R. Cro. Car. 131. H. P. C. 49.

So, if one strike a child in the high-street with his dagger, of which he dies. Sav. 67.

### (M 10.) Unlawful act.

When a man does an unlawful act (*r*) and death ensues, it is murder: as, if a man rob an orchard, and being rebuked by the owner, kills him.

If a man commits a riot, and in the doing of it another is killed. H. P. C. 47.

If malefactors in a park, kill the parker. H. P. C. 46. R. Pal. 35. Sav. 67.

Though the parker shoots, and upon flight pursues them, and then is killed. H. P. C. 46. Pal. 35.

So, if a man assaults another to rob him, and after resistance and stroke, kills him. H. P. C. 45, 46.

And if several do an unlawful act, and one of them kills a man, it is murder in all aiding the unlawful act. H. P. C. 51. (*s*)

And in all ready to give aid, though only lookers on. H. P. C. 51.

Though out of sight, in another room, or at half a mile distant in the same park. H. P. C. 51.

If A. begins a riot, which continues for an hour, and then B. is killed by another, it will be murder in A. R. 1 Sal. 334, 335.

### (M 11.) Act apparently mischievous.

When a man with a mischievous intent, does an act apparently mischievous, and death ensues, it is murder.

As, if he ride among a multitude with an horse used to kicking. H. P. C. 44.

If he throw a stone over an house among a multitude to hurt them. H. P. C. 44. 3 Inst. 57.

(*r*) 1. Persons infected with the plague going abroad, with intent to infect and infecting others, whereof they die, are guilty of murder. Semble. 1 Hale 432.—2. And though no intent appears, they are guilty of a great misdemeanor. Ibid.—3. It is an indictable offence, unlawfully and injuriously to carry a child infected with the small pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. 4 M. & S. 73.—4. And it likewise is an indictable offence in an apothecary, after having inoculated children, unlawfully and injuriously to cause them to be exposed in the public streets, to the danger of the public health. 4 M. and S. 272, 275.

(*s*) 1. Vide Fost. 270, 352. 1 Hale. 439, 464, 494, Kel. 87. 1 Hawk. c. 51. 4 Blk. Com. 200, 1 East, P. C. p. 257, &c.

If he wilfully prepare poison, and lay it for any person. H. P. C. 44.  
By the st. 1 Ed. 6. 12. 3 Inst. 52.

(M 12.) Killing an officer.

When an officer is killed in the execution of his office, it is murder: as, a watchman, or constable. H. P. C. 45. Sav. 67. 3 Inst. 52.

Serjeant, or magistrate. H. P. C. 45. 3 Inst. 52. Sav. 67.

Or any in their assistance. H. P. C. 45. 3 Inst. 52.

Though he be not known to be an officer. H. P. C. 45, 46.

Though the process is erroneous. H. P. C. 46.

But if the officer does what is not warrantable, it is only manslaughter. H. P. C. 46. R. Mar. 4.

If the process mistakes the name, or addition of the party. Dy. 88. a. in Marg. R. Jon. 346.

(M 13.) Officer exceeding his jurisdiction.

When an officer of justice exceeds the limits of his jurisdiction in the death of another, it is murder; as, if a justice of peace gives judgment for high treason, and the officer executes it, it is murder in both. H. P. C. 35.

If a justice of peace give judgment of death for a trespass, it is murder in him, but the executioner is excused. H. P. C. 35.

If a judge executes a criminal; for that belongs to the sheriff. H. P. C. 35, 36.

Or, if a stranger does it of his own head. H. P. C. 35, 36.

So, if a sheriff behead a man condemned to be hanged. H. P. C. 36.

If any execute martial law in time of peace. H. P. C. 46.

If a gaoler by duress kill his prisoner. H. P. C. 46.

(M 14.) Homicide upon the st. 1 Jac. 8.

By the st. 1 Jac. 8., any who stabs a person, not having a weapon drawn, nor first stricken, (a) so that he die in 6 months, though malice afore-thought cannot be proved, shall suffer as for murder. (b)

But this does not extend to persons present, who do not give the stab. H. P. C. 58. R. Al. 44.

Nor to a person, who in a passion throws a hammer at another. R. Jon. 433. (c)

Nor to those, who are not indicted upon the statute. H. P. C. 58.

The indictment need not conclude *contra formam statuti*. H. P. C. 58. Al. 44.

And though the indictment be upon the statute, the jury may find manslaughter generally. H. P. C. 58. Al. 44.

(a) As to the meaning of these words, see Byard's case, W. Jones, 340. Skin. 668. Fost. 301. 1 Hawk. P. C. c. 30. 4 Blk. Com. 193.

(b) See touching the policy, &c. of this statute, 4 Blk. Com. 193. 1 Ld. Raym. 140. Fost. 299, 300.

(c) See as to the meaning of the words 'stab or thrust,' 1 Hale 469. Fost. 300. 1 Hawk. c. 30. s. 8. 1 East, P. C. 248. Kel. 131.

If the person killed had thrown a pot at the other, he shall be said to have had a weapon drawn. R. per 5 J. 3 Lev. 256. (*f*)

Vide post, (Y 5.)

(M 15.) Manslaughter : — If one kill upon a reasonable provocation.

The distinction between murder and manslaughter began upon the plan of the Mosaic law. Eq. Ca. 270.

And therefore, where a man kills another upon a reasonable provocation (*g*) given, it will be only manslaughter.

As, if a son, having been beaten complain to the father, who goes three quarters of a mile, and beats the person that misused his son, upon which he dies. H. P. C. 48. R. 12 Co. 87.

If a servant, seeing his master assaulted, kills the assailant. H. P. C. 51, 52.

If a stranger seeing two men fighting, helps one and kills the other. H. P. C. 52. R. 1 Sid. 160. 12 Co. 87.

If a man sees another taken by a prest-master, who upon demand refuses to shew his warrant, and for this he kills the prest-master. R. per 8 J.

If a collector of tallage makes a distress and being resisted, kills. R. 1 Vent. 216.

If a man sees his wife in adultery, and kills the adulterer. R. 1 Vent. 158.

If a man kills an officer, who arrests him without warrant.

Or, who exceeds his warrant; as, if he break an house to make an arrest. H. P. C. 46.

If a man kills another, who attempts to enter into his house upon pretence of a title. H. P. C. 40. 57.

Or, to recover a possession gained by force. H. P. C. 40. 56.

(M 16.) Upon a sudden quarrel.

So, upon a sudden quarrel (*h*); as, if two quarrel for the wall and fight, and one of them is killed. H. P. C. 57. 3 Inst. 55. (*i*)

If two quarrel, and one of them fetches a weapon and kills the other. H. P. C. 56. (*k*)

If two fight, and one of them breaks his sword, and a stranger gives him his sword, with which he kills the other; this is manslaughter in both. H. P. C. 57.

So, if two quarrel and agree to fight and fetch their swords, and the one kills the other; for the blood never cooled. H. P. C. 48. 56. 3 Inst. 55. (*l*)

(*f*) 1. As to who shall be said to be a person that hath not then any weapon drawn, see 1 East, P. C. 248, 249. Sty. 467. Fost. 301. — 2. And what a weapon drawn, see Fost. 300, 301. 1 Hale, 470. 1 Hawk. c. 30. s. 8. Sty. 468. 1 East, P. C. 250.

(*g*) Vide 1 Russell, 632. et seq.

(*h*) Vide 2 Ld. Raym. 1485. 2 Str. 771.

(*i*) And if the combat be equal at the onset, the use of a deadly weapon afterwards will not make the offence more than manslaughter, 1 East, P. C. 243. 5 Burr. 2793. 1 Hawk. c. 31. s. 39.

(*k*) Vide Fost. 132.

(*l*) Vide 3 East, Rep. 581. 1 Hawk. c. 31. 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 42. 1 Hale, 442. 452. 480. 4 Blk. Com. 185. 1 East, P. C. c. 5. Fost. 295, &c.

So, if two quarrel and part, and presently meet and fight, and one of them is killed. H. P. C. 56.

Though there was former malice; if they were reconciled and quarrel upon a new occasion. H. P. C. 49.

If they fight upon malice, and are parted, and afterwards fight again upon a sudden. H. P. C. 49.

If A. and B. have malice, A. challenges, B. refuses, but says he will go to such a town, and in the way A. assaults, (m) and B. kills him. H. P. C. 48.

### (M 17.) Upon an unjustifiable act.

Upon an act not justifiable, though done without a mischievous intent; as, if a person in wrestling kills another. H. P. C. 57.

Or in play at foils. H. P. C. 57. R. Al. 12.

Or at hand-sword, without the king's command. H. P. C. 32.

Or in justing, without the king's licence. (Vide 3 Inst. 56.)

If a man, shooting or throwing stones into an highway, kills another. H. P. C. 32. 44. 58.

Or shooting at a deer in a park. H. P. C. 31. 3 Inst. 56.

Or rides a wild horse among a concourse of people. H. P. C. 44.

Or whips an horse in the street to make him run speedily, whereby a child is killed. H. P. C. 58.

### (M 18.) Homicide : — *se defendendo*.

Homicide is excusable, when done upon inevitable necessity: as, for one's own defence; for if a man be assaulted and retreats to a wall, and then in his defence kills the pursuer, it is not murder, nor manslaughter. H. P. C. 41. and this by the st. Glo. 9. 2 Inst. 315. 3 Inst. 56.

So, if he retreat, when he can, without danger of his life.

Or till he fall down. H. P. C. 41.

Or, if he does not retreat, where the pursuit is so fierce that there cannot be a retreat with safety of life. H. P. C. 41. 3 Inst. 56.

Though there was malice between the assailant, and the person who killed him in his own defence. H. P. C. 42.

But if a man strikes the assailant before retreat, and then kills him in his own defence, this is manslaughter. H. P. C. 42.

### (M 19.) By chance-medley.

Or, when done by misadventure: as, where a man does a lawful act without a bad intent, and death ensues. H. P. C. 31. by the st. 52 H 6. 26. de Marl. 2 Inst. 148. 315.

As, if a man be shooting at rovers, or at a bird, and by chance kills another. H. P. C. 31. 3 Inst. 56.

Or cutting wood, and the axe-head flies off and kills. H. P. C. 31.

Or justing by the king's command. H. P. C. 31.

If a father corrects his son, and by accident kills him. H. P. C. 31.

Or a master gives proper correction to his scholar. H. P. C. 31.

Or to his servant. H. P. C. 31.

If a thief breaks an house in the night, and A. rises and finds a

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(m) The first blow is immaterial, if quarrel is sudden, and combat equal. Foot. 295. 1 Hale, 456. 1 Hawk. c. 31. s. 27, 28. Fest. 295.



stranger there by consent of a servant, but not of the master hiding himself, and supposing him to be the thief, kills him with his sword. R. Mar. 5.

(M 20.) Justifiable.

Or, when done by a warrant of law: as, for the advancement of justice; as, if an officer puts another to death pursuant to judgment. H. P. C. 35.

If a champion in a writ of right kills another; or a combatant in an appeal. H. P. C. 37.

If a sheriff, bailiff, &c. having a warrant to arrest one indicted of felony, kills him, if he will not obey the arrest. H. P. C. 36.

So, a person, who pursues upon an hue and cry. H. P. C. 36.

So, if a person arrested for felony, when a felony is done, escapes from his conductors to gaol, and they cannot retake him without killing him. H. P. C. 36.

If rioters, &c. oppose a lawful warrant of a justice and one of them is killed. H. P. C. 37.

So, in civil process, if the party resist, the sheriff, &c. may kill him without retreating. H. P. C. 37. 3 Inst. 56.

Or, if in the arrest the sheriff kill him, it is not felony. H. P. C. 37. 3 Inst. 56.

If an officer, in pursuit of transporters of wool, after resistance, kills one of them. 3 Mod. 66.

If a prisoner assaults his gaoler, the gaoler may kill him. H. P. C. 37. 3 Inst. 56.

If hunters in a park fly or resist, the parker may kill them. H. P. C. 37. By the st. 21 Ed. 1. de Malefactoribus in Parcis.

So a man may kill a thief, who attempts to rob him upon the highway, or in his house. H. P. C. 39. Declared by the st. 24 H. 8. 5. 3 Inst. 56.

And a woman, him that attempts to ravish her. H. P. C. 39.

Or a man, who attempts burning an house. H. P. C. 39.

Otherwise, if he attempt only a battery. H. P. C. 40.

Or if the parker, &c. had malice. By the st. 21 Ed. 1 de Malefactoribus in Parcis.

In these cases the party shall be arraigned, and upon the special matter found, if it be *se defendendo*, or chance-medley, he forfeits his goods, but he shall have a pardon of course. H. P. C. 32. 40.

If it be justifiable homicide, he shall be dismissed without forfeiture, or pardon. H. P. C. 38.

(N) Misprision and compounding offences.

(N 1.) Of treason.

All treason includes misprision. H. P. C. 127. 3 Inst. 36.

By the st. 5 Ed. 6. 11. concealment of treason shall be only misprision. So, by the st. 1 and 2 Ph. and M. 10. 3 Inst. 36.

The concealment is misprision, though the treason be made so by statute. H. P. C. 127. R. Kelg. 21.

If one knows a counterfeitor of the coin, and does not discover him, that is a misprision. H. P. C. 128.

By

By the st. 13 El. 2. Concealment of bulls, &c. from Rome, is misprision of treason.

By the st. 14 El. 3. To counterfeit coin not of this realm, nor current here, is misprision of treason.

If A. be informed of a design and of the persons, it will be misprision, though he says generally, that there is a plot, &c. for he ought to discover all that he knows of the design. Kelg. 22.

And he ought to discover it to a privy counsellor, or a justice of peace. Semb. Kelg. 22. H. P. C. 127. 3 Inst. 36.

But the receiver of a traitor knowingly, if he comforts him, is a traitor. H. P. C. 127. 3 Inst. 138.

So knowledge of treason, and assent make a traitor. H. P. C. 127.

Or, approbation. Kelg. 21.

Yet concealment of a fact, not treason, is not misprision. Kelg. 33.

So a man cannot be guilty of misprision, without knowing the design and the persons. Kelg. 21, 22.

One convicted of misprision of treason forfeits his goods, his land for life, and shall be imprisoned for life. H. P. C. 128. 3 Inst. 36.

### (N 2.) Of felony.

Misprision of felony is, when a man conceals (*n*) the felony. H. P. C. 129. 3 Inst. 139.

Or, if he procures the concealment. H. P. C. 129.

### (N 3.) Other misprisions.

If a man strikes in Westminster-hall *sedente curia*, it is a great misprision, for which he shall lose his hand, his goods, the profits of his land for life, and shall have perpetual imprisonment. H. P. C. 131. 3 Inst. 140.

So, if he rescues a prisoner from the bar of the court of chancery, B. R., C. B. or exchequer. H. P. C. 131. Vide 3 Inst. 141.

So, if in the presence of the same courts, or of justices of assize, or oyer and terminer, a man draws his sword and strikes another. H. P. C. 132. 3 Inst. 140.

Or, draws upon a judge, though he does not strike him. H. P. C. 132. 3 Inst. 140.

By the st. 33 H. 8. 12. If a man strikes in the king's palace and draws blood, he shall lose his hand, and suffer fine and ransom and perpetual imprisonment. (Vide 8 Inst. 140.)

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(*n*) 1. As if he silently observe the commission of a felony, without using any endeavour to apprehend the offender. 1 Hale, 374, 375. 1 Hawk. c. 59. s. 2. n. (1). — 2. For there is an obligation to disclose to a magistrate another's crime, with all possible expedition, 3 Inst. 140. — 3. But there must be a knowledge merely, without any assent; for if a man assent to a felony, he will be either principal or accessory, 4 Blk. Com. 121. — 4. So theft bote or compounding felony, which is where the party robbed, not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. 1 Hawk. c. 59. s. 5. 4 Blk. Com. 133. — 5. And is punishable by fine and imprisonment, unless where the party makes himself an accessory. Hawk. Id. s. 6. 2 Hale 400. — 6. But the barely taking again one's own goods which have been stolen, is no offence at all, unless some favour be shown to the thief. Hawk. Id. s. 7. — 7. By 4 G. 1. c. 11. taking a reward to help to stolen goods, is felony. — 8. And by 25 G. 2. c. 36., to advertise a reward for the return of things stolen, incurs a forfeiture of 50l. — 9. So, compounding a misdemeanour is unlawful. 2 Wils. 341. 5 East, 298. 302. 4 Blk. Com. 363, 364. — 10. So compounding informations on penal statutes. 4 Blk. Com. 136. 18 Eliz. c. 5. s. 4. Vide 6 East, 126.

If one utters coin, knowing it to be counterfeit, it is a great misprision, for which he shall be fined and imprisoned. H. P. C. 20. 128.

So, if one of a grand inquest discovers the person indicted, or the evidence against him. H. P. C. 131.

Or, if a man dissuades another from giving evidence against a felon. H. P. C. 131.

So, if a man reproaches a judge. H. P. C. 131. 3 Inst. 142.

Or assaults the attorney of the adverse party. H. P. C. 131.

Or abuses a juror, who gives a verdict against him. H. P. C. 131.

As to premunire, vide title PRÆMUNIRE.

## (O) Felony to goods.

(O 1.) Robbery, what : — a violent taking.

Robbery is (o) a felonious (p) and violent (q) taking of money or goods of any (r) value, from the person (s) of a man, putting him in fear. (t) H. P. C. 71. 3 Inst. 68.

The

(o) 1. A felonious taking of money or goods of any value from the person of another or in his presence, against his will, by violence, or putting him in fear. 2 Russell, 987. 2 East, P. C. 707. 1 Leach, 280. 4 Blk. Com. 243. 1 Hawk. c. 34. 1 Hale, 532. 3 Inst. 68. — 2. And it is an aggravated species of larceny. 1 Leach, 228. 321.

(p) 1. 1 Leach, 196. 2 East, P. C. 662. — 2. And see where the question as to the felonious intent has arisen where the property has been taken under colour of a purchase. 2 East, P. C. 712. 1 Hawk. c. 34. s. 14. 4 Blk. Com. 244. 2 East, P. C. 661, 662.

(q) 1. The property must be taken against the will of the party. — 2. And therefore where he consented to the fact for a base purpose, it was held to be no robbery. Fost. 121. 128. — 3. And if it be taken by violence though without putting in fear, or *vice versa*, it is robbery. 2 Russell, 996. — 4. For fear is constructive violence. 1 Leach, 196, 197. 2 East, P. C. 727. 2 Leach, 619. 2 East, P. C. 735. — 5. But where the taking is by actual violence, a sudden taking or snatching from a person unawares, is not sufficient. 1 Leach, 287. 290. n. 2 East, P. C. 702, 703. — 6. But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual violence. 1 Leach, 320. 335. 290. n. 2 East, P. C. 709. — 7. Violence accompanied by some colourable and specious pretence is robbery. 2 East, P. C. 709. Id. n. 1 Leach, 280. 2 East, P. C. 709. — 8. And though the violence be not used for the purpose of obtaining the property of the party assaulted, yet if property be obtained by it, the offence may be robbery. 2 East, P. C. 711.

(r) 1. The property must be of some value. 2 Leach, 673. 680. — 2. Otherwise the offence will be only that of an assault with intent to rob. 2 Russell, 989.

(s) 1. The taking need not be immediately from the person of the owner; it will be sufficient if it be in his presence. 1 Hale, 533. 1 Hawk. c. 34. s. 6. 2 Str. 1015. 3 Inst. 68. 4 Blk. Com. 243. 2 East, P. C. 707, 708. — 2. But it must not precede the violence or putting in fear.

(t) 1. However slight the degree of fear may be; yet, if through its means property is obtained, it is sufficient. — 2. It is enough, too, if the fact be attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person. Fost. 128. 4 Blk. Com. 243, 244. 1 Leach, 197. — 3. And it is not necessary that actual fear should be strictly and precisely proved; as the law in *odium spoliatoris* will presume fear, where there appears to be a just ground for it. Fost. 128. 2 East, P. C. 711. 2 Russell, 1003. — 4. And such fear may be presumed though the party go to meet the robber, and for the purpose of apprehending him. Fost. 129. — 5. And this fear may exist, though the property be taken under colour and on pretence of a purchase. 2 East, P. C.

The indictment says, *violenter et felonice cepit a personâ, &c. in terrorem*; and therefore differs from an indictment of a cut-purse, which says, *clam et secrete à personâ*. H. P. C. 71. 74. 75. 3 Inst. 68, 69.

If a robber, by terror, prevails with a person to deliver his money and takes it, it is a violent taking. H. P. C. 72. 3 Inst. 68. (u)

So, if he compels him to swear to fetch him money, which the robber receives. H. P. C. 72. 3 Inst. 68. (x)

Though he has no weapon drawn to terrify. H. P. C. 72. (y)

If he cuts a girdle, by which a purse falls to the ground, and the robber takes it up, it is a violent taking. H. P. C. 72. 3 Inst. 69.

Though upon seeing a small sum in it, he re-delivers it. H. P. C. 72. (z)

Or lets it fall, and does not take it up again. H. P. C. 72. 3 Inst. 69. (a)

But if he takes nothing, (a) though he assaults to rob, it is no robbery. H. C. P. 71. (b)

Though he cuts the girdle, and the purse falls to the ground, if he does not take it up. H. P. C. 72. 3 Inst. 69.

All aiding, or in company to rob, are principals, though only one takes it. H. P. C. 72.

If several come to rob A. who escapes; and afterwards one of them rides from the others, and out of their presence and without their privity, robs and returns to the company, all are guilty. H. P. C. 72.

### (O 2.) From the person.

A taking in my presence is a taking from my person. H. P. C. 73. 3 Inst. 69.

Taking of beasts out of a pasture in my presence, after terror done to me by an assault or violence, is robbery. H. P. C. 73. 3 Inst. 69.

If a man being assaulted to be robbed, throws his money into a ditch, and a robber takes it. H. P. C. 73. 3 Inst. 69.

Or, if he drops his hat, and the robber takes it. H. P. C. 73.

### (O 3.) Any value.

Though the value be under 12 pence. H. P. C. 73. 3 Inst. 69.

Or only one penny. 3 Inst. 69.

Vide post, (Y. 8.)

712. — 6. And may be of violence to the child of the party. 2 East, P. C. 718. 735. — 7. As to the fear of injury to one's property, being sufficient, see 2 Russell, 1005. 1009. — 8. And as to that of injury to the character, see Id. 1009. to 1025.

(u) 1. And which taking is termed a taking in law.

(x) 2 East, P. C. 711. 4 Blk. Com. 244.

(y) 1 Hawk. c. 34. s. 2. 1 Hale, 533.

(z) 1 Leach, 228. 320.

(a) 1. The taking must be such as to give the robber a possession of the thing taken. 1 Leach, 322. n. — 2. And though formerly it may have been holden, that a sudden taking or snatching of any property from a person unawares is sufficient, yet the contrary doctrine appears to be now established, and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person, or unless there be some previous struggle for possession of the property. 1 Leach, 287. 291. 2 East, P. C. 703. 2 Russell, 991

(b) By the st. 7 G. 2. 21., he shall be adjudged guilty of felony, and transported for seven years.

(O. 4.) Lar-

(O 4.) Larceny, what.

Larceny is (c) a felonious taking of the personal goods of another, H. P. C. 60. 3 Inst. 107.

If it be above the value of 12 pence, it is grand larceny. H. P. C. 69.

If under that value, it is only petit larceny. H. P. C. 70. 75.

So, if of the value of 12 pence. 2 Rol. 78. H. P. C. 70.

Grand larceny may be committed by a taking *clam et secretè à personá*; as, by picking a pocket, cutting a purse. H. P. C. 75.

And the indictment for this must say, *clam et secretè*; for if it does not appear, by the indictment or verdict of the jury, to be *clam et secretè à personá*, it does not differ from common larceny. H. P. C. 75.

Or it may be committed in a man's habitation. H. P. C. 76. 3 Inst. 108. Vide post, (P. 2, &c.)

Or at large, without regard to the person or habitation of any. H. P. C. 60. 3 Inst. 107.

(O 5.) Who may commit it.

An infant not at the age of discretion, viz. 14 years, may commit larceny. H. P. C. 65. (d)

But it is prudent to respite the judgment. H. P. C. 65.

A woman by her own act may commit it, though *covert*. H. P. C. 65. 3 Inst. 108.

And the command of her husband does not excuse her. H. P. C. 66.

But the coercion of her husband excuses her; but not in murder. H. P. C. 65. 3 Inst. 108.

And if done in company with her husband, it shall be intended by his coercion. H. P. C. 65.

Though she commits burglary. R. Kelg. 31.

Yet the coercion of a master does not excuse the servant. H. P. C. 66.

And if the woman cannot prove her marriage, it does not excuse her. R. Kelg. 37.

(O 6.) What is a felonious taking.

The indictment shall say, *cepit*, for, *felonice abduxit* is not sufficient. H. P. C. 61.

If a man steals my horse, and A. steals it from him; A. may be indicted for a felonious taking from me. H. P. C. 64.

If a man takes a woman with the goods of her husband against her will, it is felony. H. P. C. 64.

If A. kills my sheep and takes only the skins, it is felony. H. P. C. 64.

Or, the wool. H. P. C. 64.

If a man takes a horse by colour of a replevin. H. P. C. 63. 3 Inst. 108.

If he takes any thing out of a trunk and lays it on the floor, but being

(c) The felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker. 2 Leach, 1089.

(d) Vide 3 Inst. 108. cont.



surprised leaves it there. R. Kelg. 31. for by such taking he had the possession. (p)

Though the bare use was permitted to him: As, if a guest steals plate brought for his use. H. P. C. 61. 3 Inst. 108.

Or sheets from his bed. H. P. C. 64. 3 Inst. 108.

Or, though the bare charge was committed to him: as, if a butler steals plate committed to his charge. H. P. C. 61. 3 Inst. 108.

Or a shepherd, sheep. H. P. C. 61. 3 Inst. 108.

Or, though the thief be apprehended before the goods removed: as, if a guest carries sheets down stairs *animo furandi*, (q) but is apprehended before he gets out. H. P. C. 64. 3 Inst. 108.

If a man steals an horse, but is taken before he gets out of the pasture. H. C. P. 64. 3 Inst. 109.

If several come with intent to steal, and one of them takes goods, they are all felons. Per Kelg. 47.

But it is not felony, if a man finds goods and converts them *animo furandi*. H. P. C. 61. (r)

Or, if a wife delivers them to him, without the assent of the husband. H. P. C. 64. Sho. 52. (s)

Or, if he obtain them by false token, or counterfeit letter. Vide the st. 33. H. 8. 1. (t)

So, if possession was delivered (u): as, if A. lend an horse to a stranger, who never returns with it, it is no felony. H. P. C. 61.

(p) Any removal of the goods, with a felonious intent, is a sufficient carrying away. 3 Inst. 108. 109. 1 Hawk. c. 35. s. 25. 2 East, P. C. 555. 1 Hale, 507. 508. 1 Leach, 236. — 2. But there must be an entire possession of the goods by the thief, though but for an instant. 2 East, P. C. 556. 1 Leach, 236, 237. (n.) — 3. And a severance. 2 East, P. C. 556. 1 Hale, 508.

(q) 1. The taking must be *animo furandi*. — 2. And as a taking, though wrongful, may only amount to a trespass, such taking will not be larceny. 1 Hale, 509. 2 East, P. C. 661. 4 Blk. Com. 232. — 3. Thus, where the prisoners took two horses from a stable, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot; and the jury having found that the horses were taken by the prisoners only in order to ride them, and afterwards leave them, it was holden to be trespass and not larceny. 2 East, P. C. 662, 665. — 4. So the taking may be by mistake without any *animus furandi*. 1 Hale, 506, 507. 2 East, P. C. 661. — 5. So the *animus furandi* may be negatived by a claim of right. 1 Hale, 506. 509. 513. 2 East, P. C. 510. 659. — 6. But whether it is not felony to take corn by gleaning, see Woodf. L. & T. 242. 2 Russell, 1040, 1041. — 7. And where there is any doubt as to the right, the court will direct an acquittal. 2 East, P. C. 659.

(r) 1. 3 Inst. 108. 1 Hawk. c. 33. s. 2. 1 Hale, 506. — 2. Which doctrine, however, only applies, where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. 1 Hale, 506, 507. 2 East, P. C. 664. — 3. See cases of hackney coachmen taking articles left in their coaches. 2 East, P. C. 664. 1 Leach, 415. 415. n. 2 Russell, 1042. 1044. — 4. Of notes found and converted. 2 Russell, 1044, 1045. — 5. Of a conversion of money found in a bureau delivered to a carpenter to be repaired. 8 Ves. 405. 2 Leach, 952.

(s) 1. The taking must be *invito domino*. — 2. And where some thieves, having planned with the servant of the owner to steal some goods, the owner, knowing of the plot, directed the servant to carry on the business, with a view to the detection of the thieves, which the servant accordingly did; it was held larceny. 2 Leach, 913. 2 East, P. C. 666.

(t) 1. If the owner part with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. 2 East, P. C. 668, 693. — 2. And see the cases arranged in 2 Russell, 1054, at seq.

(u) As to which see 2 Russell, 1068. 1083.

If a clothier deliver yarn to a weaver, who embezzles or runs away with it. H. P. C. 61, 62.

If a carrier carry away goods delivered to him. H. P. C. 61.

If a goldsmith embezzle plate committed to him to be wrought. Sho. 52.

If a woman hire a room furnished, and afterwards carry away the furniture. Sho. 54. R. Kelg. 24. 14 Car. 2.

Yet, if the privity be determined upon which the delivery was made, it is felony (*x*): as, if the carrier open a pack or trunk and take the goods out. H. P. C. 62.

Or, if he carry them to the place appointed, and afterwards steal them. H. P. C. 62.

If a throwster delivers silk to a workman in his house to be worked, and he steals it; for the whole property remained in the owner. R. 1664. Kelg. 35. (*y*)

And by the st. 21 H. 8. 7. if a servant embezzle or go away (of intent to steal) with any money, or goods entrusted with him to the value of 40 shillings, it is felony. Provided not to reach an apprentice, or one under 18.

If goods are delivered to a servant by another servant, it is within the statute. H. P. C. 62.

But if the servant waste or consume, &c. it is not within the statute. H. P. C. 63.

Or, if he receive rent for his master and run away with it. H. P. C. 63.

Or, if the master deliver beasts to him to sell, and he runs away with the money after the sale. H. P. C. 63.

Or, if he deliver an obligation to him, and he receives the money due, and departs. H. P. C. 63.

Or, if he departs with the obligation itself. H. P. C. 63.

Or, if he does not continue servant at the time of the delivery, and the running away with the goods. H. P. C. 63.

### (O 7.) What goods.

If a man take feloniously any moveable goods of another, it is felony.

Though he had but a special property, as bailiff. H. P. C. 67. 3 Inst. 110.

Cloth in the hands of a taylor. H. P. C. 67. (*r*)

Goods in the hands of a carrier. R. Kelg. 39.

Though the owner himself take them, with intent to charge the bailee, &c. for them. H. P. C. 67.

Though the owner be uncertain: for he may be indicted, *quare bona mortui, bona ignoti*, &c. H. P. C. 67.

(*x*) As to which see 2 Russell, 1088. 1094.

(*y*) And where a landlady sent her servant to a lodger with a bank-note, requesting him to change it, and he went away with it, it was held larceny. 2 Leach, 564. Vide 2 Leach, 1079.

(*z*) 1. Washerwoman, 1 Leach, 557. n. 2 East, P. C. 653. — 2. Coachmaster, 1 Leach, 356. — 3. Livery-stable-keeper, 1 Leach, 557. — 4. Driver of stage coach, 2 Leach, 875. 2 East, P. C. 653.

So, *quare bona capellæ*, or *parochianorum*, if he takes the goods of a church or chapel, in the time of vacation. H. P. C. 67. 3 Inst. 110. (a.)

So, if he takes a shroud from a person buried, he shall be indicted, *quare bona executorum*. H. P. C. 67. 3 Inst. 110.

Though the things taken be (b) *feræ naturæ*, si sint domui, aut manui assuet', and the thief knows them to be tame. H. P. C. 68. (c)

As, if he take a deer, coney, crane, partridge, or pheasant, which he knows to be tame. H. P. C. 68. 3 Inst. 110.

Or a swan marked and pinioned. H. P. C. 68.

Or not marked, if it be tame in a moat, pond, or private river. H. P. C. 68.

An hawk reclaimed. H. P. C. 66. 3 Inst. 109.

And by the stat. 37 Ed. 3. 19. if he steal any hawk, &c. and does not proclaim it. 3 Inst. 97.

So, if they be restrained of their natural liberty *ratione impotentia*, as young hawks, and young pigeons in the nest. H. P. C. 68.

*Vel ratione loci*; as, old pigeons in a dove-house. H. P. C. 68.

Fish in a net, trunk, or separate pond. H. P. C. 67. 3 Inst. 109. (d)

But there can be no felony of things *feræ naturæ*, though privileged *ratione loci*; as deer, conies, in a park, warren, or inclosure. H. P. C. 68. (e)

Nor, of things reclaimed or tame, when they regain their natural wildness. Vide Biens, (F.)

So an indictment, *quare bona* B. where they are the goods of another, will be bad, and the defendant acquitted.

So, if it be, for goods of the Marquis of B. where he is only the eldest son of a duke. R. Sal. 451.

Nor, of things of a base nature, though tame; as bears, foxes, monkeys, ferrets, or their whelps. H. P. C. 66. 3 Inst. 109.

Though *domitæ naturæ*; as, a mastiff, or other dog. H. P. C. 66. 3 Inst. 109.

Nor, of things real, or annexed (f) to the realty; as, of corn, or grass growing, apples on trees. H. P. C. 66. 3 Inst. 109. (g)

Lead taken from a church. H. P. C. 66.

(a) 1. Where a statute gives a corporate capacity and name to individuals and vests property in them, such property must be laid in an indictment, as belonging to them in their corporate name, and not in the names of their individual members. 1 Leach, 253. 2 East, P. C. 1059. — 2. But where property is vested in trustees not incorporated, nor having a public name given to them collectively, it should be laid in the indictment in their individual names. 1 Leach, 513.

(b) Larceny may be committed, by pulling wool from the bodies of live sheep and lambs with a felonious intent. 1 Leach, 171. 2 East, P. C. 618.

(c) Unless they are of a base nature; as dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, and the like. 3 Inst. 109. 1 Hale, 511, 512. 1 Hawk. c. 33. 1. 36. 4 Blk. Com. 236. 2 East, P. C. 614. 2 Russell, 1127.

(d) Vide 2 Russell, 1184, et seq. Id. 1197, et seq.

(e) Nor of parchment writings which concern the realty. 1 Leach, 12. 2 East, P. C. 596.

(f) 1. But statutes have in many cases changed the law. — 2. As to which, see as to black lead mines, 25 G. 2. c. 10. — 3. Lead, &c. affixed to houses, &c. see 4 G. 2. c. 32., 21 G. 3. c. 68; and for the construction of which, see 2 Russell, 1100, et seq. — 4. Cutting, &c. in the night, trees, &c., see 6 G. 5. c. 36, 48; 13 G. 3. c. 33; 45 G. 3. c. 66; and for the construction of which, see 2 Russell, 1107, et seq.

Other-

Otherwise, if left there after severance, and at another time removed.  
H. P. C. 66. 3 Inst. 109.

Nor, of a copper fixed to an house. R. 1664. Kelg. 29.

Nor taking an infant in ward. H. P. C. 66. 3 Inst. 109.

Nor a chest with charters, though the chest be above the value of 12d. H. P. C. 66. 3 Inst. 109.

Yet stealing an obligation is felony; for it is a *chose en action*.  
H. P. C. 67. (g)

Nor, of things which are *nullius in bonis*; as treasure-trove, wreck, waife, or stray before seizure. H. P. C. 67. 3 Inst. 108.

(O 8.) What value.

If a man be indicted in the same indictment for taking of 4d. at one time and 10d. at another from the same person, this is grand larceny.  
H. P. C. 70.

If two take goods to the value of 13d., it is grand larceny in both.  
H. P. C. 70.

But though goods are valued in the indictment at 10s., the jury may find specially guilty to the value of 10d.; and that will be petit larceny. H. P. C. 70.

Vide post, (Y. 9, 10.)

(P) Felony to the habitation.

(P. 1.) Arson.

Arson was felony by the common law, when a man maliciously (*h*) burned the house of another. H. P. C. 85. 3 Inst. 66. (*i*)

The indictment need say only *domum*. H. P. C. 86. 3 Inst. 67.

When a man burns a mansion-house, it is felony. H. P. C. 86. 3 Inst. 67.

Or, a stable, mill-house, sheep-house, barn, parcel of the mansion.  
H. P. C. 86. 3 Inst. 67.

Or, a barn with corn or hay, though it be not parcel of the mansion.  
H. P. C. 86. 3 Inst. 67. (*k*)

Though he intended the house of another (*l*); and he may be indicted, *quod ex malitiâ præcogitatâ combussit domum C.*, though the house of B. was designed. H. P. C. 85. 3 Inst. 67.

(g) 1. But now, by 2 G. 2. c. 25., stealing of exchequer orders or bills, South Sea bonds, bank-notes, East India bonds, dividend warrants, bills of exchange, promissory-notes, &c. &c. is made felony, as if goods of the like value were taken. — 2. And for the construction of this statute, see 2 Russell, 1115, et seq. — 3. And as to stealing lottery tickets, see 57 G. 3. c. 31. s. 58.

(h) The burning must be malicious and wilful; and, therefore, no negligence or mischance will amount to such burning. 3 Inst. 67. 4 Blk. Com. 222. 1 Hale, 569. Dalt. 506. 2 East, P. C. 1019.

(i) 1 Hale, 566. 1 Hawk. c. 39. 4 Blk. Com. 220. 2 East, P. C. 1015.

(k) 4 Rep. 20. a. Sum. 86. 1 Hawk. c. 39. s. 1. 4 Blk. Com. 221.

(l) 1. 1 Hale, 569. 1 Hawk. c. 39. s. 19. Plowd. 475. 2 East, P. C. 1031. — 2. And arson of another's house, may be by means of firing the party's own; notwithstanding his primary intention was only to burn his own house; for if in fact other houses are burnt, being adjoining, and in a situation as that the fire must in all probability reach them, the intention being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. 2 East, P. C. 1031. 6 St. Tr. 222.

Though only part of the house was burnt. H. P. C. 85. 3 Inst. 66. (m)

By the st. 22 and 23 Car. 2. 7. It shall be felony, if in the night with malice any burn stacks of corn or hay, buildings, kilns, &c.

But setting fire, if no part of the house is burned, is not felony. H. P. C. 85. 3 Inst. 66.

Or, burning of his own house, (n), with intent to burn the house of another, if it be not burned. H. P. C. 85. (o)

Vide post, (Y 6.)

### (P. 2.) Burglary : — if one in the night.

Burglary is (p) when a man *noctanter* breaks and enters the mansion-house of another, with a felonious intent. H. P. C. 79. 3 Inst. 63.

*Noctanter* is said, when the face of a man cannot be distinguished. H. P. C. 79. 3 Inst. 63. (q)

So, by the st. 12 Ann 7. if he enter by day or night, with intent to commit felony, or commit felony, and break the house in the night to get out, it is burglary.

### (P 3.) Breaks.

If a man actually breaks a mansion-house he commits burglary. H. P. C. 80. 3 Inst. 64.

So, if he breaks the window. H. P. C. 80. 3 Inst. 64.

Breaks the wall. H. P. C. 80. (r)

Unlocks the door. H. P. C. 80.

Or draws the latch. H. P. C. 80. (s)

So, if he, being within the mansion-house, (t) draws the latch and enters a (u) chamber. H. P. C. 82. (x)

If

(m) 1. 1 Hale, 568, 569. 1 Hawk. c. 59. s. 16, 17. 2 East, P. C. 1020. — 2. But it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. Ibid.

(n) 1. To constitute arson, the fire must burn the house of another. — 2. Therefore it is not felony in a party to burn a house whereof he is in possession under a lease for years. Cro. Car. 376. W. Jones, 351. — 3. Or under an agreement for a lease from a lessee. 1 Leach, 220. 2 East, P. C. 1026. — 4. Though a landlord firing the house leased, is guilty of felony. Fost. 115.

(o) But now, by 43 G. 3. c. 58. the setting fire to a house, &c. with intent to injure or defraud any one, is a capital felony; and whether the house be in possession of offender or of others.

(p) A breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. 2 Russell, 900.

(q) 1. 1 Hale, 550. 551. Sum. 79. 1 Hawk. c. 38. s. 2. 4 Blk. Com. 224. 2 East. P. C. 509. — 2. Which, however, does not extend to moonlight. 1 Hale, 551.

(r) As to breaking a wall built about a house for its safeguard, see 2 Russell, 904. 2 East, P. C. 488.

(s) Quære, if he opens a door closed by its own weight without any interior fastening? Brown's case. 2 East, P. C. 487. Accord that it is burglary. Callam's case. 2 Russell, 90. 3. semble contra.

(t) See as to a servant. 2 Hale, 554, 555.

(u) It seems, that breaking open a cupboard let into the wall, would not be burglary. Fost. 108, 109. 1 Hale, 527. — 2. And, clearly, breaking a box or chest not affixed, is not. 1 Hale 523, &c. 1 East, P. C. 488, 489.

(x) 1. 1 Hale, 553. 1 Hawk. c. 36. s. 6. 2 East, P. C. 488. — 2. So, if a servant in the



If the thief enters by the open door and A. retreats to a chamber, into which the thief breaks. H. P. C. 81.

If he enters by the open door, and after stealing goods, breaks the house to get out. H. P. C. 81. (y)

If he comes down the chimney. H. P. C. 81. (z)

If a servant opens the window to let him in. H. P. C. 81. (a)

If the thief makes hue and cry, brings a constable to whom the owner opens the door, and then the thief enters. (b) H. P. C. 81. Kelg. 44. 3 Inst. 64. (c)

If one breaks, &c. and the others watch in the street, all are burglars. H. P. C. 81. 3 Inst. 64. (d)

If a thief in the night comes to rob, and finding the door locked pretends to speak with the owner, and upon such pretence the servant opens the door, and the thief enters and robs. R. Le Mott, Kelg. 42. (e)

If by fraud he has a judgment in ejectment, and arrest the party in a false action, and then enters and robs. R. Farr, 1665. Kelg. 43.

But if the thief enters by the open door and gets out so, it is no burglary. H. P. C. 81. (f)

Or, if he enters by a hole made in the wall before. H. P. C. 82.

Or, if he assaults the house, and the owner throws out his money. H. P. C. 81.

(P 4.) And enters.

An entry (g) is necessary (h); but if he steps within the house, it is an entry. H. P. C. 80. 3 Inst. 84. (i)

Or,

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the night-time open his master's or mistress' chamber-door, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or, if any other person lodging in the same house, or in a public inn, open and enter another's door, with such evil intent. 1 Hale, 553, 554. 4 Blk. Com. 227. 2 East, P. C. 488. 1 Str. 481. Sum. 82. 84. — 3. But it has been questioned, whether if a lodger in an inn should in the night-time open his chamber-door, steal goods and go away, the offence would be burglary. 1 Hale, 554. *sed vide* 2 East, P. C. 488. 2 Russell, 905.

(y) 1. But this doctrine having been questioned, *vide* 2 East, P. C. 490. — 2. The st. 12 Anne, st. 1. c. 7. s. 3. declares it to be burglary.

(z) 1 Hale, 552. Crompt. 32. Dalt. 253. 1 Hawk. c. 38. s. 6. 2 East, P. C. 485.

(a) 1. 1 Hale, 553. 1 Hawk. c. 38. s. 14. 4 Blk. Com. 227. — 2. *Vide etiam*, 2 Str. 881. 1 Hawk. c. 38. s. 14. 19 Howel's St. Tr. 782. n.

(b) 1. 1 Hale, 552, 553. Sum. 81. Crompt. 32 b. Kel. 82. 1 Hawk. c. 38. s. 10. 4 Blk. Com. 226. — 2. So if a man go to a house under a pretence of having a search warrant, or of being authorised to make a distress, and by these means obtain admittance. 1 Leach, 284.

(c) So if he enters by threats, as to which see Crompt. 32. 1 Hale, 553. 555. 2 East, P. C. 486. 1 Hawk. c. 38. s. 3. 7. Sum. 81. 2 Russell, 907, 908.

(d) 1. 1 Hale, 555. — 2. So if the entry and stealing are effected by means of an infant. 1 Hale, 555, 556.

(e) 1. And so where some persons took lodgings in a house, and afterwards at night, while the people were at prayers, robbed them, it was considered that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. Kel. 62, 63. 1 Hawk. c. 38. s. 9. 1 Leach, 424. — 2. And see for another case, 1 East, P. C. 485.

(f) 3 Inst. 64. 1 Hawk. c. 38. s. 4. 1 Hale, 551, 552.

(g) It need not be made the same night as the breaking. 1 Hale, 551. 4 Blk. Com. 226.

(h) 1 Hawk. c. 38. s. 3. 1 Hale, 551. 4 Blk. Com. 226.

(i) 1. 1 Hale, 555. Sum. 80. 1 Hawk. c. 38. s. 11, 12. 1 And. 115. Lamb. c. 7. p. 263.

Or, if he puts his hand or foot within the door, or window. H. P. C. 80. 3 Inst. 64. (i)

Or, an hook, or pistol. H. P. C. 80. 3 Inst. 64. (i)

So, if he turns the key of a door locked on the inside. H. P. C. 80.

(P 5.) A mansion-house.

The indictment must say, *domum mansionalem*. H. P. C. 86. 3 Inst. 64.

A church is a mansion-house. H. P. C. 82. 3 Inst. 64. (k)

So, a shop. H. P. C. 83. 3 Inst. 64.

So, a chamber within the inns of court, if it be inhabited. H. P. C. 83. (l)

By the st. 5 Ed. 6. 2., a booth, or tent in a fair, or market in which any then remains. (m)

An house, from which all are occasionally absent. (n) H. P. C. 82. 3 Inst. 64. (o)

So, if a man inhabits sometimes in one house sometimes in another, both are mansion-houses. H. P. C. 82. Kelg. 52.

If a woman hires an house, and lives separate from her husband, and the lease being in the husband's name he refuses to have it, yet it shall be the mansion-house of the husband. R. Kelg. 44. (p)

If

p. 263. Fost. 107, 108. 4 Blk. Com. 227. Crompt. 32. — 2. So, discharging the contents of a loaded gun from without. 1 Hale, 555. 1 Hawk. c. 38. s. 11. 1 East, P. C. 490. — 3. But the mere introduction of an instrument in the act of breaking the house, will not make a sufficient entry; but the instrument by which the entry is effected must be introduced for the purpose of committing a felony. 1 Hale, 555. 1 Leach, 406. 1 Hawk. c. 38. s. 12. 2 East, P. C. 491. 2 Russell, 912. — 4. And where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken, it was ruled to be burglary, though considered, however, as going to the extremity of the law. 1 East, P. C. 487. 2 Russell, 912.

(k) And a portion only of a building may come under the description of a mansion-house. 1 Leach, 89. 428. 1 East, P. C. c. 15. s. 19.

(l) 1. 1 Hale, 522. 556. 1 Hawk. c. 38. s. 18. Cro. Car. 473. 4 Blk. Com. 252. 2 East, P. C. 505. — 2. So a loft situated over a coach-house and stables, in a public mews, and converted into lodging rooms. 1 Leach, 305. 2 East, P. C. 492.

(m) 1. But this must be classed under the offence of housebreaking by day or night. Vide infra (S). — 2. Burglary cannot be committed by breaking into any enclosed ground, or any booth or tent, erected in a market or fair, though the owner may lodge therein. 1 Hale, 557. 1 Hawk. c. 38. s. 35. 4 Blk. Com. 226.

(n) 1. Fost. 77. 1 Hale, 556. Sum. 82. 2 East, P. C. 496. — 2. But there must be an *animus revertendi* in the owner. Fost. 76, 77. 4 Blk. Com. 225. — 3. And inhabiting, merely casual, or for some particular purpose, will not be sufficient. 2 East, P. C. 497. 502. — 3. And quære, as to the case of an execution putting servants into the house of his testator, but not going to live there himself. 2 East, P. C. 499.

(o) 1. It is well settled, that unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house in the proper meaning of the word, as applied to the offence of burglary. 2 Russell, 921. 1 Leach, 185. 2 East, P. C. 496. 498. 2 Leach, 701. n. 771. 1 Leach, 187. 2 Leach, 701. 2 East, P. C. 498. — 2. And the same holds where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant. 2 Leach, 876. 2 East, P. C. 499.

(p) 1. But see 2 East, P. C. 504. — 2. As to the ownership, where the occupation is by means of the servants of the owner. Where the servant of a farmer and his family lived in a cottage adjoining his master's house, which he took to by agreement with his master, when he went into the service, but for which he paid no rent, and only an abatement

If a man hires an house for his habitation and removes his goods thither, and before he lodges there, the house is broke. Dub. Kelg. 46.

But a barn, or stable disjoined, (*q*) at a distance from the house, are not mansion-houses at this day. H. P. C. 82.

Nor,

abatement was made in his wages, on account of his family being to reside in the cottage, it was held that this was no more than a licence to the servant to lodge in the cottage, and not a letting of it to him, and that the cottage therefore continued part of the mansion-house of the farmer. 2 East, P. C. 501, 502. — 3. And where the servant of three partners in trade had weekly wages and some rooms assigned to him for a lodging, over the bank and brewery offices of the partners, with which his lodging communicated by a trap-door and a ladder, it was held that a burglary committed in the banking room was well laid as in the dwelling-house of the three partners. 2 Taunt. 339. 2 Leach, 1015. — 4. And the same rule of the occupation of the servant being that of the master, will hold with respect to all persons standing in the relation of servants. 2 Russell, 931, 932. — 5. But the rule does not extend to a house occupied by the agent of a trading company, though he resided in it with his family, only for the purpose of conducting their trade, and the lease of the house was held, and the rent and taxes for it paid by the company. 2 Leach, 930. — 6. And where persons are abiding in a house as guests, or by sufferance or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as in the mansion-house of the proprietor of the house. 1 Hawk. c. 38. s. 26. 1 Hale, 554, 557. 2 Russell, 934, 936. 2 East, P. C. 503. — 7. And where the prisoner, under pretence of being robbed, had forced open, in the night, the chamber-door of a guest in an inn, and stolen his goods, it was held that the burglary should have been laid in the dwelling-house of the innkeeper, and not of the guest. 2 East, P. C. 502, 503. — 8. The ownership of apartments let out to inmates, depends upon whether the owner sleeps under the same roof, and whether there is but one outer door. 2 Russell, 936. 1 Hale, 556. Kel. 83, 84. 1 Hawk. c. 38. s. 27, 29, 30, 32. 4 Blk. Com. 225. Cowp. 8. 2 East, P. C. 503, 506, 507. 1 Leach, 90. n. 1 Leach, 89, 237, 427. — 9. And where there is an actual severance of a house in fact by partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, separate and distinct mansions in law will be constituted. 2 East, P. C. 504. 2 Russell, 939. — 10. And this may be, though the rent and taxes of the whole premises be paid jointly out of the partnership fund of the several occupants. 1 Hawk. c. 38. s. 34. 1 Leach, 557. 2 East, P. C. 504. 1 Leach, 537. — 11. The owner himself breaking open the apartments of his lodgers would not be guilty of burglary, since they are parcel of his dwelling-house. 2 East, P. C. 506.

(*q*) 1. But the mansion-house includes not only the dwelling-house, but also the out-houses, though not under the same roof, or joining contiguous to the dwelling-house, provided they are parcel thereof. 3 Inst. 64. 1 Hale, 558. Sum. 82. 1 Hawk. c. 38. s. 21. 4 Blk. Com. 225. 2 Russell, 915. — 2. And any outhouse within the custilage, or same common fence as the mansion itself, must be considered as parcel of the mansion. Ibid. — 3. And though there be no common inclosure or custilage, yet if the outhouses adjoin the dwelling-house, and be occupied as parcel thereof, they may still be considered as parts of the mansion. 1 Hale, 558. 1 Hawk. c. 38. s. 24. 2 East, P. C. 493, 502. 2 Russell, 916. — 4. But where the outhouse is at all separated from the dwelling-house, and not within the same custilage or common fence, it will not be protected by the mere circumstance of its being in the occupation of the owner of the dwelling-house; but in such case the fact of its being parcel of the dwelling-house or not, is one that should be found by the jury upon the evidence submitted to them. 1 Leach, 144. 2 East, P. C. 493. 2 Russell, 917. — 5. And, therefore, however near the outhouse may be to the dwelling-house, it will not be protected unless it be parcel of the dwelling-house, and be so found; and if the outhouse be far remote from the dwelling-house, so as but reasonably to be esteemed parcel of it, as if it stand a bow-shot off, and not within or near the custilage, it is clearly no part of the mansion-house, and the breaking of it is not burglary. 1 Hale, 559. 1 Leach, 144. n. 2 Russell, 917. — 6. So burglary cannot be committed by breaking into a centre building, used for purposes of trade, but having no communication with the dwelling-house, which formed the wings. 2 Leach, 913. 2 East, P. C. 494. 2 B. & P. 508. — 7. And a part of a house may be so severed from the rest, as no longer to be a place

Nor, a shop let to another, who works there by day, but does not abide there by night; for it is severed by lease from the mansion-house to which it is annexed. H. P. C. 83.

The indictment must say, *domum mansionalem domini regis*, if it be in a chamber in Whitehall. Kelg. 27.

*Domum mansionalem dominæ reginæ*, and not of the possessor, if it be in a chamber in Somerset-house. R. Kelg. 27.

### (P 6.) With a felonious intent.

If the entry be with a felonious intent, (*r*) it is burglary, though the intent be not executed; as, with intent to murder. H. P. C. 82. 3 Inst. 65.

Or, to commit a rape. H. P. C. 83. R. 1664. Locost and Villars. Kelg. 30.

But if a man enters and breaks a mansion-house with intent to commit a battery or trespass, it is no burglary. H. P. C. 83. 3 Inst. 65.

If several men enter with intent to search for suspected persons, and one of them steals, it is felony in him; but the others not being privy are not guilty. Per Kelg. 47.

Though they take soldiers, and, without a constable, &c. break the house, which cannot be justified. Per Kelg. 47.

The indictment shall say, *burglariter*. H. P. C. 84. 3 Inst. 65.

Vide post, (Y 7.)

### (Q) Breaking of prison.

Vide IMPRISONMENT, (M 3.) — ESCAPE.

### (R) Rescue of a prisoner, and escape.

Rescue of a felon out of prison (*s*), or custody, was felony at common law. 2 Inst. 589. H. P. C. 116. Vide Rescous.

Rescue of a traitor is treason. H. P. C. 116. 2 Inst. 590.

If A. takes a prisoner with him, out of the door of the place where prisoners stand for trial at the Old Bailey, it will be a rescue. R. Kelg. 45.

But there must be a felony committed. H. P. C. 116.

And a lawful commitment. H. P. C. 116. (*t*)

And the principal ought to be attainted before the rescuer be arraigned. H. P. C. 116. (*u*)

place in which burglary can be committed. 1 Hale, 557, 558. Kel. 83, 84. 4 Blk. Com. 225, 226. 2 East, P. C. 507. — 8. A shop, however, adjoining to a house but let with some of the rooms of the house to a tenant, is still part of the dwelling house if under the same roof and within the custilage, although there be no internal communication, and although no person sleep in the shop. *Secus*, if such shop be let by itself to a person who does not sleep therein. 1 Leach, 357. 2 East, P. C. 508. — 9. And it seems that an outhouse will not be prevented from being parcel of the dwelling-house by being holden under a distinct title. 2 East, P. C. 494.

(*r*) And the felony intended may be either felony at common law or by statute. 1 Hawk. c. 58. s. 58. 4 Blk. Com. 228. 2 East, P. C. 510, 511. Kel. 30. 1 Str. 481.

(*s*) Vide 1 Hale, 106.

(*t*) Vide 2 Hawk. c. 21. s. 1. 2. 2 Inst. 589. Staunf. 30, 31.

(*u*) But it is said, that he may be immediately proceeded against for a misprison only, if the king please. 2 Hawk. c. 21. s. 8.

If the principal die before he be attainted, the resouer shall only be fined and imprisoned. H. P. C. 116.

Or, if he prevent the arresting of a felon. H. P. C. 116.

If there be a rescue of a person arrested at the suit of a common person, he shall have an action against the rescuer. Vide Escape, (B 1, &c.)

Or, if there be a rescue of a distress made.

As to Escape, Vide Escape, (A 1, 2.)

### (S) Felony &c. by statutes.

#### (S 1.) Duress: — [and other offences by an officer.]

By the stat. 14 Ed. 3. 10. if a gaoler compels a prisoner by duress to be an appellor, it is felony. Vide imprisonment, (I). (x)

#### (S 2.) Rape.

Rape was felony at the common law, and afterwards altered to the loss of eyes and testicles. 2 Inst. 180.

By the st. W. 1. 3 Ed. 1. 13. the penalty was mitigated to fine and imprisonment.

But by the st. W. 2. 13 Ed. 1. 34. it is provided, that if a man ravish a woman, &c. he shall have judgment of life and member.

And if she did not consent she shall have an appeal; but if she afterwards consent she loses the appeal, yet he shall be indicted at the king's suit. 2 Inst. 433.

By the st. 6 R. 2. 6. if the woman afterwards assent to the ravisher, both shall lose their inheritance, dower, or joint estate after the death of the husband or ancestor, and the next in blood shall enter; and he or the husband shall have an appeal.

The indictment shall say, *rapuit*, which no word supplies. Co. L. 124. a.

Rape is, when a man by force has carnal knowledge of a woman against her will. Co. L. 123. b.

Though it be of a nief by the lord. Co. L. 123 b. 2 Inst. 181.

There must be carnal knowledge. (Vide H. P. C. 117. 3 Inst. 60).

*Penetratio* as well as *emissio*. H. P. C. 117. 3 Inst. 60. (y).

Though consent be forced, by the fear of death or duress, it is a rape. 3 Inst. 60.

But if there be consent, it is no rape. 2 Inst. 433.

If the woman prove *privement enseint* it is evidence of consent.

(x) 1. So by 3 Edw. 1. c. 9., the sheriff, coroner, or any other bailiff concealing felonies, or not arresting felons, or otherwise not doing their duty, are to be imprisoned for a year, and fined at the king's pleasure. — 2. So by 35 G. 3. c. 55., two justices, at petty sessions, may fine constables, &c. for neglect of duty. — 3. And in the case of a coroner, the 25 G. 2. c. 29. s. 6., enacts that when convicted of extortion, or wilful neglect of duty, or misdemeanour in office, he may be removed from office by the judgment of the court in which he is convicted, unless such office be annual, or annexed to some other office. — 4. So by 11 G. 1. c. 4. s. 6., chief officers of corporations absenting themselves from, or hindering the elections of, other officers, may be imprisoned. — 5. And as to what shall be an absenting within the statute, see 5 East, 372. — 6. As to the punishment of frauds by officers of the Milbank Penitentiary, see 56 G. 3. c. 63. s. 12. — 7. As to that for receiving presents by officers in India, see 33 G. 3. c. 52. s. 62.

(y) 1 Russell, 803. 806. But penetration is presumptive proof of emission. 1 East, P. C. 440. 2 Leach, 854.



So, if she be an harlot; yet an harlot may be ravished.

Or, was his concubine before.

By the st. 18 El. 7. carnal knowledge of an infant under ten years old, is felony, though there be consent.

Whoever aids the rape is a ravisher. H. P. C. 118.

Vide post, (Y 12.)

### (S 3.) Forcible marriage of a woman contrary to 3 H. 7. 2.

By the st. 3 H. 7. 2. it is enacted, that persons who take a maid, widow, or wife, having substance in goods or lands, or being an heir apparent, against her will to marry or defile her, their abettors and receivers, knowing the same, are felons. (z)

If she be married, though not deflowered, it is within the statute. R. 1 Vent. 244.

Though she consent to the marriage, being under a force. H. P. C. 119.

All accessories, before or after, are principals. H. P. C. 119. 9 Inst. 61.

The woman is a good witness. R. 1 Vent. 244.

But forcible marriage of a niece or ward, is not within the statute. H. P. C. 118. 3 Inst. 61.

Nor privies to the marriage, if not privy to the force. H. P. C. 119.

If the taking be in one county and the marriage in another, the county where they were married may enquire of the forcible taking. H. P. C. 119.

Vide post, (Y 12.)

### (S 4.) Buggery.

By the st. 25 H. 8. 6. revived by the st. 5 El. 17. When any commit buggery with mankind, or beast, and is convicted by verdict, confession, or outlawry, he shall suffer as a felon, without benefit of clergy.

Vide post, (Y 13.)

### (S 5.) Poligamy.

By the st. 1 (a) Jac. 11. If any in England or Wales being married, marry again, the former husband or wife being living, it is felony (b), unless the husband or wife were absent beyond sea for seven years before, (c) or in the realm (d) without knowledge of his or her life, or the

(z) Without clergy. 39 Eliz. c. 9.

(a) 2d, though *vulgo* 1st

(b) By 55 G. 3. c. 67. s. 1., the punishment for bigamy is the same as that for grand or petit larceny.

(c) 1. In the construction of this statute it has been holden, that if a woman marries a husband in Ireland, and afterwards such husband, still living, marries another husband in England, it is within the act. — 2. But that if she marries a husband in England, and afterwards, such husband still living, marries another person in Ireland, it is not within the act. 1 Hale, 692, 693. 1 East, P. C. 465. *sed vide*. 1 Hawk. c. 44. s. 7. Kel. 80. — 3. So, if A. take B. to husband in Holland, and then in Holland takes C. to husband, living B., and then B. dies, and then A. living, C. marries D. in England, this is not marrying a second husband the former being alive; the marriage to C. living B. being simply void. 1 Hale, 693.

(d) The words are, within his majesty's dominions; and in lord Hale's judgment comprehend England, Wales, and Scotland. 1 Hale, 693

former marriage was within the age of consent (*e*), or annulled by sentence in the ecclesiastical court (*f*), or there was a divorce. Provided not to forfeit dower, or corrupt blood.

A marriage after a divorce *à mensa et thoro*, is not felony within the statute. H. P. C. 122. R. Mar. 101. (*causa adulterii*.) R. Kelg. 27. 3 Inst. 89. (*g*)

Nor a marriage of one beyond sea, and of another within the realm. R. 1 Sid. 171. (*h*)

But a divorce for severity, is no excuse of felony. R. Mar. 101. Dub. Cro. Car. 462. But said it was R. to be within the proviso. Kelg. 27. (*i*)

The first husband is no witness to prove his marriage. R. Ray. 1.

### (S 6.) Malicious mayhem.

By the st. 5 H. 4. 5. if any cut out the tongues, or put out the eyes of any the king's liege people, of malice prepense, it is felony.

By the st. 22 & 23 Car. 2. 1. if any of malice, and by lying in wait, cut out or disable the tongue, put out the eye, slit the nose, cut off the nose or lip, cut off or disable any member of any subject, with intent to mayhem or disfigure him, it is felony in him, his aiders, or abettors, without clergy.

By the st. 22 & 23 Car. 2. 7. If any maliciously, in the night time, kill or destroy any horses, sheep, or other cattle, it is felony. (*k*)

### (S 7.) Felonious hunting, &c.

By the st. 37 Ed. 3. 19. if any steal and carry away a hawk, not doing according to the ordinance, it is felony.

And by the st. 1 H. 7. 7. the king's council or the justices of peace, on information of hunting by night, or with painted faces, may issue a warrant to arrest the persons, and if any arrested conceal those with him, or if any make *rescous* or disobedience to the warrant, so that it

(*e*) 1. Which is fourteen in a man, and twelve in a woman. 1 Blk. Com. 436.—  
2. And the construction is, that if either of the parties were within such age at the time of the first marriage, not only the one within age but the other also who was above it, is entitled to the benefit of the exception. 3 Inst. 89. 1 Hale, 694. 1 Hawk. c. 42. s. 6.—3. But in a case of this kind it seems that if the parties afterwards, when at the age of consent, agree to the marriage, as such agreement would complete the contract, and would indeed be the real marriage, a second marriage would be within the act. 4 Blk. Com. 164. 1 East, 468. 1 Russell, 288.

(*f*) 1. But a sentence of the spiritual court against a marriage in a suit of jactitation of marriage, is not conclusive evidence so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally and not directly. 11 St. Tr. 262. 1 Leach, 146. 1 Hawk. c. 42. s. 11.—2. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence by proving it to have been obtained by fraud or collusion. Ibid.

(*g*) And if there be a divorce *à vinculo matrimonii*, and an appeal by one of the parties, though this suspends the sentence and may possibly repeal it, yet a marriage pending that appeal will be aided. 3 Inst. 89. 1 Hale, 694.

(*h*) Upon this first exception the construction has been, that it will apply though the party in England have notice that the other is living. 1 Hale, 693. 3 Inst. 88. 4 Blk. Com. 164. Vide 1 East, P. C. 466.

(*i*) A marriage solemnized in England, is indissoluble by any thing except an act of the legislature. Lolly's case, 1 Russell, 287.

(*k*) Vide 2 Russell, 1682, *et seq.*

cannot

cannot be executed, or if any be convict of hunting in the night, or with vizors or painted faces, it is felony.

(S 8.) Soldiers departing without licence, &c.

By the stat. 18. H. 6. 19. If any, being mustered, and entered the king's soldier of record, and receiving the king's wages, departs from his captain, unless disabled by sickness to go, of which he shall give notice to his captain, and repay his money: or, being a soldier, man of arms, or archer, so mustered of record, and passing the seas with his captain, returns without licence from his captain under his hand and seal for reasonable cause, during his term, he is guilty of felony.

But this act is of little force; for the antient manner of retaining and covenant with soldiers is discontinued. R. 6. Co. 27. 3 Inst. 86.

Yet by the stat. 5 El. 5. it was extended to mariners and gunners.

By the stat. 7 H. 7. 1. if any soldier, being no captain, retained with the king, being in wages and retained, or taking prest to serve the king on the sea, or upon land beyond sea, shall depart out of the king's service without licence of the captain, it is felony without clergy.

And by the st. 3 H. 8. 5. if any soldier, being no captain, retained with the king, who shall be in wages and retained, or take any prest to serve the king upon the sea, or on the land, or beyond sea, departs without licence of the lieutenant, it is felony without clergy, (not being within the orders of holy church.)

By the st. 2 & 3 Ed. 6. 2. if any, having served the king, departs without licence, out of the king's service, or out of garrison, it is felony without clergy.

The statutes 7 H. 7. 1. and 3 H. 8. 5. are perpetual. R. 6. Co. 27. 3 Inst. 86.

And departure from a conductor is felony, for he is a petit captain. R. Cro. Car. 72. (l)

(S 9.) Egyptians, rogues, wandering soldiers, &c.

By the st. 1 & 2 Ph. & M. 4. persons calling themselves Egyptians, conveyed into the realm and remaining here a month, if above 13 years old, are felons without clergy, unless in 20 days they betake themselves to an honest way of living.

And by the st. 5 El. 20. such as continue a month at one or several times in company of vagabonds, commonly called Egyptians, or by apparel, speech, or behaviour counterfeiting themselves such, if above 14, shall suffer as felons without clergy.

By the st. 39 El. 4. dangerous rogues, banished the realm by justices of peace, and returning without a licence, be felons.

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(l) 1. Serving foreign states is a misdemeanor at common law. 1 East, P. C. 81. 4 Blk. Com. 122. — 2. And 3 Jac. 1. c. 4. s. 18. makes it felony in subjects going out of the realm to serve, &c. — 3. For the construction of which act, see 3 Inst. 80. 1 East, P. C. 82. — 4. The 9 Geo. 2. c. 50. makes the enlisting, or procuring others to enlist, &c. into foreign service, felony without clergy. — 5. And by 29 Geo. 2. c. 17. though no enlisting-money be paid or received. — 6. The 29 Geo. 2. c. 17. makes entering the French king's service without leave, &c. felony without clergy. — 7. And in like manner the 37 Geo. 3. c. 70. made perpetual by 57 Geo. 3. c. 7. makes seducing the soldiers or sailors from their allegiance. — 8. And the persuading, &c. sailors to desert, is punishable by 1 Geo. 1. c. 47. & 37 Geo. 3. c. 12.

By the st. 39. El. 17. idle and wandering soldiers or mariners, who will not betake to any lawful course of life, or to the place of their birth or abode; and such who come from beyond sea, and have not a testimonial from a justice of peace, or counterfeit such testimonial, or have one known to be counterfeit, be felons without clergy.

By the st. 1 Jac. 7. a dangerous rogue in sessions shall be branded, and if he afterwards beg or wander, shall be adjudged a felon without clergy. Vide Justices of Peace, (B 76.)

(S 10.) Exportation of sheep, &c.

By the st. 8 El. 3. such as, after conviction for the first offence, shall export sheep alive out of the realm, are guilty of felony; but not to corrupt blood, or lose dower.

By the st. 13 & 14 Car. 2. 18. if any export into Scotland, or other foreign parts, or pack or load, or cause to be packed or loaden, of intent to be exported, any sheep of the breed of England or Wales, or the dominions thereof, or any wool, woolfells, mortlings, shorlings, yarn made of wool, woolflocks, fuller's earth, or fulling clay, it is felony.

But, by the st. 7 & 8 W. 3. 28. this act is repealed, as to making the exportation of wool felony. (l)

(S 11.) Refusing abjuration, &c.

By the st. 35 El. 1. if any above 16, who shall for a month, without cause, refuse to hear divine service, go about to persuade any of the realm to impugn the queen's authority in cases ecclesiastical, or to that end persuade to forbear coming to church according to law, or to be present at a place of religious assembly contrary to law; or shall of himself or by incitement of others be present at such assembly, and being convict of such offence, and for not conforming three months after conviction, being required by the justices, in quarter sessions, &c. to abjure the realm, shall refuse to abjure, or after abjuration shall refuse to depart at the time limited, or shall return, &c. he shall be a felon without benefit of clergy. Provided not to corrupt blood, or lose dower.

By the st. 3 Jac. 4. if any pass out of the realm to serve, or do voluntarily serve any foreign prince, without having taken the oath of allegiance: or (being a gentleman or of higher degree, or a captain, lieutenant, or conductor of soldiers) without giving a bond of 20*l.* penalty conditioned not to be reconciled to the see of Rome, or to enter into

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(l) 1. The clandestine transportation of sheep or wool out of the kingdom, to the detriment of its staple manufacture, called *ouling*, from its being usually carried on in the night, was forbidden at common law. 4 Blk. Com. 154. Mirr. c. 1. s. 3. — 2. And made the subject of criminal prosecution by different statutes, beginning with 11 Edw. 3. c. 1. — 3. But the 28 Geo. 3. c. 38. repeals all former acts relating to this offence, (except so much of the 9 & 10 W. 3. c. 40. as relates to wool within ten miles of the sea side in Kent or Sussex, and to persons residing within fifteen miles of the sea in those counties,) and after imposing various penalties and forfeitures for conveying sheep or wool out of the kingdom, proceeds to create an offence in the opposing any person putting the act in execution. 1 Russell, 177, 178. — 4. By s. 56. persons hindering, &c. officers seizing sheep, wool, &c. or being armed or disguised, and rescuing sheep, wool, &c. to be transported.

any plot against the king or realm, but to disclose all such, he shall be a felon.

By the st. 35 El. 2. a popish recusant above 16, and convict for not coming to church, (not being a feme covert, nor having 20 marks *per annum* in lands, tenements, or annuities, nor to the value of 40*l.* in goods,) if he repair not to his dwelling or place of birth in 40 days after conviction, (unless stayed by imprisonment, order of the queen or six privy council, or sickness,) and then certify his name to the minister or constable, or after depart above five miles from home, shall abjure; and if he refuse to abjure, or after to depart the realm, or return, he shall be adjudged a felon, without benefit of clergy.

Vide Sacraments.

### (S 12.) Embezzlement of stores.

By the st. 31 El. 4. if any, having charge, &c. of purpose to hinder her Majesty's service, wittingly embezzle, purloin, or convey away any armour, ordnance, munition, shot, powder, or victuals for soldiers, &c. or other habiliments of war, at one or several times to the value of 20*s.* he shall suffer as a felon; provided he be prosecuted within a year; not to corrupt blood, or lose dower.

And by the st. 22 Car. 2. 5. clergy is taken away.

### (S 13.) Witchcraft: — vide justices of peace, (B 13.)

By the st. 1 Jac. 12. if any practise invocation or conjuration of any evil spirit; or shall consult, covenant with, &c. any evil spirit; or take up any dead body, skin, bone, &c. to be used in any manner of witchcraft, sorcery, charm, or enchantment; or shall use any witchcraft, inchantment, charm, or sorcery, whereby any person shall be killed, wasted, or lamed in his body or any part of it, their abettors, aiders, &c. or if any, after conviction for the first offence, shall take upon him by witchcraft, inchantment, charm, or sorcery, to tell where treasure may be found in the earth; or lost goods may be found; or to the intent to provoke to unlawful love; or whereby cattle or goods shall be destroyed or impaired; or to hurt any person in his body, though the same be not effected, he shall suffer as a felon without clergy. Provided not to corrupt blood, or lose dower. (*m*)

At common law, witchcraft was punished as heresy, by the writ *de hæretico comburendo*. H. P. C. 6. 3 Inst. 44.

But now there is no remedy but by the st. 1. Jac. 12. H. P. C. 6. 3 Inst. 45.

By this statute, it is felony to consult, covenant with, entertain, employ, feed, or reward an evil spirit; though no act be thereupon done. H. P. C. 6. 3 Inst. 45.

So, to take up a dead body, &c. to use in witchcraft; though not used. H. P. C. 6. 3 Inst. 45.

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(*m*) By the st. 9 Geo. 2. 5. the st. 1 Jac. 12. is repealed (except so much as repeals the st. 5 El. 16.), and no prosecution shall be carried on for witchcraft, &c. And if any person pretend to exercise any witchcraft, sorcery, &c. or undertake to tell fortunes, or pretend to discover where goods, supposed to be stolen or lost, may be found, he shall be imprisoned for a year, and once in every quarter of it be set on the pillory, and (if the court think fit) be bound for his good behaviour.



So, to take upon them to tell where treasure or goods shall be found, how love shall be provoked; though they cannot do it. H. P. C. 7. 3 Inst. 46.

But to use sorcery, &c. whereby any one may be killed, or destroyed, or goods or cattle destroyed, is no felony, unless the mischief be done. H. P. C. 7. 3 Inst. 45, 46.

In all cases where a second offence is felony, there must be an actual conviction and judgment for the first offence. H. P. C. 8. 3 Inst. 46.

And the second offence must be committed after judgment for the first. H. P. C. 8. 3 Inst. 46.

[(S 14.) Quarantine.] (o)

[(S 15.) Excise and customs.] (p)

[(S 16.)

(o) 1. The 45 Geo. 3. c. 10. is the principal statute upon the subject now in existence, the ninth section thereof having repealed all other acts, excepting as to arrears of duty, and as to offences then committed against them.— 2. s. 10. Particularizes the ships, &c. which shall be liable to quarantine.— 3. s. 19. Commanders, &c. not disclosing infection, or omitting to hoist the proper signal, are guilty of felony without clergy.— 4. s. 23. So persons refusing or neglecting to repair to the lazaret, &c. and persons escaping from the same.— 5. s. 26. So officers, &c. permitting persons, ships, &c. to depart from the lazaret, &c. without an order, or giving a false certificate.— 6. By s. 27. persons not infected, nor liable, &c. entering the lazaret, &c. must perform quarantine; and if they escape without performing it, they are guilty of felony without clergy.— 7. s. 31. So clandestinely conveying, or secreting in order to convey, goods, &c. from a vessel or a lazaret, &c.— 8. s. 21. Persons quitting any ship liable to perform quarantine before such ship is regularly discharged, to be imprisoned and forfeit 200*l*.— 9. And by s. 38. smaller offences, for which no specific penalty is provided, may be determined by two justices, who may fine or imprison.— 10. And by 46 Geo. 3. persons going within the limits of quarantine stations, contrary to order in council, to forfeit 500*l*.

(p) 1. With respect to such offences as are punishable with death, the 53 Geo. 3. c. 145. reciting that it was expedient that the provisions contained in any laws then in force for collecting his Majesty's revenue in Great Britain, whereby the penalty of death was imposed for any act done in breach of, or in resistance to, the said laws or any of them, should be amended and reduced into one act, enacts, that in all cases where any act to be done or committed after the passing of this act in breach of, or in resistance to, any part of the laws for collecting his Majesty's revenue in Great Britain, would, by the laws now in force, subject the offender to death as guilty of felony without benefit of clergy, by virtue of the said laws or any of them, such act so to be done or committed, shall be deemed and taken to be felony, with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act.— 2. By s. 11. three or more persons armed and assembled in order to be aiding and assisting in illegal exportation, &c.; or rescuing, &c.; or being so aiding or assisting; and any person shooting at a ship or boat; or shooting at, maiming, &c. any officer, &c. is guilty of felony without clergy.— 3. s. 12. So refusal or neglect of offenders to surrender, in certain cases, after being required by order in council.— 4. Many of the provisions of the eleventh section of which statute, are contained in a former statute of 19 Geo. 2. c. 34. s. 1. which extends also to any person having his face blacked, or wearing any vizard, mask, or other disguise, when passing with illegal goods, or forcibly hindering, obstructing, assaulting, opposing, or resisting any of the revenue officers in the seizing or securing such goods.— 5. As to what shall be an offensive weapon within the act, see 1 Leach, 312. Id. n. 1 Leach, 23, 255. Cald. 244.— 6. As to what shall be an assembling, see 1 Leach, 345.— 7. As to what shall be a disguising, see 1 Leach, 342.— 8. The other statutes which relate to acts committed in breach of, or in resistance to, the revenue laws, and create offences which are *not the subject of capital punishment*, are 13 & 14 Car. 2. the sixth section of which relates to hindering, wounding, &c. officers by persons armed.— 9. By 6 Geo. 1. c. 21. s. 34. persons armed, and tumultuously assembling to the number of eight, and hindering, &c. officers, are

[(S 16.) Corn.] (*q*)[(S 17.) Seducing artificers.] (*r*)[(S 18.) Unlawful oaths.] (*s*)[(S 19.) Bribery.] (*t*)

[(S 20.)

liable to transportation. — 10. By 8 Geo. 1. c. 18. s. 6. persons passing with foreign goods landed without entry within twenty miles of the coast, being five in company, or armed or disguised, and hindering, &c. officers in seizing run goods, are liable to the same punishment. — 11. By 9 Geo. 2. c. 35. s. 10. persons to the number of three or more assembled to be aiding and assisting in the clandestine running, &c. of goods, and armed, may be apprehended by the warrant of a justice; and, upon conviction, are liable in like manner. — 12. By s. 15. persons to the number of two or more, passing with horses, carts, &c., laden with tea, &c., and armed or disguised, or forcibly hindering, &c. officers, shall be taken as runners of foreign goods within 8 Geo. 1. c. 18. — 13. By s. 28. persons forcibly hindering, &c. officers, being on board any ship, &c. their aiders, &c. are liable to seven years' transportation. — 14. By 24 Geo. 2. c. 40. s. 28. persons riotously rescuing offenders against the acts relating to spirituous liquors, &c. or assaulting informers, are punishable in like manner. — 15. By 19 Geo. 3. c. 69. s. 9. persons to the number of two or more, passing with horse, cart, &c. on which there shall be tea, &c. armed or disguised, may be indicted at the sessions, and sentenced to hard labour. — 16. And so by s. 10. persons assaulting, &c. officers in seizing goods, or rescuing goods, or destroying casks, &c. — 17. And by 24 Geo. 3. c. 47. s. 15. persons hindering, opposing, &c. officers, may be sentenced to hard labour, on a navigable river. — 18. Which section extends to excise-officers, when executing their duty on land. 2 Leach, 803. 1 B. & P. 187. 2 Leach, 808. n. — 19. And is not repealed by 24 Geo. 3. c. 48. s. 16. 2 Leach, 803. — 20. By 45 Geo. 3. c. 121. s. 11. persons assaulting, &c. officers in the execution of the powers of this act, are liable to be transported or imprisoned. — 21. By 47 Geo. 3. s. 2. c. 66. s. 84. making lights, &c. on the coast as signals to smuggling vessels, is punishable by fine or imprisonment. — 22. Upon which statute an indictment may be preferred at the quarter sessions; and if it be removed into K. B., and the defendant be tried and convicted at N. P., K. B. shall award sentence. 4 M. & S. 71. — 23. By 48 Geo. 3. c. 84. s. 9. persons on an enemy's coast, or under an enemy's protection, having on board, or intending to take on board, spirits, tea, tobacco, or snuff, are liable to transportation.

(*q*) The 11 Geo. 2. c. 22. provides against hindering the exportation of corn, or preventing its circulation within the kingdom.

(*r*) The seduction of artificers into foreign countries is prohibited by 5 Geo. 1. c. 27.; 25 Geo. 2. c. 13. (and see upon these two statutes, 4 Burr. 2026.); 22 Geo. 3. c. 60; 25 Geo. 3. c. 67. s. 6.; and 39 Geo. 3. c. 56.

(*s*) 1. By 37 Geo. 3. c. 125. s. 1. administering unlawful oaths is liable to transportation. — 2. So is the taking them. — 3. Which statute is not confined to oaths administered for seditious or mutinous purposes. 3 East, 157. — 4. And by 58 Geo. 3. c. 104. s. 1. administering unlawful oaths, purporting or intending to bind to commit treason, murder, or felony punishable with death, is felony without clergy. — 5. And taking such oath is liable to transportation. — 6. And by these statutes, compulsion shall not excuse the taker, unless he discloses the fact within a limited time. — 7. & 5. of the first-mentioned, and s. 6. of the last-mentioned statute, defines an oath. — 8. And s. 3. and s. 4, as just mentioned, makes aiders and assisters principals. — 9. And by s. 7. and s. 8. persons tried and acquitted or convicted under these statutes, are not liable to be tried for the same fact as high treason. — 10. But they may be so tried in the first instance. Ibid. — 11. By 57 Geo. 3. c. 19. s. 25. societies taking unlawful oaths, &c. to be deemed unlawful combinations and confederacies within 39 Geo. 3. c. 79. — 12. But the statute is not to extend to Freemasons' lodges and some others. — 13. And see for provisions relating to Ireland, 50 Geo. 3. c. 102.

(*t*) 1. By 24 Geo. 3. c. 47. s. 32. officers taking bribes not to do their duty, in relation to the customs and excise; and persons offering bribes to officers to neglect their duty, are liable to penalties. — 2. As to bribery at elections for members of parliament, by 7 & 8 W. 3. contracts, &c. to procure elections, are void; and persons making them, forfeit 300/. — 3 By 2 Geo. 2. c. 24. s. 7. persons taking money, &c. for voting

[(S 20.) Election writs.] (*u*)

[(S 21.) Slave-trade. (*x*)

[(S 22.) Obstructing process.] (*y*)

[(S 23.) Rescue, and aiding escape, *et vide infra*. (S. 24.)  
(S 25.)] (*z*)

[(S 24.) Returning from transportation, or rescuing one  
sentenced to be transported, *et vide supra*. (S 23.)] (*a*)  
[(S 25.)

or forbearing to vote, and persons procuring others to vote, or forbear to vote by any gift, &c. forfeit 500*l.* and are disabled to vote in any election, and to hold any office or franchise. — 4. By s. 8. offenders discovering others in 12 months after the election, indemnified. — 5. Which statute, however, does not take away the common law crime. 3 Burr. 1535. 1 Blk. 380. — 6. As to the construction of the statute, vide 3 Burr. 1235. 1 Blk. 317. 1 Hawk. c. 67. s. 10. n. 4. 1 Blk. Rep. 523. 4 Burr. 2471. 2504. 2464. — 7. The 49 Geo. 3. c. 118. s. 1. imposes penalties on persons giving or receiving money, &c. to procure the election of a member to parliament, though such money, &c. be not given to voters. — 8. And s. 3. imposes them on persons giving or receiving offices, &c. by way of bribes, to procure the return of members of parliament.

(*u*) The 55 Geo. 3. c. 89. provides against neglecting or delaying to deliver election writs.

(*x*) The 51 Geo. 3. c. 25. provides against dealing in slaves.

(*y*) 1. The 8 & 9 W. 3. c. 27; 9 Geo. 1. c. 28.; and 11 Geo. 1. c. 22., enact, that persons opposing the execution of any process in the pretended privileged places therein mentioned, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years; and persons in disguise joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing, or for having executed the same, are declared to be felons without benefit of clergy. 4 Blk. Com. 148, 149. — 2. But the arrest must be lawful to render a party guilty of an obstruction. 5 East, 304. — 3. Though where the process is regular, and only the execution of it attended with an affray, not even can a peace officer interpose to prevent its execution. 1 East, P. C. 304, 305.

(*z*) 1. By 9 Geo. 1. c. 22. (commonly called the Black Act,) rescuing persons in custody for offences against this act, or aiding such offenders, is felony without clergy. — 2. So by 25 Geo. 2. c. 37. s. 9. is rescuing persons in custody for murder. — 3. And by s. 10. rescuing the body of a murderer after execution, is a transportable felony. — 4. As to the escape of offenders sentenced by a court-martial, and conditionally pardoned, see 55 Geo. 3. c. 108. s. 13. — 5. Naval court-martial, see 57 Geo. 3. c. 140. s. 6. — 6. By 52 Geo. 3. c. 156. persons aiding the escape of prisoners of war are liable to transportation. — 7. By 56 Geo. 3. c. 22. persons rescuing or aiding the escape of Bonaparte, are guilty of felony without clergy. — 8. As to aiding a prisoner convicted of treason or felony, or committed for those offences, in an attempt to escape, see 16 Geo. 2. c. 51. s. 1. — 9. Or convicted or committed for petty larceny or other crime than treason or felony, or confined upon process for any debt, &c. amounting to 100*l.* Ibid. — 10. And as to conveying any disguise or instruments into any prison, to facilitate the escape of prisoners convicted of, or committed for, treason or felony, see *Id.* s. 2. — 11. Or to facilitate the escape of prisoners convicted of, or committed for petty larceny, &c. or confined upon any process for any debt, &c. amounting to 100*l.* Ibid. — 12. And as to assisting any person charged with treason or felony, in an attempt to escape from a constable, &c. see *Id.* s. 3. — 13. Or a felon in a boat carrying felons for transportation, or from the contractor for their transportation. Ibid. — 14. But a commitment upon suspicion only is not within the act. 1 Leach, 97, 98, n. 363. — 15. Nor does the statute extend to cases where an actual escape is made. 2 Leach, 662.

(*a*) 1. By 4 Geo. 1. c. 11. persons convicted of offences within the benefit of clergy, may be transported for seven years; and persons convicted of offences for which they are excluded the benefit of clergy, and receivers of stolen goods, may be transported for

[(S 25.) Vagracy] (b)  
[(S 26.) Abduction of women.] (c)

[(S 27.)

for 14 years, or other term. — 2. And persons so ordered to be transported, and returning before the end of their term, are to be punished as persons attainted of felony without clergy. Ibid. — 3. By 6 Geo. 1. c. 23. s. 5. persons rescuing, &c. offenders from the custody of those who have contracted for their transportation, are guilty of felony without clergy. — 4. And by s. 6. felons ordered for transportation, and being at large before the end of their term, are to suffer death without clergy. — 5. By 16 Geo. 2. c. 15. felons, &c. ordered to be transported, or agreeing to transport themselves, and being afterwards at large before the expiration of their term, are guilty of felony without clergy. — 6. As to aiders, *vide supra* (s. 23.) — 7. By 8 Geo. 3. c. 15. s. 1. offenders reprieved and ordered for transportation, and being afterwards at large before the expiration of the term, are guilty of felony without clergy. — 8. See farther, 19 Geo. 3. c. 74., as to convicts liable to be transported to America. — 9. As to convicts in Scotland, see 25 Geo. 3. c. 46. — 10. By 56 Geo. 3. c. 27. offenders subject to be transported, may be transported beyond the seas, to such place as the king, with the advice of his privy council, shall appoint; and offenders convicted of crimes excluded from clergy, to whom the king shall extend mercy on condition of transportation beyond the seas, may be ordered to be transported according to such condition. Ibid. — 11. And persons rescuing such offenders, or assisting them to escape from those who have them in custody, are felons without clergy. Ibid. — 12. And offenders ordered to be transported, or having agreed to transport themselves, and afterwards being at large before the expiration of their sentence, are felons without clergy. Ibid. — 13. Male offenders may be removed to places of confinement in England or Wales, and placed under the custody of a superintendant or overseer. Ibid. — 14. And offenders escaping from such custody, and persons rescuing them, &c. are to be punished as if such offenders had been confined in a gaol or prison. Ibid. — 15. Where an offender is ordered to be transported beyond the seas to a particular place, the place may be changed by order of K. B. or two judges. Ibid. — 16. And any offender, so ordered for transportation, and afterwards being at large without lawful cause, is a felon without clergy. Ibid. — 17. By 56 Geo. 3. c. 63. convicts sentenced to transportation, may be confined in the General Penitentiary at Milbank. — 18. And convicts confined there breaking prison or escaping, are to be punished by an addition of three years to the term of their confinement; and, upon a second breach of prison or escape, to be felons without clergy. Ibid. — 19. And persons rescuing convicts ordered to be confined in the penitentiary, or aiding in such rescue, to be guilty of felony, and confined in the penitentiary. Ibid. — 20. And persons having the custody of such convicts, and voluntarily permitting an escape, and other persons aiding or attempting any escape or rescue, to be guilty of felony. Ibid. — 21. And any person having such custody, and negligently permitting an escape, to be guilty of a misdemeanour. Ibid. — 22. The mutiny acts provide against returning from transportation after sentence by a court-martial. — 23. As to evidence of the day on which a criminal was discharged from prison, (having a pardon on condition of transporting himself within so many days from that time,) see 1 Leach, 391, 392. — 24. As to evidence of a sign-manual, see 1 Hawk. c. 47. s. 22. Ca. C. L. 69. 1 Leach, 74. 2 Blk. Rep. 797. — 25. As to the offender being referred to his original sentence of transportation, see 1 Leach, 76. 223. 1 Hawk. c. 47. s. 23. 1 Russell, 586, 587. — 26. And poverty and ill-health amount to a lawful excuse for not having quitted the kingdom. 1 Leach, 396.

(b) 1. By 17 Geo. 2. c. 5. s. 9. rogues and vagabonds, and incorrigible rogues, may be confined in the house of correction and whipped; and if an incorrigible rogue, so confined, break out or escape, or offend again in like manner, he becomes a felon, and is liable to transportation. — 2. And a party convicted under a subsequent statute, 23 Geo. 3. c. 88. as a rogue and vagabond, and offending again, may be indicted on this statute of 17 Geo. 2. 1 Leach, 396.

(c) 1. The 4 & 5 P. & M. c. 8. prohibits the taking away a maid under 16 from the possession of the father, mother or guardian. — 2. A natural daughter is within the act. 2 Str. 1162. 1 Hawk. c. 41. s. 14. 1 East, P. C. c. 11. s. 6. — 3. And a mother retains her authority, notwithstanding her marriage to a second husband; and the consent of the second husband is immaterial. 3 Rep. 39. — 4. And the fourth section of this statute

[(S 27.) Kidnapping.] (*d*)

[(S 28.) Maiming, and attempts to kill.] (*e*)

[(S 29.) Assault.] (*f*)

[(S 30.) Stealing lead from houses.] (*g*)

[(S 31.) House-breaking.] (*h*)

[(S 32.)

statute extends only to the custody of the father, or to that of the mother where the father has not disposed of the custody of the child to others. *Ibid.* — 5. *Vide* 3 *Mod.* 84. 1 *Hawk.* c. 41. s. 11. 1 *East*, P. C. 457. 3 *Mod.* 169. 1 *Lev.* 257. 1 *Lid.* 387. 2 *Keb.* 32. 1 *Hawk.* c. 41. s. 10.

(*d*) See 43 *Eliz.* c. 13.; 31 *Car.* 2. c. 2. s. 12.; 11 & 12 *W.* 3. c. 7. s. 18. and 54 *Geo.* 3. c. 101.

(*e*) 1. By 9 *Anne*, c. 16. attempting to kill, assaulting, &c. a privy-counsellor in the execution of his office, is felony without clergy. — 2. As by 9 *Geo.* 1. c. 22. is maliciously shooting at any person. — 3. And the last act extends to persons aiding and assisting. 1 *Leach*, 64 359. 1 *Hawk.* c. 55. s. 11. 1 *East*, P. C. 413, 414. — 4. The shooting must be malicious. 1 *Leach*, 417. 1 *Hawk.* c. 55. — 5. And the instrument must be loaded with a bullet, &c. and be levelled at the party. 1 *Leach*, 247. *Id.* 224. — 6. The shooting may be in the party's own house. 1 *East*, P. C. 415. — 7. By 26 *Geo.* 2. c. 19. the beating or wounding persons shipwrecked with intent to kill them, &c., or putting out false lights to bring a ship into danger, is felony without clergy. — 8. And by 43 *Geo.* 3. c. 58. shooting at, or attempting to shoot, stabbing, or cutting any person, with intent to murder, maim, &c. or to do grievous bodily harm, or to resist lawful apprehension, is felony without clergy — 9. But if the stabbing or cutting were so committed, that if death had ensued, it would not have been murder, the party charged is to be acquitted. — 10. As to the words "grievous bodily harm," see 1 *Holt*, n. P. C. 469. — 11. As to the words "stab or cut," see 1 *Russell*, 859. — 12. And where the wounding is charged to be done with intent to obstruct, &c. a lawful apprehension, it must appear that the offender had some notification of the purpose for which he was apprehended. *Ibid.* — 13. And where the wounding is charged to be done with the same intent, it must appear that the person apprehending acted under proper authority. 1 *Stark.* n. P. C. 246.

(*f*) 1. The 7 *Geo.* 2. c. 21. punishes assaults with intent to rob. — 2. And it seems that the statute describes two offences. 1 *Leach*, 267. 1 *East*, P. C. 419, 420. 5 *T. R.* 169. 2 *Leach*, 583. — 3. As to the offensive weapon or instrument, see 1 *East*, P. C. 421. — 4. And that the words "unlawfully and maliciously," are an essential part of the description of the offence of assaulting with an offensive weapon, with intent to rob. See 1 *East*, P. C. 420. — 5. And that the assault must be made upon the person intended to be robbed. See 1 *Leach*, 530. 1 *East*, P. C. 418. — 6. The 6 *Geo.* 1. c. 23. provides against assaulting with intent to spoil garments. — 7. Upon which, the construction is, that the primary intention must be a tearing, spoiling, cutting, &c. of the clothes, and not a wounding of the person. 1 *Leach*, 529. 1 *East*, P. C. 424, 425. — 8. The 26 *Geo.* 2. c. 19. provides against assaulting persons on account of their discharge of their duty in the salvage of vessels in distress, or of vessels, goods, &c. wrecked, stranded, &c. — 9. By 11 & 12 *W.* 3. c. 7. persons laying hands on the commander of a ship to hinder him from fighting shall suffer death. — 10. The 53 *Geo.* 3. c. 67. provides against obstructing seamen, or assaulting them with intent to obstruct and prevent them from pursuing their lawful occupations. — 11. The 5 *Eliz.* c. 4. provides against a servant, workman, &c. assaulting master, mistress, &c. — 12. The 12 *Geo.* 1. c. 24. provides against assaulting manufacturers for not complying with illegal bye-laws. — 13. The 9 *Anne*, c. 14. provides against assaults on account of money won at play. — 14. And the assault need not be committed at the time of playing. 4 *East*, 174. but 1 *East*, P. C. 425. is contra.

(*g*) 1. By 4 *Geo.* 2. c. 32. and 31 *Geo.* 3. c. 68. it is a transportable felony to steal, &c. lead, iron, &c. fixed to any house, &c. or other building, or in any garden, &c. fence, or outlet belonging thereto. — 2. Which statutes extend to a church. 2 *East*, P. C. 592. 1 *Leach*, 318. *Vide* 2 *East*, P. C. 593.

(*h*) 1. The statute 1 *Edw.* 6. c. 12. provides against breaking a house by day or night, any person being therein, and put in fear. — 2. And as to what shall be a break-



[(S 32.) Robbery and larceny in a house, without breaking.] (*i*)

[(S 33.) Privately stealing to the value of five shillings in a shop, &c.] (*k*)

[(S 34.) Stealing from the person.] (*l*)

[(S 35.) Stealing cattle.] (*m*)

[(S 36.) Stealing deer.] (*n*)

(S 37.) Stealing on rivers, and plundering wrecks.] (*o*)

[(S 38.) Larceny by servants.] (*p*)

ing, see 1 Hale, 548. 2 Hawk. c. 33. s. 88. Fost, 108. 2 East, P. C. 651. 2 Hale, 353. — 3. The 5 & 6 Edw. 6. c. 9. provides against robbing any persons in their dwelling-houses, the owner, &c. being within the precinct of the house, either sleeping or waking. — 4. And also against robbing any person in any booth or tent, in any fair or market, the owner, &c. being within, either sleeping or waking. — 5. And as to whether a breaking is essential, see 1 Hale, 522, 523. 2 Hale, 352, 353. 1 Hawk. c. 34. s. 2. 2 Hawk. c. 33. s. 92. 2 East, P. C. 636. 2 Russell, 967. — 6. And for other points, see 2 Russell, 968, 969. — 7. By 3 W. & M. c. 9. robbing any house in the day time, any person being therein, is felony without clergy. — 8. And for the construction of this statute, see 1 Leach, 428. 2 Russell, 970, 971. — 9. By 39 Eliz. c. 15. taking in the day time property to the value of 5s. in a house, &c. no person being therein, is felony without clergy. — 10. And a breaking is necessary under this statute. 2 Hawk. c. 33. s. 96. 2 Hale, 356. — 11. And as to the nature of the breaking, vide 2 Russell, 972, 973. — 12. And as to what shall be deemed a dwelling-house, outhouse, &c. see 2 Russell, 973, 974. — 13. Property must be taken to the value of 5s., but it need not be carried out of the house. 2 Russell, 974. — 14. And no person must be in the house at the time. 2 Russell, 974, 975.

(*i*) 1. By 3 W. & M. c. 9. s. 1. feloniously taking away any goods or chattels, being in any dwelling-house, the owner or any other person being therein, and put in fear, or comforting, aiding, abetting, assisting, counselling, hiring, or commanding the commission of said offence, is felony without clergy. — 2. As to the meaning of the word dwelling-house, it must be construed by reference to the same rules as prevail in the case of burglary. 2 East, P. C. 633. — 3. The value of the property taken must exceed twelve pence. Id. 633, 634. — 4. And proof must be given of actual fear. Id. 635. — 5. By 12 Anne, c. 7. feloniously stealing any money, goods, or chattels, wares, or merchandizes, of the value of forty shillings, or more, being in any dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person, be or be not in the house or outhouse; or assisting or aiding any person to commit such offence, is felony without clergy. — 6. But the act is not to extend to apprentices under the age of fifteen years, robbing their masters as aforesaid. — 7. The dwelling-house must be one in which burglary may be committed. 2 East, P. C. 644. — 8. But the statute does not extend to stealing in a man's own house. 1 Leach, 338. 2 East, P. C. 644. — 9. And, therefore, not to theft by a married woman in her husband's house. 1 Leach, 217. 2 East, P. C. 81. — 10. The theft, too, must be of property deposited in the house, and under its protection, and not of property which was about the person of the party from whom it was taken. 2 Leach, 564. 2 East, P. C. 644, 645, 646. 680, 681. 1 Hawk. c. 36. s. 6. 2 Leach, 572. 574. n. 640. — 11. But the stealing of bank-notes is within the statute. 2 Leach, 693. 1083. 1090. 1 East, 6. P. C. 602. 646. — 12. And the stealing must be to the amount of 40s. at one time. 1 Leach, 294. 348.

(*k*) See 2 Russell, 1166, et seq.

(*m*) Ibid. 1176, et seq.

(*o*) Ibid. 1206, et seq.

(*l*) See 2 Russell, 1173, et seq.

(*n*) Ibid. 1184, et seq.

(*p*) Ibid. 1212, et seq.

[(S 39.)

[(S 39.) Embezzlement by servants, clerks, bankers, &c.] (*q*)

[(S 40.) Bank act.] (*r*)

[(S. 41.) Post-office acts.] (*s*)

[(S 42.) Embezzling naval and military stores.] (*t*)

[(S 43.) Larceny and embezzlement of manufactures.] (*u*)

[(S 44.) Larceny, and embezzlement from lodgings.] (*x*)

[(S 45.) Receiving stolen goods.] (*y*)

[(S 46.) Having or receiving public stores.] (*z*)

[(S 47.) Receiving stolen goods on river Thames.] (*a*)

[(S 48.) Receiving jewels, &c. stolen.] (*b*)

[(S 49.) Receiving stolen lead, &c.] (*c*)

[(S 50.) Arson and burning.] (*d*)

[(S 51.) Cutting hop-binds.] (*e*)

[(S 52.) Destroying fences, mounds, works, &c.] (*f*)

[(S 53.) Injuring turnpikes or bridges.] (*g*)

[(S 54.) Destroying mines and engines.] (*h*)

[(S 55.) Destroying manufactures.] (*i*)

[(S 56.) Destroying ships.] (*k*)

[(S 57.) Overloading boats on the Thames.] (*l*)

[(S 58.) Bankrupts.] (*m*)

[(S 59. Threatening letters.] (*n*)

(*q*) See 2 Russell, 1229. et seq.

(*r*) Ibid. 1259, et seq.

(*u*) Ibid. 1285. et seq.

(*y*) Ibid. 1301. et seq.

(*a*) Ibid. 1345, et seq.

(*c*) Ibid. 1350, et seq.

(*e*) Ibid. 1703, et seq.

(*g*) Ibid. 1718, et seq.

(*i*) Ibid. 1725, et seq.

(*l*) Ibid. 1741, et seq.

(*n*) Ibid 1829, et seq.

(*r*) See 2 Russell, 1253. et seq.

(*t*) Ibid. 1278, et seq.

(*x*) Ibid. 1295, et seq.

(*z*) Ibid. 1322, et seq.

(*b*) Ibid. 1348, 1349.

(*d*) Ibid. 1662, et seq.

(*f*) Ibid. 1706, et seq.

(*h*) Ibid. 1721, et seq.

(*k*) Ibid 1731, et seq.

(*m*) Ibid. 1743, et seq.

## (T) Accessory.

## (T 1.) Before the fact : — Who shall be.

Accessories (*o*) to a (*p*) felony are before, or after the felony committed. 2 Inst. 182. 3 Inst. 138.

A man, who by his command, counsel, contrivance, consent, or encouragement (*q*) incites or moves another to commit a felony, though he be not present (*r*) when it is done, will be an accessory before. 2 Inst. 182. H. P. C. 217.

As, if he urge, persuade, or procure him to do it. 2 Inst. 182.

If he furnish him with a weapon, &c. for such intent. 2 Inst. 182.

Though the fact vary in the circumstance of the command, &c. (*s*): as, if A. command, &c. B. (*t*) to poison D. and he shoots him, &c. H. P. C. 217.

So, though the execution of the fact exceeds the command: as, if the command be to commit a robbery, and he in the robbery kills. H. P. C. 217.

So, if the command be only for a tortious act not felony, and he in the execution commits felony: as, where the command was to beat another, and by the battery he killed him. H. P. C. 217.

If a statute makes a new felony, he shall be accessory who would be so before. Sal. 543. H. P. C. 215.

But where the fact varies in the substance and nature of the crime from the command, &c. he who commanded will not be accessory: as, if the command be to kill A. and he kills another person. H. P. C. 217.

If the command be to commit a robbery, and he commits a burglary. H. P. C. 217.

So, if a statute makes a particular fact, which was an offence by the common law, more penal; the accessory shall not be subject to the pe-

(*o*) 1. Felons are either principals in the first degree. — 2. Principals in the second degree. — 3. Accessories before the fact. — 4. Or accessories after the fact. 1 Russell, 29. — 5. Principals in the first degree are those who have actually, and with their own hands, committed the fact. Ibid. — 6. Principals in the second degree are those who were present aiding and abetting at the commission of the fact. Ibid. — 7. They are generally termed aiders and abettors, and sometimes accomplices. Ibid.

(*p*) 1. With respect to crimes in which there may or may not be accessories, see as to *high treason*, 2 Hawk. c. 29. s. 2. 5. 1 Hale, 613. Fost. 341. 4 Blk. Com. 35. — 2. *Petit treason*, 4 Blk. Com. 36. 1 Hale, 615. 2 Hawk. c. 29. s. 24. — 3. *Petit larceny*. 2 East, P. C. 743. 1 Hale, 550. 616. 2 Inst. 185. 12 Rep. 81. Fost. 73. — *Forgery*. Moor, 666. 1 Lid. 312. 2 Hawk. c. 29. s. 2. 2 East, P. C. 973, 974. 2 Leach, 1096. n. 1 Russell, 44. — 5. *Crimes under the degree of felony*. 4 Blk. Com. 36. 1 Hale, 613. — 6. *Felonies created by statute*. 1 Hale, 613, 614. 704. 3 Inst. 59.

(*q*) See for the description of accessories before the fact, in different statutes. 1 Russell, 41.

(*r*) 1. 1 Hale, 615. — 2. And the offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was indicted as an accessory before the fact, it was held, that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted, to be necessary to charge a principal in the second degree with being present, aiding and abetting. 1 Leach, 515. 1 East, P. C. 352. *et vide*. 4 Rep. 48. b. 1 Russell, 39.

(*s*) As to how far an accessory is implicated when the principal varies from the terms of the instigation, see Fost. 369, 370. 1 Hale, 617. 4 Blk. Com. 37. 2 Hawk. c. 29 s. 20.

(*t*) As to accessories by the intervention of a third person, see Fost. 125. 2 Hawk. c. 29. s. 1. 10 St. Tr. 417. 19 Howel's St. Tr. 746. 1 St. Tr. 335.

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nalty, unless he was present. Per Holt, but the other justices semble cont. Sal. 542, 543.

(T 2.) After the fact : — Who shall be.

Accessory after, will be when a man receives and aids (u) a felon, knowing that he is a felon, after an offence committed. 2 Inst. 183. H. P. C. 218.

Though it be his brother, or wife. H. P. C. 219.

As, if he conceal him in his house. (Vide Dalt. 530, 531. c. 161. s. 7.)

Or supply him with money, horse, or other provision for his journey. H. P. C. 218.

So, by the st. 3 & 4 W. & M. 9. and 5 Ann. 31. a buyer or receiver of stolen goods knowing them to be stolen.

So, receiving an accessory to a felony, makes him accessory. H. P. C. 219.

But, by the common law, a receipt of goods stolen did not make him accessory, unless he received the felon. H. P. C. 218.

Nor receipt of a felon when the felony is not completed; as, after the wound, and before the death. H. P. C. 219.

Or, when a felony was only intended. H. P. C. 219.

So relief of a felon in prison, or bound in surety for his appearance, does not make a man accessory. H. P. C. 218.

So a man will not be accessory, who does not apprehend a felon. H. P. C. 216. 219.

Or does not prevent the felony. H. P. C. 216.

Or suffers the felon's escape, when he pursues him, or he comes to his house. Mo. 8. H. P. C. 220.

Or writes in his favour. H. P. C. 219. 3 Inst. 139.

Or instructs him to read, or advises to prevent the appearance of a witness against him. H. P. C. 219. 3 Inst. 139.

Or agrees for money, that he will not give evidence against him. Dub. Mo. 8.

So, if a wife receive her husband, she shall not be accessory. H. P. C. 219.

So, he that would be accessory to felony by the common law, will be so if a statute makes a new felony. H. P. C. 215. (x)

But in high treason there is no accessory, for procurers, abettors, &c. are all principals. 3 Inst. 183. H. P. C. 215. 12 Co. 81.

Nor, in petit larceny. R. Cro. El. 750. 12 Co. 81. 2 Inst. 183.

So, in every felony, all present and aiding are principals, though only one does the act. H. P. C. 215.

Though they do nothing, if they come with intent to assist. H. P. C. 216.

Or, if they do not come with a bad intent, but being present furnish a sword, &c. H. P. C. 216.

So, if they come with intent to aid, though not within view. H. P. C. 216.

So all present and consenting to a poison prepared, though absent when taken. H. P. C. 216. 2 Inst. 183.

(u) And as to what shall be a receiving and aiding, see 2 Hawk. c. 29. 1 Hale, 613, 619. 4 Blk. Com. 38. 5 Anne, c. 31. s. 5. Fost. 125. Crompt. Inst. 41. b. pl. 4, 5.

(x) See 1 Hale, 613, 614, 615. 2 Hawk. c. 29. s. 14. 32. 35. 4 Blk. Com. 38.

So, if they leave poison for another. H. P. C. 216.

So, by the st. 3 H. 7. 2. all persons taking a woman (having lands or goods) against her will, and procuring and abetting the same, and receiving her knowingly, are to be judged principal felons.

So, in manslaughter, there can be no accessory before. Mo. 461. H. P. C. 217.

Nor in forgery, which is felony for the second offence. R. Mo. 666.

So, there cannot be an accessory, where there is no principal. (y)

So, if the principal be convicted for murder, the accessory cannot be for petit treason. H. P. C. 215. 3 Inst. 139.

### (T 3.) How arraigned, and tried.

If the principal be acquitted, or die before attainder, the accessory shall not be arraigned. H. P. C. 221. 2 Inst. 184.

So, if the principal be convicted only *se defendendo*. H. P. C. 221.

Or of manslaughter, if he be charged as accessory before. H. P. C. 221.

So, if the principal be pardoned before attainder. H. P. C. 221. 2 Inst. 183. 3 Inst. 139.

Or have his clergy. H. P. C. 221. 2 Inst. 183. 3 Inst. 139.

Otherwise, if after attainder. H. P. C. 221. R. Ray. 477.

So, if the principal stand mute. H. P. C. 221. 2 Inst. 184. (z)

The accessory shall not be tried before the principal be attainted. H. P. C. 222.

By the st. W. 1. 3 Ed. 1. 14. Exigent does not go against him, till the principal be attainted.

Nor shall he be arraigned at the suit of the party, when the principal is attainted at the suit of the king. H. P. C. 221. 2 Inst. 184.

Or, if the principal be attainted of another felony. H. P. C. 221.

But the accessory (a) may be arraigned before the principal be attainted or appears. H. P. C. 222.

Or, he may be tried before, if he consent. H. P. C. 222.

Or, if one principal be convicted, when he is charged as accessory to two, he may be tried, if the court please. H. P. C. 222.

And if acquitted as accessory to him, he may afterwards be tried as accessory to the other. H. P. C. 222.

He may be tried by the same inquest with the principal; but the inquest shall be charged to dismiss him, if the principal be acquitted. H. P. C. 222. 2 Inst. 184.

And if convicted, judgment shall be first against the principal. H. P. C. 222.

(y) See the case where an accessory objected that as the jury had acquitted the principal of burglary, and found him guilty only of stealing in the house, they could not find the accessory guilty as accessory to the *said felony*. 1 Russell, 40.

(z) 1. But now, by st. 1 Anne, st. 2. c. 9. accessory may be tried where the principal has been *convicted*, though not *attainted*, or stands mute, or peremptory challenges above the number of 20. — 2. And, accordingly, it has been held sufficient, in an indictment for felony against a receiver of stolen goods, to state that principal was tried and duly convicted without going on to show that judgment was passed upon him, or how he was delivered. 2 Leach, 925. 2 East, 782.

(a) The accessory may controvert the guilt of his principal. Post. 365. 367, 368. 1 Leach, 288. 290. n. 3 Esp. C. 134.



By the st. 2 & 3 Ed. 6. 24. where the stroke or poison is in one county and the death in another, there may be an appeal against accessories in the county where the party died, though accessories in another county. And, by the same statute, the accessories may be indicted in the county where they were accessories, though not the same county where the principal offence was committed. (b)

If a man indicted as principal be acquitted, he cannot be afterwards indicted as accessory before. R. Kelg. 26. H. P. C. 224.

But the court may discharge the jury before verdict. Kelg. 26.

And he may afterwards be indicted as accessory after. R. Kelg. 26.

Vide post, (Y 4, &c.)

## (V) Approver.

### (V 1.) Who shall be.

Proceeding against a criminal is, by appeal, by indictment, or as approver. H. P. C. 176.

As to appeal, vide title Appeal.

As to indictment, vide title Indictment.

An approver is a common person, indicted for treason or felony, who confesses the indictment before plea, and then, being sworn for discovery of all treasons or felonies, enters his appeal against *participes criminis* for the offence in the same indictment. H. P. C. 192. 3 Inst. 129.

A man may be an approver, though he be maimed or 70 years old, whereby he cannot wage battle. H. P. C. 192. (c)

### (V 2.) Who not.

But a peer of the realm cannot be an approver. H. P. C. 192. 3 Inst. 129.

Nor an infant, idiot, *non compos*, clerk, or woman. H. P. C. 192. 3 Inst. 129.

So confession, before indictment against him, does not make him an approver. H. P. C. 193. 3 Inst. 129.

So, if he plead to the indictment, he cannot be an approver; for he appears false. H. P. C. 193.

Nor an appellee in an appeal. H. P. C. 193. 3 Inst. 129.

And, therefore, if there be an appeal against him after the indictment confessed, the approvement ceases. H. P. C. 193. 3 Inst. 129.

Nor an appellee of an approver. H. P. C. 193.

So a person, indicted before justices of peace in a tourn or leet, cannot be an approver. H. P. C. 194. 3 Inst. 130.

And if the appeal be for an offence not contained in the same indictment, it will be a detection, but no approvement. H. P. C. 194. 3 Inst. 130.

Though of an accessory to the same offence. H. P. C. 194.

And it shall be in the discretion of the court, whether he shall be allowed to be an approver. H. P. C. 194. 3 Inst. 129.

(b) Vide *supra* Action.

(c) Vide 3 Inst. 129 Semb. cont.

## (V 3.) Proceeding upon an approvement.

An approver, if he refuses combat against the appellee, shall be drawn and hanged, as in petit treason. 3 Inst. 21.

Vide Officer, (G. 6.) — (Vide 3 Inst. 130.)

## (W. 1.) Trial per pares.

Trial for a capital offence shall be by battail, by inquest, or by his peers. H. P. C. 254.

As to trial by battail, vide Battle, (A. 1, &c.)

As to trial by jury, vide Enquest, (A. 1, &c.)

When there shall be trial of a peer by his peers, vide Dignity, (F 1, 2.) — Parliament, (L 16, 17.)

Trial of a peer upon an impeachment, or indictment, shall be before the lords in parliament. 3 Inst. 28. Vide Parliament, (L 13. 16. 18, &c.)

Trial of a common person shall be by the justices of B. R.

Or, by justices of gaol-delivery, or upon a special commission of oyer and terminer. Vide ante, (G. 1, &c.—H.)

## (W 2.) The manner of trial in a criminal case: — how the prisoner shall be arraigned. Vide Indictment, (M).

In a trial for high treason, or felony, a precept goes to the sheriff by four commissioners (*quorum unus*) if the trial be by commission of oyer and terminer, commanding him, *quod venire faciat prisonar' cum indictamento, &c. et xxiv probos et legales homines, &c. Proclamari faciat quod omnes sint ibi qui sequi voluerint, et scire faciat justic' pacis, &c. Et quod ipse et subvicecomes ibi sint ad faciend, omnia quæ ad officia pertinent.*

After the precept returned, the grand jury sworn and charged, and the indictment found, the indictee shall be arraigned. Vide Indictment, (M).

By the common law, treason shall be tried in the county where committed.

Foreign treason, where the offender's land lies. H. P. C. 15. 204. 3 Inst. 11.

But by the st. 35 H. 8. 2. (which is not repealed by the st. 1 M 1.) treasons and misprisions done out of the realm shall be tried in B. R. or before such commissioners, and in such shire as the king shall assign. 3 Inst. 11.

Ireland is out of the realm. H. P. C. 205. 3 Inst. 11.

If the king sign the commission, or put his signet to the warrant, it is sufficient. H. P. C. 205. 3 Inst. 11.

If B. R. remove after indictment, the trial shall be, by a jury of the first county. H. P. C. 204.

By the st. 28 H. 8. 15. treasons, &c. within the admiral's jurisdiction shall be tried, at land, by commission under the great seal to the admiral, or his lieutenant, and others.

By the st. 1 & 2 Ph. and M. 10. all treasons shall be tried according to the course of the common law, and not otherwise.

By

By the st. 7 W. 3. 3. a person indicted for treason, which corrupts blood, or misprision, shall have a copy of the indictment five days before trial, and a copy of the jury two days before, and make defence by counsel, and the court shall assign him two such counsel as he desires, who shall have free access.

He may challenge 35 without cause. H. P. C. 260.

As to the indictment and process upon it, vide Indictment (A, &c. — I.)

### (W 3.) How he shall plead.

The indittee may demur, or plead to the indictment.

A demurrer is a confession of the offence as alleged, and if the indictment be sufficient, there shall be judgment and execution against the prisoner. H. P. C. 243.

And now, by the st. 7 W. 3. 3. in high treason, or misprision, the indictment, process upon it, or return may be quashed, before any evidence given, upon motion of the prisoner or his counsel, for mis-writing, mis-spelling, false or improper Latin.

If he plead, he may confess the indictment and plead guilty. St. P. C. 142. Vide Indictment, (K).

Or he may plead in abatement, as misnomer, &c.

If he plead a misnomer of the surname, he ought to plead over to the felony. H. P. C. 243.

If misnomer of the Christian name, he must give his true name; and if the attorney-general confesses the misnomer, the indictment shall be quashed; but he may be immediately indicted by his true name. H. P. C. 243.

Plea of sanctuary is taken away by the st. 21 Jac. Vide Abjuration, (D).

Or he may plead in bar: as, *autrefois acquit*, *autrefois convict*, or *attaint*. St. P. C. 105. 107. H. P. C. 244. 247. Vide Indictment, (L).

A pardon. St. P. C. 99 H. P. C. 252.

Or the general issue, not guilty. St. P. C. 151. a. H. P. C. 254. Vide Indictment, (L).

After not guilty pleaded and recorded, the prisoner, *relictâ verificatione*, may confess the indictment. R. R. Kelg. 11.

So, if he plead a frivolous plea, and will say nothing more, the court will give judgment for treason upon the *nil dicit*. R. Dy. 300. b.

If there are several in the same indictment, some may be tried, others confess after plea, others shall be outlawed. Kelg. 11.

### (W 4.) How the evidence shall be given.

After plea what process shall be against the jurors, vide in Enquest, (C 1, &c.) What challenge, vide in Challenge, (B — C 1, 2.)

By the st. 1 Ed. 6. 12. and 5 and 6 Ed. 6. 11. no person shall be indicted or convicted for treason, or misprision of treason, unless accused by two sufficient and lawful witnesses, or he willingly, without violence, confess the same. So, by the st. 1 Ed. 1. for offences by that act.

And by the st. 5 and 6 Ed. 6. 11. the accusers, if living at the time of arraignment, shall be brought in person before the party accused, and

and avow what they have to say to prove him guilty of the indictment. So, by the st. 1 El. 1.

So, by the st. 7 W. 3. 3. no person shall be indicted, tried, or attainted of treason, whereby corruption of blood ensues or misprision of such treason, but by the oaths of two lawful witnesses to the same overt act, or one to one overt act and one to another overt act of the same treason, unless without violence in open court he confess the same, or stand mute, or refuse to plead, or in cases of high treason challenge above thirty-five of the jury peremptorily.

So, by the same statute, if admitted to trial after outlawry for such treason.

And if two treasons of divers species are in the same indictment, one witness to one, and another to the other species of treason, shall not be two witnesses to the same treason within the intent of this act.

And the person so indicted, &c. shall be admitted to make defence by counsel, and by witnesses on oath.

And no evidence shall be of any overt act not laid in the indictment. Nor shall any be prosecuted for treason, or misprision done in England or Wales, except as to assassination of the king's person, unless the indictment be found within three years after the offence committed.

But this statute extends not to counterfeiting the coin, great seal, privy seal, sign manual, or privy signet. To which treasons neither does the st. 1 & 2 Ph. & M. 10. extend. Vide Rastal, Treason 24.

And by the st. 1 Ann. 9. all witnesses on trial for treason, or felony, shall give evidence on oath.

The force of the st. 1 Ed. 6. 12. and 5 & 6 Ed. 6. 11. was not taken away by the st. 1 & 2 Ph. & M. 10. H. P. C. 262. Dub. Kelg. 49. 18. Vide 2 Jon. 233. H. P. C. 208.

Testimony of hearsay shall not be allowed in treason, or felony. H. P. C. 262.

But by the common law one witness in treason was sufficient. Kelg. 49.

So now, by the st. 1 & 2 Ph. & M. 11. for treason in counterfeiting the coin. H. P. C. 262. Kelg. 50.

So, in treason for clipping, &c. R. 2 Jon. 233.

So one witness is sufficient in petit treason or felony.

So, since the st. 1. and 5 & 6 Ed. 6. and also since the st. 7 W. 3. one witness is sufficient for one overt act, and another for another overt act of the same treason. Kelg. 9.

So the two witnesses, who give evidence for the finding of the indictment, are sufficient witnesses upon the trial. Kelg. 18.

So, by the st. 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & M. 10. justices of peace, before whom any is brought for felony, shall take examination of the prisoner and such as bring him, of the circumstances of the fact, and certify them to the justices of gaol-delivery, &c.

This examination, subscribed by the prisoner, shall be read upon the trial as evidence against him. H. P. C. 262.

So, the information of any, taken by a justice of peace upon oath, being proved by the justice or his clerk, if the witness himself be dead, or beyond sea. H. P. C. 263. Semb. cont. 2 Jon. 53.

So, a deposition taken before the coroner, if the witness be dead, or beyond sea. R. 2 Jon. 53.

So,

So, in treason, confession of the prisoner, upon examination before a justice of peace, shall be evidence against himself. Kelg. 18.

Or, before a privy councillor, though he be not a justice of peace Kelg. 19.

So two witnesses of his confession upon such examination are sufficient, without other witnesses to prove the treason, notwithstanding the st. 1 Ed. 6. and 5 & 6 Ed. 6. for the words, "unless without violence he confess," &c. are intended of a confession upon his examination, though he deny it in court. R. Kelg. 18.

## (X) Judgment.

### (X 1.) In high treason.

The judgment in high treason shall be, that the man be drawn, hanged, his entrails taken out and burned, his head cut off, his body quartered, and his head and quarters hanged up. H. P. C. 268. Ca. Parl. 131. (c) Vide Forfeiture, (B. 1, 2, &c.)

*Quod secreta membra amputentur*, is also a necessary part of the judgment, but it need not be entered upon the roll. Skin. 442.

The judgment for counterfeiting the coin is only to be drawn and hanged. H. P. C. 268. (d)

So, for clipping or diminishing. Dy. 230. R. 2 Jon. 233. 1 Vent. 254. Ray. 234.

So the judgment in treason for a woman, in cases of the coin, is to be drawn, and burnt. H. P. C. 268.

If any essential part of the judgment be omitted, the judgment shall be reversed: as, *quod interiora ipso vivente comburentur*. R. 4 Mod. 400. Ca. Parl. 136, 137.

The judgment for high treason shall be given by the chief judge present, not by the recorder. Kelg. 11.

For treason a man forfeits all his lands and tenements, goods and chattels, to the king. Co. Lit. 41. a. 3 Inst. 211. Vide Forfeiture, (B 1, 2.)

Also, his wife shall lose her dower, and his blood is corrupted. Co. Lit. 41. a. 3 Inst. 211.

But the blood is not corrupted, nor dower lost, for treason against the st. 5 El. 11. or 18 El. 1. in the case of the coin.

Nor, for treason against the 5 El. 1.

As to judgment in petit treason, vide ante, (L 3.)

### (X 2.) Judgment, if a man stand mute.

In high treason, if the party stand mute, he shall have the same judgment as if convicted. H. P. C. 226. Dy. 205. a. 3 Inst. 217.

So, in an appeal. H. P. C. 226.

So, by the st. 33 H. 8. 12. for treasons and felonies within the verge.

So, if he be mute by the act of God, he shall be tried and have judgment, as if he had pleaded. H. P. C. 225.

(c) Now see 54 G. 5. c. 146.

(d) For that was the judgment before 25 Edw. 3 st. 5. c. 2., and was not intended to be altered thereby. 1 East, P. C. 138.



So, after conviction, if he stand mute, when asked, what he can say why there should not be execution, he shall be executed. H. P. C. 226.

So, if he had formerly pleaded. H. P. C. 225, 226.

But in other cases of felony he shall have *pain fort et dure*, viz. he shall be remanded to prison, and being naked in a dark place with his hands and legs extended, weights shall be put upon his body till he answer. H. P. C. 227.

A man stands mute, where of malice he will not plead to the indictment. H. P. C. 225.

Or challenges above 35. H. P. C. 226.

If he speaks, but will not plead directly, or put himself upon the country. H. P. C. 226.

If he cut out his tongue to disable his speaking. H. P. C. 225.

### (X 3.) Judgment in felony.

The judgment (e) in felony is, *quod suspendatur per collum quousque sit mortuus*, except petit larceny, where it is, *quod flagelletur*. H. P. C. 268, 269. 3 Inst. 211. Vide Forfeiture, (B 3, &c.)

And the king, though he may pardon the whole or any part of the judgment, cannot alter it to beheading, or any other death. H. P. C. 268. R. 12 Co. 130.

And the court cannot alter the punishment by command of the king, or consent of the prisoner;

And therefore, where Felton, convicted of the murder of the D. of Buckingham, requested that his hand might be cut off, and the king also desired it, the court could not do it. 1 Rushw. 640.

But by the st. 4 Geo. 11. any convicted for an offence entitled to the benefit of clergy, may be sent to the plantations for seven years; and for a higher offence may be pardoned, on condition he be transported for fourteen years.

For all felony, in which there is judgment to be hanged, his blood is corrupted. Co. L. 391. b.

He forfeits his goods and chattels, his lands and tenements. Co. L. 391. a. 41. a. Vide Forfeiture, (B 3, &c.)

The goods and chattels are forfeited by the conviction. Co. L. 391. a.

The lands and tenements, not till attainder. Co. L. 391. a.

And the forfeiture, as to the mesne profits, relates to the judgment. Co. L. 390. b.

As to mesne charges and incumbrances, to the time of the offence alleged in the indictment. Co. L. 390. b. Stamf. 192. a.

Unless it be in the case of an attainder by outlawry upon an appeal; for then it relates only to the time of the outlawry, for no time is mentioned in the writ of appeal. Co. L. 390. b.

And the felon shall live upon his goods and lands during his life.

But in petit larceny he forfeits only his goods. Co. L. 391. a.

(e) 1. As to murder, see 25 G. 2. c. 37.—2. Which statute extends to peers. Fost. 138, 139. 1 East, P. C. 574.—3. And as to the court by whom judgment shall be given after removal of indictment to K. B. by *certiorari*, see 1 Russell, 697, 698. 4 M. & S. 447.

So, the blood is not corrupted, nor dower lost, in felony contrary to the st. 8 El. 3 of exportation of sheep a second time; the st. 31 El. 4. of embezzlement of ammunition, &c.; the st. 35 El. 1. of refusing abjuration, &c.; the st. 1 Jac. 11. of polygamy; the st. 1 Jac. 12. of witchcraft.

If a statute saves the descent to the heir, the blood is not corrupted; and if it saves the corruption of blood, the inheritance is preserved to the heir. H. P. C. 8.

### (Y) Clergy.

#### (Y 1.) When allowed.

The allowance of clergy is a privilege, which a priest, or any other who by possibility may be a priest, may claim when arraigned for felony, to be delivered to the ordinary to make purgation of the same offence. St. P. C. 123. C.

And it commenced by the canon law, which does not allow a clerk to be tried *coram iudice seculari*, and is confirmed by the st. art. cleri, and other acts of parliament. St. 123. C. Kelg. 99, 100. Eq. Ca. 272. 2 Inst. 636.

It was afterwards extended to inferior orders. Kelg. 100.

And afterwards, to all who read as clerks, which was the test, or trial, whether they were clerks or not. Kelg. 101.

And it shall be allowed to every one, who by dispensation, or possibility may be a clerk: as, to a man excommunicated. H. P. C. 229. 11 Co. 29. b.

One of the Greek church. H. P. C. 229.

One, who had abjured the realm, after his return. H. P. C. 230.

Or, had committed sacrilege, if the ordinary will claim him. St. 123. D. 2 Inst. 114.

So it shall be allowed in all crimes, except high treason, where it is not taken away by statute. 2 Inst. 635. H. P. C. 230.

And, by the common law, it was to be allowed *toties quoties*, till the st. 4 H. 7. 13. St. P. C. 135. D.

So, since that statute, to a clerk *infra sacros ordines*. St. 135. D.

And if a statute creates a new felony, clergy shall be allowed in it, unless it be expressly ousted. H. P. C. 230.

And if clergy is ousted by a statute, the indictment must pursue the act. H. P. C. 231.

And taking it away from the principal, does not take it away from the accessory, unless he be mentioned. H. P. C. 231.

When an offence is within clergy, it shall be allowed, though he be convicted by verdict or confession, though he stand mute, or challenge above 35. H. P. C. 231.

#### (Y 2.) When not.

But clergy shall not be allowed to one, who by no possibility can be a priest: as, to a woman, though she be a nun. St. 123. D. H. P. C. 229. 11 Co. 29. b.

Nor to a Turk; Jew, or other infidel. H. P. C. 229. 11 Co. 29. b.

Nor to a man blind, or maimed. St. 123. D. H. P. C. 229. 11 Co. 29. b.

So a man, who had committed sacrilege, shall not have his clergy, if the ordinary will not demand him; if he be arraigned for that or another crime. St. P. C. 123. D. 11 Co. 29. b. 2 Inst. 114.

So, by the st. 4 H. 7. 13. a man not *infra sacros ordines* shall not be admitted to his clergy, if once admitted to it, and he be eftsoon arraigned of any such offence.

And therefore, to his prayer of clergy, it may be counterpleaded, that he formerly had his clergy. St. P. C. 135. B.

Yet by the st. 4 H. 7. 13. the court upon such a counterplea shall give a day to produce a certificate, or letters of his orders.

By the st. 34 and 35 H. 8. 3. the transcript of any conviction, or attainder upon any indictment, &c., which ought to be made by every clerk of the crown, clerk of the peace, or clerk of assize into B. R., shall be as effectual as the record itself.

So, by the st. 21 Jac. 6. a woman convicted by confession or verdict for felony under the value of 10s. or as accessory, in a case where a man shall be allowed his clergy, shall for the first offence be branded by the gaoler in court with a T. on the left thumb.

And may be punished by imprisonment, stocks, whipping, or house of correction, not above a year, as the judge shall think fit.

By the st. 3 & 4 W. & M. 9. the clerk of the crown, or of the peace, or of assize, where a man (or woman) hath been convicted, who once had clergy (or the benefit of this act, which allows a woman to be burnt in the hand where a man shall have clergy), at the request of the prosecutor or any other, shall certify a transcript, briefly containing the effect of the indictment, conviction, and allowance of clergy, addition of person, and certainty of the offence.

And such certificate shall be proof to the judge, that the person once had clergy, or the benefit of clergy.

#### (Y 3.) In high treason.

Clergy was not allowed in high treason, by the common law. 11 Co. 29. lb. 2 Inst. 150. 629. 634.

Nor in sacrilege. 11 Co. 29. b. 2 Inst. 150.

But in all other crimes it was allowed. 2 Inst. 635.

And by the st. *de clero*, 25 Ed. 3. 4. all clerks, secular or religious, convict for any treason or felonies, touching other persons than the king, shall have clergy.

But if convicted of any species of high treason, though it does not relate to the person of the king, clergy is not allowable within this statute. 2 Inst. 636. H. P. C. 230.

#### (Y 4.) In petit treason.

By the st. 23 H. 8. 1., revived by the st. 5 & 6 Ed. 6. 10. (Vide 11 Co. 29.) the principal (f) in petit treason, convicted by verdict, or confession, is ousted of clergy. Vide H. P. C. 232.

(f) 1. A statute excluding principals from the benefit of clergy, does not thereby exclude the accessory. 2 Hawk. c. 35. s. 26. — 2. Nor yet *vice versa*. — 3. But certain accessories after the fact naming receivers of stolen goods are, in some instances, punished with greater severity than the principal offenders. 4 G. 4. c. 21. s. 20. 1 Geo. 3. c. 30. 2 Geo. 3. c. 28.

And

And by the st. 25 H. 8. 3. though he stand mute, challenge above 20, or do not answer directly.

So, in an appeal, if he be convicted by verdict, or confession, but not otherwise. H. P. C. 232.

And by the st. 3 & 4 W. & M. 9. where a person is excluded clergy when convicted by verdict, or confession, he shall lose it, if he stand mute, will not answer directly to the felony, or challenge peremptorily above 20.

By the st. 23 H. 8. 1. and 4 & 5 Ph. & M. 4. an accessory before, maliciously, is ousted of his clergy. H. P. C. 232. 11 Co. 30. a.

(Y 5.) In murder.

By the st. 23 H. 8. 1. 25 H. 8. 3. 1 Ed. 6. 12. in murder or malice prepense, in all cases, the principal is ousted of clergy.

And by the st. 4 & 5 Ph. & M. 4. an accessory before, of malice.

And by the st. 1 Jac. 8. he who stabs one, having no weapon drawn, nor first striking, though no malice forethought.

So, if he who stabs, struck first, though the other struck him before he was stabbed. R. per 10 J. Jon. 340.

(Y 6.) In arson.

By the st. 23 H. 8. 1. in arson of an house or barn with corn, the principal is ousted of clergy, if convicted by verdict, or confession. 11 Co. 30. Sav. 46. cont. (Vide H. P. C. 238.)

And by the st. 25 H. 8. 3. if he stand mute, answer not directly, or challenge above 20. (Vide H. P. C. 238. 11 Co. 30. b.)

And by the st. 4 & 5 Ph. & M. 4. an accessory before, of malice.

But upon an outlawry, he shall have clergy. H. P. C. 238. (Vide 11 Co. 30. b.)

(Y 7.) In burglary.

By the st. 23 H. 8. 1. and 1 Ed. 6. 12. a burglar, where any person is within the house and put in fear, convicted by verdict or confession, or not answering directly or standing mute, and by the st. 25 H. 8. 3. challenging above 20, is ousted of clergy.

By the st. 5 & 6 Ed. 6. 9. a burglar in a dwelling-house, or in a booth, or tent in a fair, or market, any person being within, though not put in fear, is excluded clergy.

By the st. 18 El. 7. a convict of any manner of burglary by verdict, or confession, or outlawry, is excluded clergy.

By the st. 3 & 4 W. & M. 9. if he stand mute, answer not directly, or challenge above 20.

And, by the same statute, an accessory before is excluded clergy.

By the st. 12 Ann. 7. any one who steals money, or goods of 40s. value in a dwelling-house, or outhouse belonging;

Or enters an house of intent to commit felony, without breaking; or commits felony in an house and breaks it in the night to get out, is excluded clergy.

(Y 8.) In robbery.

By the st. 23 H. 8. 1. and 1 Ed. 6. 12. a convict by verdict, or confession, for a robbery in or near an highway, is ousted of clergy.

And by the st. 25 H. 8. 3. if he stand mute, answer not directly, or challenge above 20.

And by the st. 4 & 5 Ph. & M. 4. an accessory before.

If an indictment says, *in quâdam viâ pedestri*, the offence is ousted of clergy. H. P. C. 242.

### (Y 9.) In larceny from the person.

By the st. 8 El. 4. a person convicted on an appeal or indictment, by verdict, confession, or outlawry, for stealing any money or goods from the person of another, privily and without his knowledge, or standing mute, not answering directly, or challenging above 20, loses the benefit of clergy.

### (Y 10.) Within an house.

By the st. 23 H. 8. 1. a convict by verdict, or confession, of robbing any person in a dwelling-house, the owner, his wife, children, or servants within and put in fear, is excluded clergy.

So, by the st. 25 H. 8. 3. if he stand mute, answer not directly, or challenge above 20.

By the st. 5 & 6 Ed. 6. 9. a convict by verdict, or confession of robbing in a dwelling-house, or in a booth, or tent in a fair, or market, the owner, wife, children, or servants within, though not put in fear, is excluded clergy.

There must be an actual breaking, as well as a robbery. H. P. C. 237, 238.

By the st. 3 & 4 W. & M. 9. a convict by verdict, or confession, of robbing a dwelling-house, any person therein and put in fear, or standing mute, not answering, or challenging above 20, is excluded clergy.

So, by the st. 3 & 4 W. & M. 9. if he rob in a dwelling-house, any person therein, though not put in fear.

By the st. 4 & 5 Ph. & M. 4. and 3 & 4 W. & M. 9. an accessory before to such robbery in a dwelling-house is excluded clergy.

By the st. 39 El. 15. and 3 & 4 W. & M. 9. a convict in any case for stealing goods to the value of 5s. in a dwelling-house, shop, warehouse, or outhouse thereto belonging in the day time, or standing mute, not answering, or challenging above 20, is excluded clergy.

So, if he takes goods of such a value, though he does not remove them out of the house; for the statute did not intend to alter the offence. R. 16 Car. 2. Kelg. 31.

By the st. 10 & 11 W. 3. 23. a convict, &c. for stealing goods to the value of 5s. by night or day in any shop, warehouse, coach-house, or stable, feloniously, though no actual breaking, and though no person there to be put in fear, or standing mute, &c. or an accessory before, is excluded clergy.

### (Y 11.) In horse-stealing.

By the st. 1 Ed. 6. 12. and 2 & 3 Ed. 6. 33. a convict by verdict, or confession, for stealing any horse, gelding, or mare, or standing mute, or not answering directly, is ousted of clergy.

(Y 12.) In



**(Y 12.) In rape, and forcible marriage.**

By the st. 18 El. 7. a person convicted by verdict, confession, or outlawed for a rape, is excluded clergy.

And by the st. 3 & 4 W. & M. 9. if he stand mute, answer not directly, or challenge above 20.

By the st. 39 El. 9. a convict for taking a woman contrary to the st. 3 H. 7. 2. procurers and accessories before are ousted of clergy; or if they stand mute, answer not directly, or challenge above 20.

**(Y 13.) In buggery.**

By the st. 25 H. 8. 6. (revived by the st. 5. El. 17.) a convict by verdict, confession, or outlawed for buggery, is ousted of clergy.

And by the st. 3 & 4 W. & M. 9. if he stand mute, answer not directly, or challenge above 20.

**(Y 14.) Where the party is indicted in a foreign county.**

By the st. 25 H. 8. 3. (revived by the st. 5 & 6 Ed. 6. 10.) and by the st. 3 & 4 W. & M. 9. a convict, standing mute, not answering directly, or challenging above 20, on an indictment in a foreign county for felony, is excluded from clergy; if on evidence it appears, the felony was done in such manner, as would have ousted him of clergy if the indictment had been in the county where done.

**(Y 15.) The effect of clergy being allowed.**

By the common law, after clergy allowed, the party was delivered to the ordinary to make purgation, or without purgation. H. P. C. 240. 5 Co. 110. a.

But by the st. 18 El. 7. when he hath had his clergy and is burned in the hand, according to the st. 4 H. 7. 13. he shall not be delivered to the ordinary, but be discharged, unless the judge think fit to detain him in prison, as he may, not exceeding a year.

By the st. 21 Jac. 6. for felony under the value of 10s. and by the st. 3 & 4 W. & M. 9. in any other case, where a man is allowed clergy, a woman shall not be hanged, but suffer burning in the hand, and imprisonment not exceeding a year, in the same manner as a man should.

By the st. 28 H. 8. 1. (continued and made perpetual by the st. 32 H. 8. 3.) persons in holy orders, who claim the benefit of clergy, shall be used as others.

By the st. 10 & 11 W. 3. 23. every person, who hath the benefit of clergy, instead of being burned in the hand, shall be burned with the usual mark, in the left cheek nearest the nose, before the judge in open court, who is to see it strictly executed.

By the st. 1 Ed. 6. 12. s. 14. in cases, where clergy is not restrained, or where it is restrained by that act, (unless for murder, or wilful poisoning,) a peer shall be deemed as a clerk convict, though he cannot read, and without burning in the hand.

If a clerk was delivered to the ordinary without purgation, to make purgation; till purgation made, he could not take goods to his own use. 5 Co. 110. a.

But now, when he has clergy, and is burned in the hand, he is capable  
T t 4 of

of taking goods afterwards to his own use; for the st. 18 El. 7. is tantamount to a pardon. R. 5 Co. 110. a.

So, if the burning is in the hand and be pardoned. R. 5 Co. 110. b.

And the king may pardon the burning in the hand, as well upon an appeal as an indictment. R. 5 Co. 50. b.

(Y 16.) At what time granted.

Clergy is not usually granted till an inquest taken for the felony; for that is more for the advantage of the king, and the party. H. P. C. 239. 2 Inst. 164.

But it may be allowed under the gallows. H. P. C. 239, 240. Dy. 205.

Where judgment of *pain foret et dure* is given. H. P. C. 239.

So, if clergy was prayed, and allowed, and *non legit* entered upon the record, it may afterwards be allowed; and if he reads, the first entry will be void. R. Dy. 205. H. P. C. 240.

It may be allowed in discretion, though he do not challenge it. H. P. C. 239.

It may be allowed in B. R. where the record is removed thither before clergy allowed by the justices of gaol-delivery. R. 1 Sal. 61.

It may be allowed, though the party does not pray it, but pleads a pardon, &c. which is disallowed. Kelg. 29.

The judge is the person who shall judge when clergy shall be granted. H. P. C. 240.

And, when he reads; for the ordinary is only the minister. H. P. C. 240. Kelg. 28. 51.

And though the ordinary allows that he reads, the judge may say otherwise. Kelg. 28.

And if the ordinary allows it, when he does not read, he may be fined. Kelg. 28. 51.

### (Z) Seizure of a felon's goods.

If a man be indicted for felony, the goods of the indictée may be seised for the king by the sheriff, &c. and inventoried, and the town shall be charged with them. 3 Inst. 228.

But, before indictment, they cannot be seized or inventoried. 3 Inst. 229.

So, after indictment, they cannot be seized and carried away before conviction, or attainder. 3 Inst. 229.

So, before conviction, or attainder, the king cannot grant those goods to another. 3 Inst. 229.

By the st. 1 R. 3. 3. if a sheriff, &c. or other, take or seize the goods of any arrested or imprisoned, before conviction, or attainder, or before the goods be otherwise lawfully forfeited, he shall forfeit double the value of the goods so taken to the party grieved.

And this extends to money as well as other goods. R. Ray. 414.

So, before conviction, the felon may make a sale *bonâ fide* for a valuable consideration; for the property remains in him. R. Skin. 357, 358.

Yet if the felon, after seizure of his goods by the sheriff, makes a sale in trust for his son, and is afterwards convicted; the sale will be fraudulent by the common law, and void, as to the king. R. Skin. 358.

**(2 A) Restitution to the party robbed.**

By the common law, the plaintiff in an appeal of robbery, shall have restitution of the goods stolen. (g)

So, by the st. 21 H. 8. 11. if a felon be indicted, and afterwards attainted by the evidence of the party robbed, or the owner of the goods, or of any other by his procurement, the party robbed or owner shall be restored to the goods or money, and the justices of gaol delivery may award writs of restitution from time to time, as in the case of an appeal.

And the owner shall have restitution, though his servant was robbed.

Stamf. 167

Though he does not make fresh pursuit. Stamf. 167.

Though the goods are sold in market overt. Kelg. 48. Dub. Kelg. 95.

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### (A 1.) How constituted.

None but the king can make justices of peace. *Vide* Dalt. 1. 10 (edit. 1727.)

And the king cannot grant a power to another to make them. 20 H. 7. 8.

Neither can a man prescribe to have such a power. Co. L. 114. Per Brian and Pigot, Bro. Peace, 18.

By the st. 27. H. 8. 24. no person shall have any power to make any justices of eyre, assize, peace, or gaol-delivery, but all shall be made by letters patent in the name and authority of the king or his heirs, in all counties, and other places.

[Provided, sect. 5 & 6. that counties palatine, boroughs, &c. which have power to have justices, enjoy the said authority. *Vide post*, (A 5.)]

### (A 2.) By tenure.

But by the common law a man might have lands by tenure, to find *tot custodes pacis* in such a place. Co. L. 108.

### (A 3.) By election of the freeholders (C)

So by the common law a writ went to a man to make him conservator of the peace: as 49 H. 3. Lamb. l. 1. c. 3.

Or a writ went to the sheriff to elect in *pleno comitatu unum de probiorum et potentiorum comitatus sui in custod. pacis*; and thereupon another writ to the bailiffs to summon the freeholders to elect, &c. 2 Inst. 174. Lamb. l. 1. c. 3.

And another writ to the person elected, *quod sit conservator pacis*. *Vide post*, (A 4.) Lamb. l. 1. c. 3.

### (A 4.) By office.

So by the common law man might be conservator of the peace by his office: as the chancellor, treasurer, high steward, constable, and marshal,

marshal, master of the rolls, and every justice of B. R. throughout the kingdom. Dalt. 1.

The justices of C. B. and barons of the Exchequer in their several courts. Ibid.

So justices of assise and gaol-delivery. Ibid.

So the steward of a turn, leet, and court of piepowders. Ibid.

So the steward of the Marshalsea.

So the constable of the household within the king's house.

So a sheriff, coroner. Dalt. 3.

Constable, and petit constable, within his precinct. Ibid.

#### (A 5.) By charter.

So the king by charter, &c. may grant to a mayor, bailiffs, &c. to be conservators of the peace, within their city, borough, &c. Bro. Commission, 5. Vide post, (A 6.)

And such justices are not determinable at the will of the king. Bro. Commission, 5.

All those that have been mayors, and the three senior aldermen. Quo Warr. 10. Vide London, (K 6.).

And that other justices of the county *non se intromittant*, &c. 20 H. 7. 6, 7. Bro. Patent, 111. Crompt. J. 8. 8 Mod. 361.

But a grant, *quod justic. de com.* or other minister *non se intromittant subpœna*, is void. R. 1 And. 297.

[A charter granting jurisdiction to borough magistrates over a district not within the borough does not exclude the county justices without express words. 3 T. R. 279.]

[And though such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district *in tam amplius modo et formâ*, &c.; yet if there be in the latter charter a saving clause of the rights of the crown and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices. Ibid.]

[By charter, the mayor and some of the aldermen of London have jurisdiction in Southwark; but as the charter contains no *non intromittant* clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. 4 T. R. 451.]

By the st. 27 H. 8. 24. justices of peace, &c. shall be made by letters patent of the king; provided, that counties palatine, boroughs, &c. which have power to have justices, enjoy the said authority. Vide ante, (A 1.) — Post, (A 6.)

#### (A 6.) By commission.

By the st. 1 Ed. 3. 16. good men and lawful, no maintainers of evil, nor barretors, shall be assigned to keep the peace.

By the st. 18 Ed. 3. 2. two or three of the best reputation in the counties shall be assigned by the king's commission. [3 T. R. 40.]

And by the st. 2 & 3 Ph. & M. 18. a commission to justices of peace in a borough, &c. shall not be superseded by a subsequent commission to justices of the county.

(A 7.)

## (A 7.) Who may be constituted.

Justices of peace, by the st. 1 Ed. 3. 16. ought to be good men and lawful, no maintainers of evil, nor barretors.

By the st. 18 Ed. 3. 2. of the best reputation in the counties (*meults vailantz*, most substantial).

By the st. 34 Ed. 3. 1. in every county there shall be assigned one lord, and with him three or four of the best quality (*meultz vauces*, the most worthy or valiant) in the county, with some learned in the law.

By the st. 12 R. 2. 2. the chancellor, &c. shall be sworn not to make justices of peace for gift, brocage, favour, or affection, nor any who by him himself, or other, privily or openly, sues to be in office, but the best and most lawful men, and sufficient.

By the st. 13 R. 2. 7. justices of peace shall be of the most sufficient knights, esquires, and gentlemen of the law in the county.

By the st. 2. H. 5. 5. sess. 2. they shall be of the most sufficient dwelling in the county not taking in foreigners, unless lords and justices of assise.

So, c. 4. sess. 1. those of the *quorum* were to be resident in the county (except lords justices of the one bench or the other, chief baron, serjeants, and king's attorney).

By the st. 18 H. 6. 11. none shall be a justice of peace who hath not 20*l.* *per annum*; and if such, in a month after notice of the commission, give not notice to the chancellor, that he may put another in his room, or act as a justice, he shall forfeit 20*l.* and be put out of the commission; except in towns corporate, or where there are not others sufficient.

[By st. 1 M. st. 2. c. 8. no sheriff shall execute the office of a justice of the peace, during the time that he acts as sheriff.]

[And by 5 G. 2. c. 18. s. 2. no attorney, solicitor, or proctor shall be a justice of the peace for any county, during the time he shall continue in the practice of that business.]

[By stat. 18 G. 2. c. 20. no person is capable of being a justice of peace, who has not 100*l.* *per annum* in lands, &c. in possession, or 300*l.* in immediate reversion or remainder, and who shall not make oath of it at the quarter-sessions before he acts, on penalty of 100*l.* the proof to lie on defendant; and he must specify any lands he intends to insist on (which are not mentioned in his oath) at delivery of plea; and if they are liable to incumbrances jointly with other lands are not sufficient. If plaintiff discontinues or is nonsuited, defendant shall have treble costs. Only one penalty of 100*l.* shall be recovered for any offence prior to the action, and no subsequent action brought for any offence prior to the first action, and it must be commenced within six months after the offence.]

[This act does not extend to cities, &c. having justices; nor to peers or lords of parliament, privy-councillors, judges, justices of great sessions for Chester or Wales, or the heir apparent of a lord of parliament, or of any qualified to be a knight of a shire; nor to the officers of the board of green cloth within the verge, nor the commissioners of the navy, nor under secretaries of state, nor secretary of Chelsea college,

lege, where they used to be justices; nor to heads of colleges in the universities, or the vice-chancellor or the mayor of Oxford or Cambridge, with respect to the counties of Oxford, Berks, and Cambridge.]

[By st. 1 G. 3. c. 15. justice who has once qualified need not sue out *dedimus potestatem* on a new commission, but shall take the oaths before the clerk of the peace, and sign a roll containing them.]

[By stat. 7 G. 3. c. 9. they need take them but once in one king's reign.]

[By st. 9 G. 3. c. 30. the commissioners of the navy may act as justices in all things relating to forgery, &c. to receive seamen's wages, &c. or to embezzling naval stores.]

### (A 8.) When their authority determines.

The authority of justices of peace appointed by commission determines by the death or resignation of the king. Dy. 165. Bro. Commission, 19. 21. Dalt. 11.

[But by 1 An. st. 1. c. 8. s. 2. no patent or grant of any office or employment shall determine by the king's death or demise, but it shall continue in force for six months after, unless in the mean time made void by the successor.]

By writ under the great seal. Dalt. 11.

By *supersedeas*. Dalt. 11.

But that only suspends their authority; for it may be revived by a *procedendo*. Bro. Commission, 13. 12 Ass. 21. (in a commission of oyer and terminer.) Dalt. 11.

By the coming of the justices in eyre or B. R. into any county, and proclamation made thereof. Bro. Commission, 9, 10.

By a new commission of the peace. 10 Ed. 4. 7. a. Bro. Commission, 6. 24.

Though such commission be only for a present turn. Bro. Commission, 7.

Or to one justice only for his life. Bro. Commission, 11.

Or to some in a particular town, or liberty; this determines the authority of the antient justices in that liberty, though there be not a clause, *quod alii justiciarii se non intromittant, per curiam, præter Choke*, 10 Ed. 4. 7. a. Cont. per Fineaux, 20 H. 7. 8. Bro. Commission, 20. acc.

But if there be a clause, *ita quod justic. de com. se non intromittant*, Fineaux acc. 20 H. 7. 8.

But if the new commission is void; it does not determine the former; as, if it be granted to persons not *in rerum natura*. Bro. Commission, 6.

A commission to hear and determine felonies does not determine a commission of the peace as to the peace. Bro. Commission, 8.

Nor a commission of gaol-delivery; for they are consistent. Bro. Commission, 24.

By the st. 2 & 3 Ph. & M. 18. a commission to a county does not determine a commission for a city or town corporate within the same county.

And a new commission to others within a town does not determine the authority of the mayor and commonalty, who are justices of peace by



by grant to them and their successors, within the same town. Bro. Commission, 5.

By the st. 1 Ed. 6. 7. a justice of peace shall not lose his authority by being made a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, serjeant at law, or sheriff.

After a new commission, an act by a justice of peace in the former commission is valid, till notice specially given to him. Bro. Commission, 2.

Or the new commission be read at the sessions, assises, or in full county, or a sessions held by force of it. Bro. Commission, 6. 14. 18.

For notice to one justice is not sufficient for others. Bro. Commission, 2.

[The power of Chancery extends only to putting them in, but has no right to punish them afterwards for mal-behaviour; the redress is to move B. R. for an information, and afterwards the complainants may apply to Chancery to turn them out of the commission. 2 Atk. 2.]

[And when affidavits are made in the court of B. R. impeaching the conduct of magistrates, they are frequently ordered to be laid before the lord chancellor, to enable him to judge whether or not such magistrates ought to be continued in the commission of the peace. By Lord Kenyon Ch. J. 4 T. R. 290.]

### (B 1.) *The authority of justices of peace.*

Commissioners of the peace in the county at large have all that authority which, by their commission, or by any statute, is given to them. *Vide Dalt. 20, §1.*

Justices within a corporation have the authority granted by their charter, or any statute, to justices of cities, boroughs, and towns corporate.

[The crown may grant to any city to have justices of their own within themselves, and exclude the county justices from intermeddling in the ordinary business of justices of peace. Str. 1154.]

[In such case the act of the county justices will be void, and not merely a breach of the franchise. *Ibid.*]

[So, where a city has an exclusive commission (as New Sarum) the county justices cannot act in excise matters within the city, though stat. 12 C. 2. c. 23. gives jurisdiction in them to justices residing near the place. *Ibid.*]

A justice of peace has no authority of any offence committed out of his borough or county. *Vide Dalt. 24.*

Unless it be felony, or breach of the peace; for then he may secure the offenders.

Or he be specially enabled by statute to do it.

But such act out of his precinct is void.

[He may commit a person for an act which is felony by the Irish law, in order to his being sent over there to be tried. 2 Str. 848. 2 Vent. 314.]

[Two justices may take a recognizance for the appearance of one charged with felony on the high seas at the sessions of admiralty, and the recognizance may be estreated into the Exchequer. Park. 241.]

A justice of peace, out of his borough or county, cannot do an act of jurisdiction of a thing within his precinct. R. Cro. Car. 213.

But a mere examination, if he exercise no jurisdiction, he may take, being out of his precinct. Ibid.

As an examination of a person robbed, upon the st. 27 El. Ibid.

[By 9 Geo. 1. c. 7. a justice dwelling in a city or precinct that is a county of itself, within the county at large, may act in his own dwelling-house within the county at large.]

[And by 24 Geo. 2. c. 55. if any person against whom a warrant shall be issued, shall escape, go into, reside or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, on proof or oath of the hand writing of the justice granting such warrant shall indorse his name thereon, and this shall be a sufficient authority to execute the warrant within such other jurisdiction.]

The authority of a justice of peace is to be used *secundum vim, formam, & effectum statuti*.

And if a statute refer a matter to his discretion, it ought to be *sana discretio*, conformable to law and reason. 4 Co. 100. a.

If a thing be referred to the next justice, others without him cannot intermeddle. 1 Sand. 263.

But others may join with him. R. Sal. 477.

So, if any authority is given to one justice, two or more may execute it. -Dalt. 25.

But if given to two, one alone cannot execute it. Ibid.

If a statute gives authority to justices of peace to make a conviction, the conviction must be exactly pursuant to the statute.

So justices of peace are confined to offences in a statute named in their commission, or which concern the peace of the kingdom in general; but cannot proceed for an offence against a statute, which creates a new offence, not named in the commission.

[They (or the quarter sessions) have no authority in new created offences, but by express words. Str. 1256.]

Or by which no jurisdiction is given to justices of peace; as, they cannot take an indictment upon the st. 2 & 3 Ed. 6. 4. R. 4 Mod. 51.

So they cannot take an indictment upon a penal statute, which does not give them jurisdiction: as, upon the st. 1 & 2 Ph. & M. 11. for using more looms than one, when he does not dwell in a city or borough. R. 4 Mod. 379.

Upon st. 1 & 2 Ph. & M. 7. for selling wares in a corporation being a foreigner, out of a fair, &c. R. 5 Mod. 149.

Nor upon the st. 5 El. 14. forging a false deed. R. Cro. El. 87. Per three J. Poph. Dub. Cro. El. 601. R. 9 Co. 118. b. Vide post, (B 3.)

Nor upon the statute of usury. R. Sal. 680.

So they cannot take an indictment for an offence at common law, not named in the commission; for the general commission *de omnibus aliis transgressionibus*, &c. must be intended for other offences intrusted to their cognizance by the several statutes which created or enlarged their power: and therefore they cannot take an indictment for perjury at the common law. 1 Sal. 406.

[But perjury on the stat. 5 Eliz. is indictable before them, because provided for by the statute. Ibid.]

Nor for forgery. R. 1 Sal. 406. 1 East, 173. S. P.

But

But an order of justices, though it be not pursuant to the authority, being upon a matter within their jurisdiction, will not be absolutely void till it be avoided: and therefore in an action upon a bond to perform it, if the defendant pleads no order made, and the plaintiff shews a defective order, upon which the defendant demurs, there shall be judgment for the plaintiff. R. Sal. 674.

[By st. 16 G. 2. c. 18. justices may act in relation to the poor, vagrants, high-ways, parochial taxes, levies, or rates, though rated or chargeable in the place; but not on an appeal.]

[By st. 24 Geo. 2. c. 44. and 30 Geo. 2. c. 24. no writ shall be sued against a justice for any thing done in execution of his office without a month's notice, and he may tender amends, and plead it in bar with other plea; or may pay money into court. Evidence shall not be given of any cause of action, but what is contained in notice.]

[No action shall be brought against a constable for any thing done in obedience to justice's warrant, unless he refuse to shew it; and if action is brought against him, without the justice, or with the justice, and the warrant is proved, jury shall find for constable, notwithstanding defect of jurisdiction in justice.]

By st. 26 Geo. 2. c. 14. justices' clerks shall take no fees, but what shall be allowed by quarter-sessions, and ratified by judges of assise; a table of fees to be deposited with clerk of peace, and copy hung in the room where quarter-sessions are held. Clerk taking more forfeits 20*l*.

[By st. 26 Geo. 2. c. 27. no act or order of two justices shall be vacated for want of *quorum unus* expressed.]

[By st. 27 Geo. 2. c. 20. justices in warrant of distress shall direct when goods shall be sold, between four and eight days.]

[Officer may deduct reasonable charges, and return overplus to the owner.]

[This extends not to the acts for quakers' tithes.]

[By st. 7 Geo. 3. c. 21. all acts done by two justices qualified to act in cities, liberties, &c. are good, though neither of them of the quorum.]

[By st. 9 Geo. 3. c. 20. they are authorised in quarter-session, on presentment of grand jury at assise, to order shire-hall, &c. to be repaired, and a rate on the county for the sums laid out; if there is occasion for sudden repairs, not more than 30*l*., two justices may do it on view.]

[By st. 15 Geo. 3. c. 1. they may administer oaths when any penalty is to be levied or distress made.]

[By st. 18 Geo. 3. c. 10. justices may award costs on complaint determined by him: to be levied by distress; for want of it commitment from one month to ten days, or till money and expence of commitment paid: where penalty amounts to 5*l*. costs not exceeding one fifth to be deducted thereout.]

[Where an act to be done by two or more justices is judicial, requiring an exercise of the judgment, they must execute it together, since the result of their conference is to be the ground of their determination; where it is ministerial only, they may do it separately. 3 T. R. 38.]

[With the exceptions of forgery, 1 East, 173, and perjury, every offence tending to a breach of the peace, is cognizable by the quarter-sessions; therefore the offence of soliciting a servant to rob his master. 2 East, 5.]

## (B 2.) In high treason, misprision, &amp;c.

In cases of treason, misprision, and *præmunire*, the justices of peace ought to apprehend the offenders. Vide Justices, (K 1, &c.—L 1, &c.)—N. 1.) *Præmunire*.

And shall take their examination. H. P. C. 168.

And the information upon oath of others, who know any thing material, in writing signed by them.

And commit the offenders. H. P. C. 168.

And take recognizances of the informers to give evidence before the council, or elsewhere when necessary. Ibid.

And shall make a certificate of their proceeding to some of the privy council. Dalt. 212. (edit. of 1727, 460.) or to B. R. or the gaol-delivery. H. P. C. 168.

And by the st. 5 El. 1. justices of peace at the quarter-sessions may inquire of *præmunire* against such as by writing, teaching, or act, maintain the authority of the bishop of Rome heretofore claimed in this realm; but in forty days or the first day of the term must certify it into B. R. on pain of 100*l.* to every justice of peace present at such presentment.

And by the st. 23 El. 1. justices of peace may inquire of treason against those who contrary to the st. 13 El. 2. use, publish, or put in ure any bull, &c. from Rome, or absolve or be absolved by colour of it; or contrary to 23 El. 1. withdraw any in the realm from their obedience, or for that intent to the Romish religion, or move to be reconciled, or shall be reconciled to the see of Rome.

And of misprision of treason against those who contrary to 13 E. 2. conceal any bull, &c.

And of *præmunire* against those who contrary to 13 El. 2. abet the users, publishers, or receivers of such bulls; or bring into the realm, offer, or receive to use any *agnus dei*, &c.

And after such inquiry, the justices of peace ought to certify their presentments into B. R. without other precept. H. P. C. 168.

Justices of peace have no authority to hear and determine high treason, or misprision of treason. Ibid.

Nor petit treason. Semb. Comb. 405.

Nor offences in cases of *præmunire*. H. P. C. 168.

Vide post, (B 3.)

## (B 3.) In felony.

Justices of peace have authority to inquire of all felonies. Vide Justices, (M 1, &c.—O 1, &c.—P 1, &c.—S 1, &c.)

Though it be murder. Dy. 69. a. notwithstanding that by the st. 6 Ed. 1. 9. an homicide shall be imprisoned till the coming of the justices in eyre, or gaol-delivery; and by the st. 4 Ed. 3. 2. keepers of the peace shall send their indictments before the justices of gaol-delivery; for their authority has been since enlarged by the st. 18 Ed. 3. 2. and 34 Ed. 3. 1. H. P. C. 165, 166.

Or petit treason, as of a felony. Co. L. 391. a.

By the st. 18 Ed. 3. c. 2. justices of peace with other learned men, when need is, shall be assigned to hear and determine and punish felonies and trespasses in the same county.

And by the st. 34 Ed. 3. 1. they may hear and determine, at the king's suit, all manner of felonies and trespasses in the same county; and writs of oyer and terminer shall be granted, &c.

And

And by the st. 17 R. 2. 10. in every commission of the peace two men of law shall be assigned, to make deliverance of thieves and felons.

But by the st. 1 & 2 Ph. & M. 13. justices of peace are directed to certify the examinations of prisoners for manslaughter or felony, and the bailment of them, to the next gaol-delivery.

Justices of peace may hear and determine all felonies by statutes, which specially give authority thereof to justices of peace. H. P. C. 167.

And all felonies made by statutes, in which no jurisdiction is given to any justice, or court in particular, nor any special manner of trial prescribed.

But they cannot hear felonies, unless there be a clause in the commission *ad audiendum et terminandum*. H. P. C. 165.

Yet, by force of that clause, they cannot hear felonies limited by statute to justices of oyer and terminer; as forgery by the st. 5 El. 14, &c. H. P. C. 165. R. 2 Rol. 96. l. 25.

And in regard of the direction above, by the st. 1 & 2 P. & M. 13. of sending the examination of felons to the next gaol-delivery, they will not in discretion determine great felonies. H. P. C. 166.

They cannot proceed upon an indictment taken before the coroner. H. P. C. 166. 168.

Or before justices of oyer and terminer, or gaol-delivery. Ibid.

But only upon an indictment before themselves or their predecessors. H. P. C. 166. 168.

Or transmitted to them from the sheriff's turn, by the st. 1 Ed. 4. 2. Ibid.

Justices of peace have no authority to hear and determine felony against the st. 3 H. 7. 18. whereby the steward, treasurer, and comptroller of the king's household, or one of them, may inquire by twelve of the check-roll, if a sworn servant admitted into the check-roll of the household have conspired the death of the king, or a lord of the realm, or the king's council, the steward, treasurer, or comptroller of the household: and on such inquisition the offender shall be put to answer before the said steward, treasurer, and comptroller, or two of them, who may hear and try the offender, not being a peer, by other twelve of the household, and if convict, by confession or otherwise, he shall suffer as a felon. H. P. C. 167.

Nor felony against the st. 8 H. 6. 12. which gives justices of the one bench or the other jurisdiction of such felons, who steal or withdraw any record out of the chancery, exchequer, the one bench or the other, or treasury, whereby any judgment is reversed, their procurers and abettors.

And this statute extends to those who raise a record. H. P. C. 167.

And by the same statute, it shall be tried by a jury, half of the men of any of the same courts, and half of other. Vide Dalt. 108.

Nor felony against the st. 38 H. 6. 1. which enacts, that if a servant who embezzles his master's goods after his death, appear not in B. R. upon proclamation to be made by the sheriff two market days, upon a writ to him directed at the suit of the executor, it is felony: for B. R. must best know the default of appearance, which is to be in that court. H. P. C. 167.

Nor murder, homicide, &c. committed within the king's house, which by the st. 93 H. 8. 12. shall be tried before the lord steward, and in his



absence before the treasurer, and comptroller, and steward of the marshalsea, or two of them.

Nor felony against 5 El. 14. for forging, after a conviction for the first offence, any deed, writing sealed, court roll, will, of intent that the estates of freehold or inheritance or interest of any person in any lands, freehold or copyhold, may be molested or charged, or that any person may claim any estate or interest for years in lands, not copyhold, or any annuity in fee-simple, fee-tail, for life, or years, or any obligation, bill obligatory, or acquittance; or for consenting to such forgery; or using such deed, or writing, knowing it to be forged: for the determination of such felony is given to justices of oyer and terminer and gaol-delivery. H. P. C. 167.

Nor felony, where the stroke is in one county and the death in another, or accessory in one county to a felony in another; for by the st. 2 & 3 Ed. 6. 24. the trial of it is given to justices of gaol-delivery and oyer and terminer. Ibid.

Nor felony against the st. 27 El. 2. if any receive, relieve, aid, &c. any jesuit, &c. knowingly.

Every justice of peace by virtue of his commission, may direct hue and cry to be made upon a felony committed. Vide Dalt. 105. 169.

May apprehend the felon.

Or make a precept to the sheriff, bailiff, constable, &c. to make search for the offender, upon a felony committed.

Or to arrest and imprison a person suspected to be a felon. Dalt. 105.

By the st. 2 & 3 Ph. & M. 10. a justice of peace, before whom any shall be brought for felony or suspicion of it, shall take the examination of the prisoner, and information of such as bring him, of the fact and circumstances, and as much as is material shall put in writing within two days after.

And by the st. 1 & 2 Ph. & M. 13. so shall he do before bailment, if the felon be bailable.

When bailable, and how he shall be bailed, vide in Bail, (F 1, &c.—G 1.—K 1.)

The examination of the prisoner shall be without oath; of the witnesses, upon oath. Per Ord. Kelg, 2. H. P. C. 262.

And the son, or daughter, may be examined against their mother. Dalt. 541.

But not a wife against her husband. H. P. C. 263. Vide Dalt. 540.

The justice shall take the information of the whole truth, though it tends to the acquittal of the felon.

By the st. 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & M. 10. the justice of peace is fineable, if he certify not such examination, and information, and bail by him taken, to the next gaol-delivery.

Or, if it be petit larceny, it may be certified to the quarter-sessions.

And all recognizances and bailments taken by a justice of peace must be certified the first day of the next sessions *ante meridiem*. Per Ord. Kelg, 1.

By the st. 2 & 3 Ph. & M. 10. the justices of peace may bind by recognizance such as prove any thing material, to appear at the next gaol-delivery for the county, or corporation; and shall there certify such recognizance, on pain of being fined.

If any refuse to give evidence, the justice may commit him. Vide Dalt. 111.

If

If the offender, being upon bail, do not appear at the next sessions the first day, or if the prosecutor do not appear at the Old Bailey the first day of the sessions, their default shall be recorded, and process go thereupon. Kelg, 2.

If the offence be notailable, the prisoner by mittimus shall be awarded to gaol.

By the st. 4 Ed. 3. 2. justices of peace shall send indictments (not determined before themselves) to the justices of gaol-delivery.

But if the party indicted does not appear before the justices of gaol-delivery, the justices of peace cannot proceed afterwards: for the indictment is not before them; and the justices of gaol-delivery cannot make process returnable before the justices of peace. R. 2 Rol. 96. l. 50.

(B 4.) For preservation of the peace.—By restraint of those who break it.

By the st. W. 1. 3 Ed. 1. 1. *le roy voet, que la pees de seinte eglise, et de la terre, soit bien gardé et maintenu en toutes pointes, et comune droiture soit fait, auxibien as poverez, come as riches, sanz regard de null y.*

And by the st. 1 Ed. 3. 16. (which first ordained justices of peace) authority was only given to them to keep the peace.

And therefore, every justice by himself may, for the preservation of the peace, do all that a private man or constable may do.

May part, and restrain the assailants.

[As to the jurisdiction of justices in respect to insane persons, see 39 & 40 Geo. 3. c. 94.]

(B 5.) By surety of the peace, and good behaviour.

So justices of peace by their commission have authority to require *conjunctim aut divisim* surety of the peace and good behaviour. Vide Forcible Entry, (D 18, &c.)

And the justice may demand such surety by parol, if the party be present. Vide Forcible Entry, (D 18.) Vide Dalt. 379. 387.

Or may by parol command an officer, or his servant, to arrest him being present to find surety. Ibid.

Or may make a precept in writing under seal, to bring any before a justice to find surety. Ibid.

And such precept may be directed to an officer, or other indifferent person. Lamb. l. 2. c. 2. Dalt. 387.

It must contain the cause. Ibid.

For the form, to answer such things as shall be objected, is new and bad. Lamb. l. 2. c. 2. But a warrant was made in this form. Per Poph. 3 Jac. and per Ellesmere Ld. Chanc. 4 Jac. Dalt. 301. (edit. of 1727, 574.) Yet said to be bad. 2 Inst. 591.

It may warn the party himself before the justice who granted it. Per Wray, 5 Co. 59.

[(B 5.) For what causes, &c. the surety of the peace shall be granted.]

[When a person has just cause to fear, that another burn his house, or do him a corporal hurt, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person. 1 Hawk. 127.]

[So, according to the better opinion, if he be threatened to be imprisoned. *Id. ibid.*]

[But the peace shall not be granted to a man, merely because he is at variance or at suit with his neighbour. *Dalt. c. 116.*]

[Nor because he is afraid that the person against whom he prays it, will do harm to his servants or cattle. *Lamb. 88.*]

[Nor, for a battery or trespass that is past, or any breach of the peace that is past. *Dalt. c. 11.*]

[Facts must be alleged in articles of the peace sufficient to warrant the apprehension of danger. *13 East, 172.*]

[Affidavits in answer to articles of the peace, denying the facts, are inadmissible. *13 East, 171.*]

[Bail on articles of the peace is not by way of punishment, but as a security for good behaviour. *1 T. R. 700.*]

[The term during which security for the peace shall be given, is entirely in the discretion of the court. After it has been given, the court may shorten the period if they see occasion. But it seems, that without fresh facts they cannot enlarge it, or require a renewal of the security after it has run out. *1 T. R. 696.*]

#### (B 6.) Recognizance for the peace, how discharged.— By release.

If a recognizance for the peace be taken by a justice, upon his discretion without complaint, the justice alone may release it.

If taken upon complaint of another, he may release it, if the release be certified to the next sessions, and recorded there.

Though it be to keep the peace against him and all people. *Cont. 21 Ed. 4. 40. b.*

And such release may be before the justice who takes the recognizance, or another justice.

And shall be sent with the recognizance to the sessions; for the recognizance may be forfeited before the release, and therefore shall not be cancelled.

But the king cannot release or discharge a recognizance, before it be forfeited. *D. 21 Ed. 4. 40. b. 2 Vent. 131.*

Nor the party after the forfeiture. *21 Ed. 4. 40. b.*

But the king after forfeiture may release. *2 Vent. 131.*

Vide post, (B 8.)

#### (B 7.) By death.

A recognizance of the peace will be discharged by the death or demise of the king; for it was to keep the peace of the present king. *1 H. 7. 2. Dalt. 398.*

Or by the death of him that required it. *Dalt. 398.*

Or by the death of the recognisor. *Ibid.*

But if it was forfeited before, it is not discharged; and therefore it is safe for the justice to send it to the next sessions. *Ibid.*

It is not discharged by the death of the sureties; for the executors are bound. *Ibid.*

If, after the death of the cognisor, his recognizance be estreated in the exchequer, it shall be discharged upon plea. *R. Sav. 53.*

So upon motion.

How

How a recognizance for the peace may be forfeited or superseded, vide Forcible Entry, (D 26. 28.)

(B 8.) Recognizance for good behaviour, how forfeited, &c. vide Forcible Entry, (D 27.)

A recognizance for good behaviour will be forfeited by any act, which is a forfeiture of recognizance for the peace. Vide Forcible Entry, (D 27.)

Or by an act, which is a reason for requiring surety for the good behaviour.

As for being drunk. Dalt. 415.

So for an escape from a constable after an arrest upon suspicion of a crime. R. 2 Leo. 166.

If he go in company with riotous malefactors. Cro. El. 86.

Or go with weapons in an hostile manner. Ibid.

If he threaten another to beat him, or fight with him. Ibid. 4 Inst. 181.

If he take the goods of another, though it be not with violence. Per Wray, Cro. El. 86.

But it is not forfeited, if the party say to one, not an officer, or not in the execution of his office, you are a quarrelsome fellow, or scurvy knave. (Vide 2 Rol. 228.) Dalt. 415.

Or to a merchant, you are a bankrupt. Dalt. 415.

Or to a man, you are a liar, drunkard, &c. R. 4 Inst. 181. for though they are provocations, they do not tend immediately to the breach of the peace. R. ibidem. Dub. Cro. El. 86. Per three J. Moore, 249.

Or if the party commit a trespass *quare clausum fregit*, though it be intended *vi et armis et contra pacem*, where it is only in reputation of law. R. 4 Inst. 181. Cro. El. 86.

Or trespass to the goods and chattels, and not to the person of a man. 4 Inst. 181.

A recognizance for good behaviour, as well as for the peace, may be released. Vide Dalt. 415.

Or superseded, or removed by *certiorari*. Ibid.

If the party refuses surety he shall be committed.

But if the party committed bring an *habeas corpus*, the return must shew for what cause the sureties were required, and in what sum, and all in certain. R. 2 Vent. 23.

[Estreats ought not to be made on proof by witnesses of misbehaviour out of court; but for non-appearance they ought, for the breach appears by act of court. Parker, 54.]

If a recognizance for the peace, or good behaviour be broken, there shall be a *scire facias* upon it. 4 Inst. 181.

And the party cannot be indicted for a breach before a *scire facias*. R. 1 Rol. 900. l. 10. R. Ray. 196.

Vide Forcible Entry, (D 16, &c.)

(B 9.) By suppression of riots, &c.

So by the st. 34 Ed. 3. 1. justices of peace shall have power to restrain all evil doers, rioters, and other barretors, and to arrest, pursue, and punish them according to law. Vide Forcible Entry, (D 8, &c.)

By the st. 13 Hen. 4. 7. if any riot be made, the justices or two of them,

them, with the sheriff, or under-sheriff, and *posse comitatus*, if need be, shall arrest them, and record what they find done in their presence, by which record the offenders shall be convicted as in forcible entry: but if the offenders be departed before the justices come, they shall inquire of such riot within a month, and hear and determine it. And if the truth cannot be so found, they shall certify the king and council in a month, on which certificate, being of the force of a presentment, the offenders shall be put to answer; and if they traverse it, it shall be sent into B. R., and if convicted they shall be punished at the discretion of the king and council. If they refuse to appear at the first precept, then shall go a *capias*, then a proclamation in the county to appear in three weeks, and on default, at the return of the proclamation they shall be convicted. And the next justice of peace, or sheriff, or judge of assise, not doing execution of this statute in case of a riot, &c. in their presence, shall as oft forfeit 100l.—Confirmed by the st. 19 Hen. 7. 19.

By the st. 2 H. 5. 8. a writ shall go to the justices, to put the former statute in execution; but if they neglect it, a commission shall go to inquire of such riots, and of the default of the justices, and that though no writ came to them. But they shall execute it at the king's charge to be allowed by the sheriff. And these statutes shall hold place in cities and boroughs, which have justices of peace.

By the st. 2 H. 5. 9. (confirmed and made perpetual by the st. 8 H. 6. 14.), on complaint that felons or rioters are fled, witnessed under the seal of two justices of peace, and the sheriff, that the common fame runs of such riots, the chancellor shall send out a *capias*, and a writ of proclamation, and if not then taken, they shall be attaint.

By the st. 19 H. 7. 13. on inquiry of riots, the sheriff shall return twenty-four jurors of 20s. freehold, or 26s. 8d. copyhold, or both, and 20s. issue the first day, 40s. the second day, on pain of 20l. and if the riot be not found by reason of maintenance or embracery the justices shall certify such maintainors or embracers, together with the riot, on pain of 20l. and they shall forfeit 20l.

[By st. 1 G. 2. c. 5. every justice, sheriff, under-sheriff, and mayor, shall, on notice or knowledge of any unlawful, riotous, and tumultuous assembly of persons, to the number of twelve or more, together with such help as he shall command, resort to the place, on which he shall, amongst the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence while proclamation is making, and after that shall openly, with a loud voice, make or cause to be made proclamation, in words to the effect prescribed by the act; *quod vide.*]

[Persons present, aiding and abetting, are principals in the second degree, and are within the riot act. 4 Burr. 2073.]

[If six are indicted for a riot, two die before trial, two are acquitted, and two are found guilty, the judgment shall not be arrested; for the jury having found two to be guilty of a riot, the court will intend that it must have been together with those two who died, who have never been tried, as otherwise it could not be a riot. 3 Burr. 1262. 1 Blk. 291. 350.]

What is a riot, &c. and how suppressed upon view, vide in Forcible Entry, (D 8, &c. 14.)

(B 10.) Upon



(B 10.) Upon inquisition.

If the rioters are departed, an inquisition may be made within a month. Dalt. 299.

If other justices take the inquisition, it is sufficient. Ibid.

And if it be within a calendar month. 1 Sid. 186.

Or if it be after the month it is good, but the justices are fineable; for the justices by their commission may inquire. Qu. Vide Dalt. 299.

Or if the jury be charged within a month, though they make their presentment afterwards. Ibid.

Justices of peace may inquire, though none of them be of the quorum. Ibid. R. 2 Leo. 184.

After inquisition taken the justices may issue process for the party. Dalt. 300.

They may hear and determine, and thereupon fine and imprison. Ibid.

And upon payment or surety for it, may deliver. Ibid.

But such inquisition is traversable. Ibid.

And if it be traversed, it shall be sent to B. R. or the quarter-sessions. Ibid.

Whether it may be taken, except at the quarter-sessions. Dub. 1 Sid. 186.

The sheriff need not join in taking the inquisition. Dalt. 300.

A certificate to the council of B. R. ought to be made, if upon the inquisition, the riot, by maintenancy or embracery, be concealed. Dalt. 301.

If the jury find ten guilty, the justices may certify twenty to be rioters. Dalt. 302.

And the certificate may supply any thing material omitted in the inquisition. Ibid.

But if any justice dies within a month after inquiry, the certificate cannot be made. Ibid.

By the st. 5 R. 2. 7. 15 R. 2. 2. and 8 H. 6. 9. justices of peace may give redress upon a forcible entry or detainer. Vide Forcible Entry, (A 1, &c.—B 1, 2.—D 1, &c.)

(B 11.) By punishment of trespasses.

By the st. 18 Ed. 3. 2. and 34 Ed. 3. 1. justices of peace may hear and determine at the king's suit all manner of trespasses in the same county.

[By st. 15 G. 2. c. 33. s. 6. any person taking the rush or shrub called starr or bent, on the north-west coast of England, convicted before one justice, forfeits 20s. and for the second offence to suffer a year's imprisonment, whipping and hard labour.]

[S. 7. Any person having it, within five miles of such places, shall be deemed the puller of it, and forfeit 20s.]

(B 12.) By seizure of arms, &c.

The statutes which concern arms are *pro bono pacis*.

By the st. North. 2 Ed. 3. 3. none, except the king's servants in his presence, his ministers in executing office, or assistants, or on hue and cry, shall come before the king's justices or ministers during their office with force, nor bring force in an affray of the peace, nor go or ride armed, &c.

&c. on pain to forfeit their armour, and their bodies to prison at the king's pleasure. Conf. by the st. 7 R. 2. 13. and 20 R. 8. 1.

The justice may command the offenders upon view, or complaint, to find surety for the peace.

Or shall go to the place where the force is, and make a record of it, and afterwards may commit the offenders, and seize and appraise the arms found with them, and the record shall be estreated in the exchequer, that the king be answered for the arms, or the value. Dalt. 130.

If the force be in a house, he may enter and search there. Ibid.

The justice may fine the offenders committed, and the record of it shall be certified to the next general sessions, as in forcible entry. Ibid.

Or in B. R. or the justices of gaol-delivery. Ibid.

Or, upon payment of the fine or surety for it, the justice may deliver them. Ibid.

So there may be an information against any one for going or riding in arms to the terror of people. 3 Mod. 117.

Upon such force there may be a writ upon the st. North. directed to the sheriff or the justice, commanding him that he make proclamation *ne quis armatus contra pacem et statutum accedat*, &c. And all offenders after proclamation commit to prison, and cause their arms to be seized and appraised. F. N. B. 249. F.

After proclamation the justice may enter himself, or by inquisition, make search for arms. Dalt. 129.

But if the offenders upon proclamation depart, he cannot commit them, or seize their arms. Ibid.

The justice must pursue the writ and make return of it. Ibid.

[See the 39 G. 3. c. 79. suppressing certain societies as unlawful assemblies.]

[See the 39 G. 3. c. 79. for the suppression of seditious publications.]

### (B 13.) For restraint of offences against religion.—Witchcraft.

Justices of peace have conusance of several offences against religion, to the common annoyance of the country, to the prejudice of trade, or deceit of the people. Vide Justices, (S 13.)

By their commission justices of peace may inquire *de veneficiis, incantationibus, sortilegiis, arte magica*.

By the st. 1 Jac. 12. (repealed by the st. 9 G. 2. 5.) if any shall take upon him by withcraft, enchantment, charm, or sorcery, to tell where treasure may be found in the earth, or lost goods found; or to the intent to provoke to unlawful love, or whereby cattle or goods shall be destroyed or impaired, or to hurt any person in his body, though the same be not effected, he shall for the first offence be imprisoned for a year, without bail, and once a quarter stand six hours in the pillory in a market town on a market or fair day, and there openly confess his offence.—And the second offence is felony. Vide Justices, (S 13.)

### (B 14.) Popery.—Mass.

So justices of peace have jurisdiction by the st. 23 El. 1. to inquire (within a year and a day after committing) of any offence against 1 El. 1. 5 El. 1. 13 El. 2. and 23 El. 1. touching her majesty's government in causes ecclesiastical, or other matters touching the service of God, coming to church, or establishment of true religion.

By the st. 1 El. 2. all ministers shall use the book of common prayer;  
and

and if any manner of parson, vicar, or other whatsoever minister refuse so to do, or use any other rite, ceremony, &c. he shall forfeit one year's profit of his spiritual benefices, and be imprisoned for six months; and if any person speak in derogation of the book of common prayer, or procure any parson, vicar, or other minister to sing or say any common or open prayer, or to administer the sacrament, otherwise than as in the book of common prayer, he shall forfeit one hundred marks, which if he do not pay within six weeks after conviction, he shall instead of the said sum suffer imprisonment for six months.

By the st. 23 El. 1. he who says mass forfeits two hundred marks and a year's imprisonment; he who hears it one hundred marks and like imprisonment. But by the st. 29 Ed. 6. the conviction shall be in B. R. or the assises, and not elsewhere.

By the st. 11 & 12 W. 3. 4. if popish bishop, priest, &c. say mass, or exercise any part of his function, or any papist teach school, educate, or board youth, he shall suffer perpetual imprisonment. Repealed by st. 18 G. 3. c. 60. [Vide post, (B 18.)]

Every one who chants mass, though not a parson, will be within the st. 1 El. 2. R. Dy. 203.

If upon the st. 1 El. 2. there be judgment, that he forfeit 100 marks, and if he does not pay it within six weeks *quod imprisouetur*, and the fine is estreated, and he afterwards dies within the six weeks, the fine shall be levied against the executor. Dub. Dy. 203. 231. b. But Dy. 231. b. in marg. semb. acc.

As to contempt of the sacrament, common prayer, or any religious service, vide Sacraments (E—F).—Temps, (B 3.)

### (B 15.) Other superstition.

By the st. 3 & 4 Ed. 6. 10. any, having missals, &c. or books or images, &c. heretofore used in churches, shall deface, or deliver them to the mayor, &c. or churchwarden, to be in three months delivered to the ordinary to be destroyed, on pain of 10s. for every book, for the first offence, 4*l*. for the second, imprisonment at the king's will for the third. And the mayor, &c. not delivering &c. forfeits 40*l*. and the bishop not destroying, 40*l*. which offences justices of peace may determine.

By the st. 3 Jac. 5. none shall import, print, sell, or buy any popish books on pain of 40s. per book, a third part to the king, a third to the poor, and a third to the informer: and two justices of the peace, or the mayor, &c. where the liberty is, may search houses or lodgings of a popish recusant convict, or whose wife is such, for popish books and relicts, and may deface or burn them; but if valuable, they shall be defaced at the quarter sessions, and returned to the owner.

### (B 16.) Conventicle.

By the st. 35 El. 1. (declared to be in force by the st. 16 Car. 2. 4.) if a subject, above sixteen, who hath without cause absented a month from divine service, persuade any to be present at a conventicle, &c. or be present, &c. he shall be imprisoned without bail, till he conform and make submission pursuant to that act; and if he conform not in three months, on the request of a justice of peace, &c. shall at the assises or quarter sessions abjure, which abjuration the justice of peace shall record, and certify to the assises.

By

By the st. 22 Car. 2. 1. if a subject, of the age of sixteen or upwards, be present at a conventicle, &c. where five or more besides the household are assembled, any justice of peace or chief magistrate of a corporation on confession, oath of two witnesses, or notoriety of the fact, may record the offence and impose 5s. on every offender, and certify the record, which is a full conviction, to the quarter sessions, and may set 10s. for the second offence; to be levied by distress and sale, &c. and if a feme-covert, on the goods of her husband; if poor, on the goods of any present, so that no one pay above 10*l*. one-third to the king, which shall be delivered by the justice of peace into the quarter sessions, and there to the sheriff, and a memorial of payment recorded, and certified into the exchequer; a third to the poor; and a third to the informer and to such as the justice thinks active in the discovery.

Provided any charged above 10s. may appeal in writing to the quarter sessions, and give a recognizance to prosecute with effect, where the justice shall certify such conviction, and the evidence on which it past, and the recognizance; and the appellant, if determined against him, shall pay treble costs.

He who preaches in a conventicle, &c. or suffers it in his house, forfeits 20*l*. to be levied by distress and sale, &c. or if unknown, fled, or insolvent, on the goods of any present, so that none pay above 10*l*. And the justice of peace, &c. on denial of entry, may break the house, &c. provided every offence be prosecuted within three months.

But by the stat. 1 W. & M. 18. the st. 35 El. or 22 Car. 2. shall not extend to any present at, or preacher in any congregation, &c. with doors open, certified to the bishop of the diocese, archdeacon, or quarter sessions, and registered in their courts, who shall take the oaths of allegiance and supremacy, or declaration of fidelity, and subscribe the declaration in the st. 30 Car. 2. And if the preacher approve and subscribe the thirty-nine articles, except 34th, 35th, 36th, and part of the 20th and 27th, at the quarter sessions.

Yet he will be liable to the former statutes, unless he be qualified as the statute requires. R. Sal. 572.

[By the 18th section of this act disturbers of places of worship shall, upon conviction, pay a penalty of 20*l*.]

[Upon conviction of several defendants of such offence, each is liable to the whole penalty. 5 T. R. 542.]

And a licence in one county does not give a liberty in another. Sal. 572. 6 Mod. 228. But this is altered by the st. 10 Ann. Sal. 572.

An action *qui tam*, &c. lies against a justice of peace, if he refuse to examine upon complaint; though he is not bound to convict. Skin. 60.

[See the st. 19 G. 3. c. 44.]

[The trustees of a chapel of dissenters, which, for want of a pastor, had been without a congregation, engaged with a new pastor for a year at a salary; he gave notice in the papers of opening the chapel, and on the first day of opening gave notice to the congregation there that they should proceed to an election of a pastor after divine service that day, and accordingly took votes. Upon being dispossessed by the trustees after the year, he applied for a *mandamus* to be restored, alleging that he was elected by the congregation for life. Refused, because, supposing there was a competent body to elect, there was not sufficient notice given of the election. 2 Smith, 20.]

[It

[It is not essential to the "pretending to holy orders" within the 8th sect. of the toleration act, 1 W. & M. c. 18. that the party should be the teacher or preacher of a separate congregation of protestant dissenters. 15 East, 577.]

[A rule of sessions, and therefore a requisition in pursuance of it, that a party applying under the toleration act, to qualify himself as teacher of a distinct congregation of protestant dissenters, shall produce a certificate from two of his congregation authenticating such his appointment, is illegal. 15 East, 590.]

### (B 17.) Recusant convict.

By the st. 35 El. 2. and 3 Jac. 5. a popish recusant convict for not repairing to church, shall in forty days repair to the dwelling of himself, or parents, or birth (unless stayed by order of the king or six of the privy council, sickness, or imprisonment, or be out of the realm, and then in twenty days after the impediment removed), and not remove above five miles thence, without licence in writing from the king, three of the privy council, or four justices of the peace with the assent of the bishop, lieutenant, or deputy lieutenant, or obliged by process, &c. on pain of losing all his goods, and freehold lands to the king, and copyhold to the lord of the manor, unless recusant, and then to the king, during life, but shall certify his name to the minister or constable, and he to the quarter sessions.

By the st. 3 Jac. 5. if any popish recusant convict come into court where the king or his heir apparent is, he forfeits 100*l.* a moiety to the king, a moiety to the prosecutor.

He shall in ten days after conviction depart from London and ten miles distance, unless he be a tradesman, or have a constant dwelling there, on like pain of 100*l.* moiety, &c.

He shall not practice common or civil law, as a counsellor, attorney, solicitor, advocate, proctor; nor physick; or be an apothecary, judge, steward, register, town-clerk, or officer of any court; or be officer in any troop, ship, or fort, on like pain of 100*l.*

A popish recusant convict, or if his wife be convict, unless he, his children and servants hear divine service, and being of meet age receive the sacrament, &c. shall be disabled to exercise any office or charge in the commonwealth by himself or deputy.

A popish recusant convict shall not be executor, administrator, or guardian in chivalry, socage, or nurture: nor, by the st. 12 Car. 2. 24., guardian by devise.

He shall be as excommunicate and disabled to sue any action, but for lands not seized for recusancy.

If married otherwise than according to the law of the realm, the man shall be disabled from being tenant by the curtesy, or if his wife have no estate of which he can be so, shall forfeit 100*l.* the woman shall lose her dower, jointure, frankbank, and customary share of her husband's goods: if he cause his child to be baptised otherwise, he forfeits 100*l.* one-third to the king, a third to the poor, a third to the informer: if buried otherwise, his executor or administrator forfeits 20*l.* to the king, poor, and informer.

By the st. 23 El. 1. 20 El. 6. and 3 Jac. 4. a popish recusant convict forfeits 20*l.* per month, or two parts of his lands and tenements whereof he



he is seised, or settled to his use or in trust for him, or wherewith he or his family is relieved, at the election of the king.

By the st. 3 Jac. 5. a feme-covert being a popish recusant convict, if her husband be not, forfeits two parts of her jointure and dower, and cannot be executrix or administratrix to her husband, or demand any portion of his goods.

By the st. 1 Jac. 4. and 3 Jac. 5. a person who sends any child to a seminary, &c. or to have his education beyond sea, without licence from the king or six privy council (not being a merchant, factor, &c.), forfeits 100*l*. And by the st. 3 Car. 2. if he send a child, &c. or relief to such child, or benevolence, &c. to any religious house, he shall be disabled to sue or be committee of a ward, executor, or administrator, or to take a legacy, or gift, or bear any office, and shall lose all his goods, and all his lands, annuities, &c. during life.

And the person sent shall be disabled to enjoy or take by descent, devise, &c. any lands, goods, &c. or be executor, &c. unless he take the oaths and receive the sacrament, &c. but they shall go to the next heir, not recusant, until conformity, who shall then account for the profits, &c.

By the st. 3 Jac. 5. and 1 W. & M. 25. a popish recusant convict, and he refusing to repeat and subscribe the declaration in the stat. 30 Car. 2. when tendered by two justices of peace, or to appear on notice by warrant under the hands and seals of two justices left at his abode, whereupon his name shall be certified and recorded at the quarter sessions, shall be disabled to present to any benefice, free-school, hospital, &c. or any in trust for him, or to grant the next avoidance, until at quarter sessions he subscribe the declaration and take the oaths, &c. but such presentation, &c. shall be given to the two universities of Oxford and Cambridge respectively.

But if the conviction be pardoned, he shall be restored to his ability. R. per three J. 3 Lev. 333.

If after conviction the king takes the advowson as part of his two parts, he shall present, not the university. Per three J. Jon. 27.

By the st. 11 & 12 W. 3. 4. any educated in popery, who after eighteen years of age doth not in six months take the oaths, &c. and subscribe the declaration 30 Car. 2. shall be disabled to take by descent, devise, or limitation, any lands, &c. for himself only, but his next of kin, being protestant, shall take the profits during his life, or till he take the oaths and subscribe the declaration, &c. without account. And no papist shall be able to purchase in his own, or any other's name. Repealed by st. 18 G. 3. c. 60. Vide post, (B 18.)

By the st. 3 Jac. 5. the armour, &c. of a popish recusant convict shall be seized by warrant of four justices of peace at the quarter sessions (except such as the justices think necessary for security of his house or person), and kept at his costs where the justices think fit: and if any refuse to shew his armour, &c. or disturb the delivery, he shall forfeit the armour, &c. and suffer three months imprisonment, without bail.

And by the st. 1 W. & M. 15. a papist refusing the oaths and declaration, 30 Car. 2., or to appear on notice left at his abode by warrant from two justices of peace, if he keep any arms, &c. more than allowed by order of quarter sessions for defence, two justices may authorize any in the day-time with a constable to search for and seize them, and deliver them at the quarter sessions; and may commit for three months without

without bail a papist not discovering arms, or hindering the search or seizure, who shall forfeit the arms, &c. and treble value as appraised at quarter sessions.

And a concealer of arms shall be committed three months without bail, and forfeit treble value; and a discoverer of the concealment shall have the value of the arms, &c. to be assessed by the justices at sessions, and levied by distress and sale, &c.

And no papist so refusing, &c. shall keep an horse above the value of 5*l*. which two justices of peace by warrant, &c. may seize, and commit the concealer for three months without bail, who forfeits treble value.

By the st. 1 W. & M. 8. if a person on the second refusal of oaths be bound over to the assises and there refuse them, and likewise refuse to make and subscribe the declaration 30 Car. 2. he shall be taken as a popish recusant convict.

By the st. 1 W. & M. 9. any justice of peace shall cause a reputed papist, not being a foreigner, in London or ten miles compass, to be brought before him, and tender the declaration 30 Car. 2., who refusing and yet continuing in London or Westminster, or ten miles distance, unless a tradesman, or hath constant dwelling there, and certifies his name at the sessions, shall forfeit as a popish recusant convict: so shall refusers, whose names the justices shall certify into B. R. or the next quarter sessions, if they do not take and subscribe the declaration next term or quarter sessions.

### **Addenda.**

It is to be observed, in general, that popish recusants are liable to all the forfeitures and disabilities, and other inconveniences to which other recusants are liable; and to many others, to which other recusants are not liable. 3 Burn, 643.

A recusant is any person who refuses to go to church, and worship God after the manner of the church of England: a popish recusant is a papist who so refuseth; and a popish recusant convict is a papist legally convicted thereof. 3 Burn, 643.

There were several statutes made against recusants in Q. Elizabeth's reign, and the former part of the reign of K. James the First, the force of which, as to protestant dissenters, is taken away by the act of toleration; but no papist or popish recusant shall have any benefit by that act. 3 Burn, 643.

The 18 G. 3. c. 60. repeals the provisions of 11 & 12 W. 3. c. 4. against papists; providing against its extending to any persons but those who, within six months after act passed, or his title accrued, or coming of age, or after disability of insanity, imprisonment, or absence beyond sea, removed, shall take the oath therein presented.

Which oath the courts at Westminster, or the general or quarter sessions, may administer; of which a register shall be kept, in like manner as for the oaths required from persons qualifying for offices.

Provided that nothing herein shall extend to any popish bishop, priest, jesuit, or schoolmaster, who shall not have taken and subscribed the above oath before he shall have been apprehended, or any prosecution commenced against him.

By 31 G. 3. c. 32. it shall be lawful for persons professing the Roman catholic religion to appear in any of the courts at Westminster, or at the general quarter sessions for the county, city, or place where he shall reside, and there in open court, between the hours of nine in the morning and two in the afternoon, take, make, and subscribe the declaration and oath therein prescribed. s. 1.

Which said declaration and oath shall be subscribed by such person; and the proper officer shall make, subscribe, and deliver a certificate of such declaration and oath having been duly made and taken, if demanded, for which he shall have 2*s*.; which certificate shall be competent evidence, unless falsified. s. 2.

And no Roman catholic, who shall have taken and subscribed the said oath as aforesaid, shall be convicted upon any of the acts following, viz. 1 Eliz. c. 2., 23 Eliz.

c. 1., 29 Eliz. c. 6., 35 Eliz. c. 2., 1 Jac. 1. c. 4., 3 Jac. 1. c. 4., 5 Jac. 1. c. 5., and 7 Jac. 1. c. 6., or any other statute or law of this realm, or in any ecclesiastical court, for not resorting to church, or having servants who shall not resort to church, or other place of common prayer. s. 3.

By 43 G. 3. c. 30. Roman catholics taking and subscribing the declaration and oath contained in 31 G. 3. c. 32. shall be entitled to all the benefits of 18 G. 3. c. 60., to every purpose as if they had taken the oath thereby prescribed.

And farther, though by 23 Eliz. c. 2., 27 Eliz. c. 2., 35 Eliz. c. 2., 1 Jac. 1. c. 4., 3 Jac. 1. c. 5., 3 Car. 1. c. 2., 25 Car. 2. c. 2., papists are made subject to several punishments, penalties, and disabilities; by this act, no person who shall take and subscribe the said oath in manner aforesaid, shall be prosecuted or convicted for being a papist, or reputed papist, or for professing or being educated in the popish religion, or for hearing or saying mass, or for being a priest or deacon, or entering or belonging to any ecclesiastical order or community of the church of Rome, or for being present at or performing or observing any rite, ceremony, practice, or observance of the popish religion, or maintaining or assisting others therein. s. 4.

Provided that the places of meeting shall be certified to the sessions. And the minister's name shall be recorded there. s. 5.

Provided that places of assembly shall not be locked. s. 6.

Penalties are denounced against disturbing congregations, or misusing priests. s. 10.

No person shall be summoned to take the oath required by 1 W. & M. sess. 1. c. 8., or the declaration required by 25 Car. 2. c. 2. Nor shall the 1 W. & M. sess. 1. c. 9., for removing papists from London and Westminster, extend to Roman catholics who shall have taken and subscribed the oath, &c. herein appointed. s. 18, 19.

No peer who shall have taken and subscribed the said oath, &c. in manner aforesaid, shall be liable to be prosecuted under 30 Car. 2. st. 2. c. 5. s. 5.

By 43 G. 3. c. 30. Roman catholics taking the oath and making the declaration by the 31 G. 3. c. 32. prescribed, shall be entitled to all the benefits given by the 18 G. 3. c. 60., as fully as if they had taken the oath therein prescribed.

By 53 Geo. 3. c. 128. all such of his majesty's popish or Roman catholic subjects as hold, exercise, and enjoy any civil or military office or offices, or place or places of trust or profit, or other office or situation whatsoever, granted to them or any of them in Ireland, under the authority of 33 Geo. 3. of the parliament of Ireland, and who shall have duly taken the oaths and declaration required by the said act, shall not, in respect of any such office, place, or situation, be liable, in England, Wales, Berwick upon Tweed, or in his majesty's navy, or in the islands of Jersey or Guernsey, to any of the pains, &c. enacted by the 25 Car. 2. c. 2., and shall also be wholly exempt from all pains, &c. whatsoever, in the said several places last mentioned, for not making, taking, and subscribing the oaths of allegiance, supremacy, or abjuration, or not making taking, and subscribing the declaration required to be taken to enable any person to hold and enjoy any office or place of trust or profit, or for not receiving the sacrament of the Lord's Supper according to the rites and ceremonies of the church of England; any thing contained in any act of parliament to the contrary notwithstanding. s. 1.

And if any of his said majesty's popish or Roman catholic subjects, having duly taken the oaths and declaration required by this act, shall have or have taken in Ireland a commission in his majesty's army, and shall afterwards take a higher commission or higher commissions in Great Britain, within the intent and meaning of the said act; or if any person having enlisted as a private in any regiment in Ireland, or being a non-commissioned officer in such regiment, shall afterwards take or have taken a commission in the said or any other regiment in Great Britain, and shall have duly taken the oaths and declaration required by the said act, he shall not, in respect of such commission, be liable, in England, Wales, Berwick-upon-Tweed, or in his majesty's navy, or in the islands of Jersey or Guernsey, to any of the pains, &c. in said 25 Car. 2. c. 2., and shall also be wholly freed, &c. as in s. 1.—s. 2.

### (B 18.) Prosecution for recusancy.

By the st. 27 El. 2. if any person, knowing a jesuit, &c. in England, discover it not in twelve days to a justice of peace, &c. he shall be fined and imprisoned at the king's pleasure: and the justice of peace, not discovering it in twenty-eight days, to some of the privy council, forfeits 200 marks.

By

By the st. 35 El. 2. a jesuit, &c. examined and refusing to answer, whether he be so or not, shall be committed until he directly answer.

By the st. 3 Jac. 4. churchwardens and constables, once a-year, shall present the monthly absence of a popish recusant, and the names of children nine years old, and servants, at quarter sessions, on pain of 20s. and for every conviction on such presentment shall have 40s.

If presented, and on proclamation he renders not himself to the sheriff before next quarter sessions, he shall be convict, &c.

But a presentment for absence the first M. and so for six months, where there are only ten days after first M. before the sessions, is bad. R. Ray. 434.

By the st. 11 & 12 W. 3. 4. any apprehending a jesuit, &c. so that he be convict of exercising his function, shall have 100l. from the sheriff, who shall pay it in four months on certificate, and on pain of 200l.

By the st. 3 Jac. 5. any discovering a recusant, or a retainer of a jesuit, &c. to a justice of peace in three days after the offence, shall be pardoned himself, and have a third part of the forfeiture, if it exceed not 150l. and then 50l. provided he be taken and convicted.

By the st. 29 El. 6. indictment of a recusant shall be good, though the party is not said to be within the realm.

By the st. 3 Jac. 4. it shall not be reversed for defect or want of form, unless the party conform. Ray. 434.

So, by the st. 22 Car. 2. 1. indictment for being or preaching at a conventicle, &c. or any proceeding on that act, shall not be impeached for default of form.

And if he conform, the conviction upon the st. 3 Jac. 4. shall not be reversed by writ of error, but shall be quashed in the exchequer. Ray. 434.

[Vide supra, (B 17.) Addenda.]

### (B 19.) Recusant conforming.

Upon conformity the recusant shall make the submission prescribed by the st. 35 El. 2.

By the st. 3 Jac. 4. a popish recusant conforming, shall in a year after receive the sacrament, &c. on pain of 20l. and so once every year, on pain of 40l. for the second year, and 60l. every subsequent year, a moiety to the king, a moiety to the informer, to be recovered at Westminster, assises, or quarter sessions.

And an information upon this statute is sufficient, though the time or court where the conviction was had does not appear, if there be no demurrer to it. R. after verdict, 2 Cro. 365.

Or, when and before whom he conformed. R. 2 Cro. 366.

But by a conformity declared in court before the trial, the action of debt commenced shall be discharged; for the prosecutor sues subject to that hazard. R. Raym. 465.

[Vide supra, (B 17.) Addenda.]

### (B 20.) Non-conformist.

By the st. 13 & 14 Car. 2. 4. and 15 Car. 2. 6. on certificate from the bishop, that any person disabled or prohibited to preach, &c. (by  
X x 2 reason

reason of non-conformity), hath preached any sermon, &c. two justices of peace or mayor, &c. may commit, &c. for three months without bail.

By the st. 17 Car. 2. 2. persons not declaring assent to the common prayer, &c. shall not come within five miles of a corporation, &c. nor teach school, &c. on pain of 40*l.* one third part to the king, a third to the poor, and a third to the prosecutor at Westminster, assises, or quarter sessions.

But by the st. 1 W. & M. 18. a person, qualified by that act to preach, shall not be subject to the penalties of the said statutes.

[Vide supra, (B 17.) Addenda, et infra (B 21.) Addenda.]

### (B 21.) Quaker.

By the st. 13 & 14 Car. 2. 1. a quaker refusing the oath, when duly tendered, or maintaining all oaths unlawful, or assembling for religion, &c. forfeits not exceeding 5*l.*, to be levied by distress and sale, &c. and for want of distress and non-payment in a week, to be committed to gaol or house of correction; for the second offence not exceeding 10*l.* to the use of the house of correction, to be levied, &c. on conviction by verdict, confession, or notoriety of the fact at the quarter sessions, &c.; for the third offence shall abjure, or be transported.

But by the st. 1 W. & M. 18. a person subscribing the declaration 30 Car. 2. and taking the declaration of fidelity, and profession of the christian belief there prescribed, is exempted from the penalty of the said statute supra. Provided he produce two witnesses to swear they believe him a protestant dissenter, or a certificate under the hands of four conformists and six of his congregation, owning him, &c.; and the justice of peace shall require a recognizance with two sureties of 50*l.*, and for failure commit him till produced.

### Addenda.

By the 1 Eliz. c. 2. every person, not having reasonable excuse, shall resort to his parish church or chapel, or upon reasonable let thereof, to some usual place where common prayer shall be used on every Sunday and holiday; on pain of punishment by the censures of the church, or of forfeiting for every offence 12*d.* s. 14.

By 23 Eliz. c. 1. every person above the age of sixteen, who shall not repair to some church or chapel, or usual place of common prayer, shall forfeit for every month 20*l.*; and if he shall forbear for 12 months, he shall be bound to the good behaviour till he conform.

By 29 Eliz. c. 6., every offender in not repairing to church, having been once convicted, shall, without any other indictment or conviction, pay half-yearly into the exchequer, 20*l.* for every month afterwards, until he conform; which, if he shall omit to do, the king may seize all his goods, and two parts of his lands.

And by 3 Jac. c. 4. the king may refuse the 20*l.* a month, and take two parts of the land, at his option. s. 11.

By 3 Jac. 5. no recusant in not repairing to church having been convicted thereof, shall enjoy any public office, or shall practise law or physic, or be executor, administrator or guardian.

And by the 35 Eliz. c. 1., if any person refusing to repair to church shall be present at any assembly, meeting, or conventicle, under pretence of any exercise of religion, he shall be imprisoned till he conform; and if he shall not conform in three months, he shall abjure the realm; which, if he shall refuse to do, or after abjuration, shall not go, or shall return without licence, he shall be guilty of felony without benefit of clergy and whether he shall abjure or not, he shall forfeit his goods, and during his life his lands also.

But by the 1 W. & M. c. 18., commonly called the Act of Toleration, which by the



19 G. 3. c. 44. is declared to be a public act, it is enacted, that neither the statutes aforesaid, nor any other made against papists and popish recusants (except the 25 Car. 2. c. 2. concerning the qualifying for offices, and 30 Car. 2. st. 2. c. 1. containing the declaration against popery) shall extend to any one dissenting from the church of England, who shall at the general sessions of the peace to be held for the county or place where such person shall live, take the oaths of allegiance and supremacy, and make and subscribe the said declaration against popery; of which the court shall keep a register. And no officer shall take any fee above 6*d.* for registering the same, nor that more than once, and 6*d.* for a certificate thereof signed by such officer.

Places of meeting shall be certified and registered. s. 19.

The 52 Geo. 3. c. 155. repealing 13 & 14 Car. 2. c. 1., 17 Car. 2. c. 2. and 22 Car. 2. c. 1. requires all places of religious worship to be certified and registered. s. 2.

And doors shall not be fastened. s. 11.

By 1 W. & M. c. 18. any person who shall willingly and of purpose maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, shall on proof thereof before any justice by two witnesses find two sureties in 50*l.*; and in default of such sureties, shall be committed to prison till the next sessions; and upon conviction at such sessions, shall forfeit 20*l.* to the king. s. 18.

Which statute does not take away the certiorari. 5 T. R. 542.

52 Geo. 3. c. 155. denounces disturbance of religious assemblies. s. 12.

And an indictment found at the quarter sessions upon this statute, may be removed into K. B. by certiorari before trial. 4 M. & S. 508.

By 1 W. & M. c. 18. dissenter being appointed to offices may appoint a deputy.

53 Geo. 3. c. 160. repeals so much of 1 W. & M. and 9 & 10 W. 3. as respects the denial of the Trinity.

### (B 22.) Profanation.

As to penalties and offences in the neglect or profanation of the sacraments, or divine service, vide Sacraments, (E—F).

As to offences by profanation of the Sabbath, vide Temps, (B 3.)

### (B 23.) Cursing and swearing.

By the st. 21 Jac. 20. (continued by the st. 3 Car. 4. and 16 Car. 4.) and by the st. 6 & 7 W. 3. 11. if any be convict of profane cursing or swearing, by confession, oath of one witness, or hearing of justice of peace, before any justice of the county or corporation, he shall forfeit, if a servant, day labourer, common soldier, or seaman, 1*s.* other person, 2*s.* to the use of the poor where the offence was, for the first offence; double for the second offence; and treble for the third offence; on neglect of payment to be levied by warrant from a justice of peace to a constable, &c. by distress and sale, &c.; and in default of distress, the person, if above sixteen, to be on warrant, &c. set in the stocks an hour for a single offence, and for more, two hours; if under sixteen and he pay not, to be whipt by the constable or parent, &c. in presence of the constable. But the offence shall be prosecuted within ten days, and the justices of peace shall certify the conviction to the next quarter sessions.

By the st. 6 & 7 W. 3. 11. a justice of peace, &c. omitting his duty, forfeits 5*l.*, a moiety to the informer.

If the party is charged by the information to be a gentleman and above sixteen years of age, it is not necessary that it appear by the adjudication, or the oath upon which the conviction is, that he was so, and not a labourer, soldier, or sailor. R. Mod. 366. *Infra*, (C 2.) [Ld. Raym. 1386. S. C.]

**Addenda.**

By the canons of the church, if any offend their brethren by swearing, the church-wardens shall present them; and such notorious offenders shall not be admitted to the holy communion till they be reformed. Can. 109. 5 Burn, 307.

And by st. 19 G. 2. c. 21. s. 1. it is enacted as follows :

If any person shall profanely curse or swear, and be thereof convicted on confessions or oath of one witness, before one justice (or mayor, or chief magistrate of any city or town corporate) he shall forfeit as follows; viz.

Every day labourer, common soldier, common sailor, or common seaman, 1s.

Every person under the degree of a gentleman, 2s.

And every person of or above the degree of a gentleman, 5s.

And for a second offence after conviction, double; and for every other offence after a second conviction, treble.

Which said penalties shall go to the poor of the parish where the offence was committed.

If such person shall curse or swear in the presence and hearing of a justice (or mayor, &c.) he shall convict him without other proof.

If in the presence and hearing of a constable, if he is unknown to such constable, shall seize and carry him forthwith before the next justice (or mayor, &c. of a town corporate) who shall convict him upon the oath of such constable.

If he is known to such constable, he shall speedily make information before some justice (or mayor, &c.) in order that he may be convicted.

So that the constable, if it is in his hearing, is required to prosecute, if he pleases.

And such justice (or mayor) shall immediately on such information on the oath of any constable or of any other person cause the offender to appear before him, and on proof of such information convict him; and if he shall not immediately pay down the penalty, or give security to the satisfaction of such justice (or mayor, &c.) he may commit him to the house of correction to be kept to hard labour for ten days.

Also the charges of the information and conviction shall be paid by the offender if able, over and above the penalties, which charges shall be ascertained by such justice (or mayor, &c.)

But for the information, summons, and conviction no more shall be paid to the justice's clerk than one shilling.

And if he shall not immediately pay such charges, or give security to the satisfaction of such justice (or mayor, &c.) he may commit him to the house of correction to be kept to hard labour for six days, over and above such time for which he may be committed for nonpayment of the penalties; and in such case no charges of information and conviction shall be paid by any person.

But if such soldier or seaman shall not so pay, or secure the penalty, and also the costs of the information, summons, and conviction, he shall, instead of being committed to the house of correction, be ordered to be publicly set in the stocks for one hour, for every single offence, and for any number of offences whereof he shall be convicted, at one and the same time, two hours.

The statute then gives a certain form of conviction.

Which conviction shall not be removed by certiorari.

And the justice (or mayor, &c.) shall cause the conviction to be fairly written upon parchment, and returned to the next general or quarter sessions, to be filed by the clerk of the peace, and kept amongst the records.

If any justice (or mayor, &c.) shall wilfully omit his duty in the execution of this act, he shall forfeit 5l., half to the poor where he shall reside, and half to him that shall sue in any court of record.

Constable omitting his duty shall, on conviction on oath of one witness before one justice, (or mayor,) forfeit 40s., to be levied by distress, half to the informer and half to the poor; and if he have not sufficient goods whereon to levy, such justice (or mayor) may commit him to the house of correction, to be kept to hard labour for one month.

And this act shall be publicly read four times in the year, in all churches and chapels by the minister immediately after morning and evening prayer, on the sundays next after March 25th, June 24th, September 29th, and December 25th; on pain of 5l. for every offence, to be levied by distress, by warrant of a justice (or mayor).

But no persons shall be prosecuted for any offence against this act, unless it be within eight days after the offence committed.

. By the 22 Geo. 2. c. 33. persons belonging to his majesty's ships of war, guilty of pro-

profane oaths or curses, shall incur such punishment as a court martial shall impose.

But the conviction ought to shew the oath for which he was convicted. 8 Mod. 58. Str. 497. S. C. 8 Mod. 367. Ld. Raym. 1568. Str. 686.

Conviction for swearing one hundred oaths, viz. by G—d, and a hundred curses, viz. G—d d—n you, is good, without repeating them a hundred times. Ld. Raym. 1576. Str. 608. S. C.

(B 24.) For restraint of offences to the common annoyance, &c.—Refusal of oaths.

By the st. 3 Jac. 4. 7 Jac. 6. 1 W. & M. 8. and 7 & 8 W. 3. 27. justices of peace have authority to make a tender of the oaths of allegiance and supremacy, and to make convictions against those who refuse. Vide Allegiance, (B 2, &c.) Vide ante, (B 17.)

Two justices of peace may issue a warrant upon the st. 7 Jac. 6. to bring the person suspected before them, to take the oath; for when a statute enables them to tender an oath, it gives a power also for warning the party before them. R. 12 Co. 130.

But a constable cannot break a house to take such a person. R. 12 Co. 131.

And the nobility may be committed for refusal of the oath; for the words extend to all before, among whom are the nobility. Ibid.

(B 25.) Inns and alehouses.

Every one may erect a common inn, if it be not *ad nocumentum*. H. P. C. 146. Hut. 92. 2 Rol. 84. l. 25.

So by the common law keeping an alehouse without a licence was no offence. Per Cur. 1 Sand. 249. Sho. 398. Q. Hut. 99. D. 1 Sal. 45.

Nor selling wine without a licence. Per Cur. 1 Sid. 6.

So a man, who has an ancient inn, may enlarge the rooms or build new edifices within the circuit of the inn, and they shall have the same privileges with the first edifice. R. 2 Rol. 84. l. 55.

But erecting a common inn, where there were ancient inns enough before, is a nuisance. H. P. C. 146. 2 Rol. 345.

Or, when situated in an inconvenient place. Ibid. R. Hut. 100.

Or, when disorders are suffered there. H. P. C. 146. 2 Rol. 345. Salk. 45.

Or, if a common innholder refuse to entertain guests, he may be indicted and fined. H. P. C. 146.

So, if a common innholder be convicted upon an indictment for bad behaviour, he may be suppressed. R. Hut. 100.

(B 26.) Ought to have licences.

By the st. 5 & 6 Ed. 6. 25. none shall keep an alehouse, unless allowed in open sessions or by two justices of the peace (1 Qu.), who shall take a recognizance against unlawful games and for good rule, and on pain of 3*l.* 6*s.* 8*d.* certify it to the next quarter sessions; the breaches whereof the quarter sessions may inquire of, &c. And if any sell ale, &c. without a licence, &c. unless in the time of a fair, for every offence two justices (Qu. 1.) shall commit him to gaol, without bail, for three days; and before his deliverance shall take a recognizance with two sureties

not to use selling of ale, as the justices see convenient; which recognizance and offence the justices of peace shall certify to the next quarter sessions, where in open sessions he shall be fined 20s. for every offence.

By the st. 3 Car. 3. if any use the common selling of cyder, ale, &c. without a licence, on conviction by view, confession, or two witnesses, he shall forfeit for the first offence 20s.; to be levied by distress, on a warrant of one justice of peace to the constable or churchwarden, for the use of the poor; and for non-payment in three days, by sale, &c.; or if no distress and no payment be in six days, shall be committed to the constable, &c. to be openly whipt, as the justice shall appoint: for the second offence shall be committed to the house of correction for a month, to be dealt with as an idle person: for the third offence shall be committed, till delivered by the justice at the general sessions. And such justice may commit a constable, &c. refusing or neglecting to execute the warrant, &c. till he cause it to be executed, or pay 40s. to the use of the poor.

Any one convicted by two justices, according to the stat. 5 & 6 Ed. 6. 25. for selling ale without licence, cannot be afterwards allowed, but in open sessions. H. P. C. 147. Per Warb. A. 1613. Dalt. 26, 27. (edit. 1727. 31.)

By the st. 5 & 6 Ed. 6. 25. justices of peace, or two of them (1 Qu.) may put away common alehouses, where they think meet.

But this clause seems to be intended of alehouses *in esse* at the time of the statute; but others extend it to alehouses afterwards; and for these they take the words of Warb. and Hale *supra*, that if they are suppressed by two justices they cannot be allowed afterwards, but in sessions.

Inns erected since the st. 5 & 6 Ed. 6. 25. must have licences, &c. as alehouses. R. cont. Hutt. 100. cont. except where it degenerates to an alehouse. Sal. 45.

By the st. 4 Jac. 4. none shall directly or indirectly sell any beer or ale to a common alehouse keeper, not then licensed, &c. other than for the expence of his household only, on pain of 6s. 8d. per barrel, whereof the sessions or court of record of a corporation, &c. may inquire, &c. by action, indictment, &c.; a moiety to the prosecutor, a moiety to the poor, which the officers levying, &c. shall deliver to the churchwardens, and they to the poor, on pain of forfeiting double, to be levied and employed as aforesaid.

By the st. 2 Geo. 2. 28. a licence, not at a general meeting, shall be void.

If a recognizance given by an alehouse-keeper be broke, it may be proceeded upon. Sal. 45.

If an alehouse be kept without licence, it may be suppressed. Ibid.

Or, if they commit disorders which amount to a nuisance, it may be indicted. Ibid.

Or suppressed. Semb. Sal. 471.

But a man cannot be indicted merely for keeping an alehouse without licence; for the statute has prescribed another manner of restraint. Sal. 45.

So the sessions cannot suppress an alehouse, which has a licence by two justices, except for disorder. R. Sal. 471.

### **Addenda.**

By stat. 5 & 6 Edw. c. 25. any two justices (1 Q.) might licence alehouses; but now by stat. 2 Geo. 2. c. 28. s. 11. and 26 Geo. 2. c. 31. s. 4. reciting that "whereas many inconveniencies have arisen from persons being licensed to keep inns and common alehouses by justices of the peace, who living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses, or the characters of the persons applying for licences to keep the same, it is enacted, that no licence shall be granted to any person to keep a common inn or alehouse, or to retail any brandy or strong water, but at a general meeting of the justices of the peace, acting in the division where the said person dwells, to be holden for that purpose on the first day of September yearly, or within twenty days after."

Provided that nothing in this act shall extend to alter the method or power of granting licences in any city or town corporate. s. 12.

Which exception does not exempt such places from the operation of the other parts of the act; but magistrates in such districts must grant licences at a public meeting, and give the like notice of their meeting to grant licences as justices for a county give. 3 T. R. 560.

Houses which take in lodgers only, need not be licensed. 12 Mod. 254.

By the same statute 26 Geo. 2. c. 31. the day and place for granting such licences shall be appointed by two or more justices for the division, as therein mentioned. s. 4.

And licences shall not be granted without the certificate therein required. s. 2. 16.

Which certificate being signed by three or four reputable and substantial householders, &c. without the parson, vicar, or curate, and churchwardens, is sufficient. 1 Burr. 556.

Any justice of the county going to the meeting in the division, is for this purpose a justice of the division. Cald. 305.

By 59 G. 3. c. 9. licences may be granted for keeping canteens. s. 52.

A *mandamus* to compel the justices to grant a licence will not be granted. 2 Str. 881. 1 Barn. 402. Nor will an action for refusing one. 3 Wils. 121.

B. R. has no power to review the reasons on which justices form their judgment in granting licences, by way of appeal from their judgments, or overruling that discretion entrusted to them. 1 Burr. 556. 3 Burr. 1317. 1716. 1786.

But if it clearly appear that they have been partially, or maliciously, or corruptly influenced in the exercise of this discretion, they are liable to indictment or information; or possibly to a civil suit, for gross and injurious malevolence. 1 Burr. 561.

The only method of bringing this before the court is on the footing of criminality; insomuch that when a rule to shew cause why an information, &c. had been moved for, and the court, out of tenderness to the justices, had made it to shew cause why they had not granted the licence, they were obliged to alter it again before it could come on to be argued regularly. 1 Burr. 561.

To obtain information, the applicant must allege innocence of the offence. 2 Burr. 653.

And it may be moved for in the second term after the offence, there being no intervening assises. 13 East, 270, 271. n.

Defendants must appear personally to receive judgment. 3 Burr. 1716.

An information will be granted for improperly granting a licence. 1 T. R. 692.

But the court refused to grant a rule nisi for a criminal information against two magistrates so late in the second term after the grievance, as to prevent them from shewing cause against such rule in the same term. 13 East, 322.

Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant licences, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; and if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licences, their proceeding is illegal and indictable. 4 T. R. 451.

Justices cannot annex conditions to the granting of licences. 2 Burr. 653.

By



By 26 Geo. 2. c. 13. justices being brewers, distillers, &c. are prohibited from granting licences. s. 12.

And by 39 G. 3. c. 86., where corporate justices are so disabled, justices for the county at large may act in their stead.

The 9 G. 2. c. 25. s. 14. and 24 G. 2. c. 40. s. 24. settles the justices' clerk's fee.

By 26 G. 3. c. 31. no licence (as in that act mentioned) shall entitle any person to keep an ale-house in any other place than that in which it was first kept by virtue of such licence, and such licence with regard to all other places shall be void. s. 3.

And all licences granted (by the justices) at the general licensing day shall be made for one year only, to commence on the 29th of September. s. 4.—See 48 G. 3. c. 143. s. 3, 4. *infra*.

By 32 G. 3. c. 59. certain provisions are enacted respecting the renewal of licences granted at the general licensing day to the executors, or to the successor of any person dying or removing from a licensed house; but such provisions appear to be superseded (if not repealed), and others substituted in lieu thereof, by st. 48 G. 3. c. 143.

The act is not to extend to houses not licensed the year preceding, nor to alter the time of granting licences, &c. s. 4, 5.

And special regulations are prescribed as to Middlesex and Surrey. s. 2. But *quære* if not repealed by 48 G. 3. c. 143.

Stamp duties on licences are imposed by 48 G. 3. c. 143.

And annual sums are by 56 G. 3. c. 113. to be paid by retailers of beer, &c.

By 48 G. 3. c. 143. licences are to be granted by commissioners of excise in London, and by collectors of excise in the country. s. 2.

Duration of licence. s. 3.

Time of taking out licences in cases of charters. s. 4.

To be renewed within ten days after expiration. s. 5.

Executors and assignees may have the benefit of licences. s. 6.

By 55 G. 3. c. 103. excise licences renewable by collectors of excise to wife, child, assignee, &c.

By 48 G. 3. c. 143. no excise licence to be granted, unless the magistrates have previously granted their licence. s. 7.

Not to repeal any regulation as to licence granted by magistrate. s. 8.

Justices' clerks to take the same fees as heretofore. s. 10.

No person disabled from keeping such houses by conviction, shall sell excisable liquors. s. 11.

And to authorize a person to keep a public house, and sell ale and spirituous liquors, two licences are necessary, 1. a magistrate's licence under 48 G. 3. c. 143; 2. an excise licence. 3 T. R. 560. 1 Burr. 41.

Recovery of fines, &c. under this statute, is provided for by s. 12.

And by s. 13. the powers of former acts, relating to his majesty's revenue of excise, are extended to this.

As to licences to sell spirits, by 43 G. 3. c. 69. and 56 G. 3. c. 113. every dealer in brandy, or other spirituous liquors or strong waters, not being a retailer in any part of Great Britain, or not being a wholesale dealer in plain aqua vitæ only, distilled from malt, corn, grain, barley, beer, big, or other British materials in Scotland, shall annually take out a licence.

And by 24 G. 3. sess. 2. c. 41. s. 7., 29 G. 3. c. 63. s. 7. and 30 G. 3. c. 38. s. 9, the said licence shall be renewed ten days at least before the end of the year, on pain of 100*l*.

Who shall be deemed a seller and dealer, see 6 G. 1. c. 21. s. 18.

The licence shall continue in force until and upon 10th Oct. next ensuing the granting thereof, and no longer; but where such licence shall be first granted between the 5th of April and the 10th Oct. in any year, there shall be charged only a rateable proportion. 30 G. 3. c. 38. s. 6, 7, 8.

Who shall be deemed a retailer. See 17 G. 2. c. 17. 19. 30 G. 3. c. 38. s. 13.

By 53 G. 3. c. 105. upon the death of any person, or the removal of any person from the house or premises in which his licence shall authorise him to deal in or sell any excisable commodity, any one of the commissioners of excise, or the proper collector and supervisor, may authorise the executors, or the wife or child of the deceased person, or the assignee or assigns of the person removing, to carry on the trade during the residue of the term.

By 9 G. 2. c. 23. s. 14., 16 G. 2. c. 8. s. 11., 5 G. 3. c. 46. s. 22., no person shall have a licence to retail spirituous liquors until he shall have been licensed to sell ale or spirituous liquors by two justices.

And a form of conviction is given by 9 G. 2. c. 23. s. 15. for selling spirits, &c. without a licence from two justices.

By

By 17 G. 2. c. 17. s. 18. no licence shall be granted, except to such persons only who keep taverns, victualling-houses, inns, coffee-houses or alehouses, and all other licences shall be void; and if any licensed person shall exercise the trade of a distiller, grocer, or chandler, or keep a brandy shop for sale of spirituous liquors, the licence shall be void, and such person shall forfeit 10*l*.

By 24 G. 2. c. 40. s. 8. and 26 G. 2. c. 13. s. 10. no licence shall be granted within the limits of the head office of excise in London, but to such as occupy tenements of 10*l*. a year, and pay parish rates for the same; or in places where the occupiers of houses are not rated to the church and poor, then to such persons as pay a rent of 12*l*. a year, without any deduction or abatement, and not otherwise; nor to persons in any other part of the kingdom, but such as pay to the church and poor; and no licence shall be of any avail longer than he shall be so qualified.

By 17 G. 2. c. 17. s. 21., 27 G. 3. c. 30. s. 4., 30 G. 3. c. 38. s. 10., no licence shall empower any person to sell spirituous liquors in any place, except in the house or places thereto belonging, wherein they shall retail the same at the time of granting the licence.

By 16 G. 2. c. 8. s. 9. retailers of spirituous liquors without a licence from the officers of excise were subject to a penalty of 10*l*. By 24 G. 2. c. 40. s. 9. all liquors found in the custody of such persons then, or at any time within six calendar months after conviction were to be seized. And by 13 G. 3. c. 56. s. 1. and 30 G. 3. c. 38. s. 9, after reciting that the said penalty of 10*l*. is sometimes insufficient to deter offenders, it is enacted that if any person shall by himself, or by any other to his benefit, retail any distilled spirituous liquors or strong waters, without a licence from the officers of excise, he shall forfeit 50*l*.

By 13 G. 3. c. 56. s. 4. the said penalty shall not be mitigated below 5*l*.

The order for suppression need not shew that it was a common alehouse, or that the party was summoned. 8 Mod. 309. 377. Fort. 325. Stra. 630. 2 Ld. Raym. 1405. S. C.

But if it afterwards appear by affidavit that the justices committed the offender without summoning him, they will grant an information against them. Ibid. Str. 678.

But if the offender appear, and is present at the conviction without offering at a defence, it is sufficient. 2 Burr. 653.

The order must shew in what county the alehouse was, for the county in the margin refers to the place of making the order. Fort. 325. 8 Mod. 310.

In conviction on 3 Car. c. 3. it is not necessary to say defendant had not been punished by 5 & 6 Ed. 6. c. 25. for that was matter of defence. Str. 555. 8 Mod. 174. S. C.

### (B 27.) Ought not to permit tippling.

By the st. 1 Jac. 9. (made perpetual by the st. 21 Jac. 7.) if any inn-keeper, victualler, alehouse-keeper (and by the st. 1 Car. 4. any taverner, keeping also an inn, or victual-house), permit any inhabitant (or by the st. 1 Car. 4. any foreigner), not accompanying a traveller during his needful abode there, nor a labourer or handicraftsman in a corporation or market town on a work-day for one hour to take diet, nor a labourer or workman for work sojourning there, nor for urgent occasions, to continue tippling in such inn, &c. shall forfeit 10*s*. to the poor on view of the mayor, justice of peace, &c. or, by the st. 21 Jac. 7. on confession, or one witness, to be levied by the constable or churchwarden by distress, and on non-payment in six days, by sale, &c. and for want of distress the offender to be committed till payment. And a constable or churchwarden neglecting to levy, &c. or certify want of distress in twenty days to the mayor, justice of peace, &c. forfeits 40*s*. to the poor, to be levied by distress, and on non-payment in six days, by sale, and for want of distress shall be committed till payment.

By the st. 4 Jac. 5. and 21 Jac. 7. if an inhabitant or foreigner continue tippling, &c. unless for urgent occasions to be allowed by two justices of peace, or the causes expressed in the st. 1 Jac. 9. he shall forfeit 3*s*. 4*d*. for every offence to the poor, to be levied after view of the mayor

mayor, justice of peace, or by the st. 21 Jac. 7. confession or proof of one witness, at assises, sessions, or leet, by distress or warrant from the court, or justice of peace; and if the person be unable, the mayor, justices of peace, or court may set him in the stocks for four hours. But the offender must be convicted in six months.

By the st. 7 Jac. 10. an alehouse-keeper convicted for suffering tippling contrary to the st. 1 Jac. 9. shall be disabled to keep an alehouse for three years.

By the st. 21 Jac. 7. the oath of an offender confessing is sufficient proof to convict any other offender of an offence against the st. 1 Jac. 9. and 4 Jac. 5.

An alehouse-keeper, convicted of tippling in another alehouse, shall be disabled for three years; upon conference of the st. 4 Jac. 5. and 7 Jac. 10. Dalt. 28. (edit. 1727. 34, 35.)

Or, of any offence against the stat. 1 Jac. 9. 4 Jac. 5. or 21 Jac. 7. H. P. C. 147. Vide Dalt. 35.

### Addenda.

By 30 G. 2. c. 24. s. 14. if any person licensed to sell any sorts of liquors, or who shall sell or suffer the same to be sold in his house, out-house, ground, or apartment thereto belonging, shall knowingly suffer any gaming with cards, dice, draughts, shuffleboards, mississippi, or billiard-tables, skittles, nine-pins, or with any other implement of gaming in his house, out-house, ground, or apartment thereunto belonging, by any journeymen, labourers, servants, or apprentices, and shall be convicted thereof on confession or oath of one witness before one justice, within six days after the offence committed, he shall forfeit for the first offence 40s., and for every other like offence 10s., to be levied by distress by warrant of such justice; three-fourths of which shall be to the churchwardens for the use of the poor, and one-fourth to the informer.

And if any journeyman, labourer, or apprentice, or servant, shall game in any house, out-house, ground, or apartments thereunto belonging, wherein any liquors shall be sold, and complaint thereof shall be made on oath before one justice, where the offence shall have been committed, he shall thereupon issue his warrant to the constable or other peace officer of the place wherein the offence shall be charged to have been committed, or where the offender shall reside, to apprehend and carry the offender before some justice of the place where the offence shall be committed, or where the offender shall reside; and if such person shall be convicted thereof by the oath of one witness, or confession, he shall forfeit not exceeding 20s., nor less than 5s., as the justice shall order, every time he shall so offend and be so convicted, one-fourth to the informer, and three-fourths to the overseer for the use of the poor; and if he shall not forthwith pay down the said sum so forfeited, such justice shall by warrant under his hand commit him to the house of correction, or some other prison of the county or place where he shall be apprehended, there to be kept to hard labour for any time not exceeding one month, or until he shall pay the sum of money so forfeited.

And any justice of any county, &c. unto whom complaint upon oath shall be made of any offence committed against this act, in the same county, &c., shall issue his warrant for bringing before him, or some other justice of any county, &c., the person charged with such offence, and the justice before whom such person is brought shall hear and determine the matter, and proceed to judgment and conviction; and if it shall appear upon oath, to the satisfaction of such justice, that any person within his jurisdiction can give material evidence on behalf of the prosecutor or of the person accused, and who will not voluntarily appear, he shall issue his summons to convene him to be examined thereto on oath; and if he shall neglect or refuse to appear on such summons, and no just excuse shall be offered, then (on proof upon oath of the summons having been duly served upon him) he shall issue his warrant to bring such witness before him; and on his appearance, if he shall refuse to be examined on oath, without offering just cause for such refusal, the justice shall, by warrant under hand and seal, commit him to the public prison of the county, &c. for any time not exceeding three months. And if on such examination the justice shall deem the evidence of the witness to be material, he may bind the witnesses over, unless a feme covert or

an infant, by recognizance, to appear and give evidence at the next general or quarter sessions of the peace, &c.

And in all proceedings on this act any person shall be deemed a competent witness, notwithstanding his being an inhabitant of the parish or place wherein the offence shall have been committed.

And the justice before whom any person shall be convicted upon this act shall cause the conviction to be drawn up in the form or to the effect therein mentioned.

The same to be written upon parchment, and transmitted to the next general quarter session of the peace, to be filed amongst the records; and if any person shall appeal to the said sessions, the justices there shall, upon receiving the said conviction, drawn up in the form aforesaid, proceed to hear and determine the matter.

And no certiorari shall be granted to remove any proceedings on this act.

And if any person convicted of any offence punishable by act shall think himself aggrieved by the judgment of the justice before whom he shall have been convicted, he may appeal to the next general or quarter sessions of the peace for the county, &c. where the judgment shall have been given, and the execution of the judgment shall in such case be suspended, the person convicted entering into a recognizance at the time of the conviction, with two sureties, in double the sum he shall have been adjudged to pay, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the said sessions; and the said sessions shall hear and finally determine the same, and award such costs as shall appear just and reasonable, to be paid by either party; and if the judgment shall be affirmed, the appellant shall immediately pay the sum adjudged to be forfeited, together with costs, as the court shall award, or in default thereof shall suffer the pains and penalties by this act inflicted upon persons respectively who shall neglect to pay or shall not pay the forfeitures by this act to be paid.

And no person punished by this act shall be punished by any other law for the same offence.

### (B 28.) Drunkenness.

By the st. 4 Jac. 5. and 21 Jac. 7. any convicted of drunkenness by view of any justice of peace, confession, or oath of any witness, though the party confessing, at the assises, sessions, or leet, or presentment, &c. or before any justice of peace within six months, forfeits for the first offence 5s. to the poor, to be levied on warrant from the court or justice by distress, and if unable to pay, shall be committed to the stocks for six hours: for the second offence shall be bound with two sureties in a recognizance of 10*l.* to be from thenceforth of good behaviour.

By the st. 7 Jac. 10. and 21 Jac. 7. an alehouse-keeper convicted of drunkenness shall be disabled to keep an alehouse for three years.

By the st. 4 Jac. 5. a constable, &c. neglecting his duty, forfeits 10s. to the poor, to be levied on warrant from the mayor, justice of peace, or court where the conviction is.

### (B 29.) Barretry.

So, by the st. 34 Ed. 3. 1. justices of peace shall have power to restrain rioters, and all other barretors, and to take, pursue, arrest, and chastise them according to their offence, and to cause them to be imprisoned and punished according to law.

Vide Barretry, (C).

### Bastardy.

As to Bastardy, vide Bastard, (G 1, 2, 3.)

### Bridges.

As to Bridges, vide Chimin, (B 1, &c.)

[(B 29. a.) Con-

## [(B 29. a.) Conspiracy.]

[The quarter sessions have jurisdiction over conspiracy. 1 Blk. 968. 3 Burr. 1321. *infra*.]

## (B 30.) Deceit.—In innholders.

By the st. 21 Jac. 21. (which repeals former statutes for this matter) if an innholder make horse bread, a baker being in the town. or sell not the same, and his oats, provender, hay, and victuals both for man and beast at reasonable prices, the justices of peace in a county, or corporation, may hear and determine, &c.; and for the first offence the innholder shall be fined; for the second imprisoned for a month without bail; for the third be set in the pillory; and for the fourth forejudged of keeping an inn again.

## (B 31.) In weights and measures.

Vide post, (B 87—93.)

## (B 32.) In victuallers.

Justices of peace may inquire of any thing done to the fraud or deceit of another.

## (B 33.) Other fraud.

As, if a man read a writing to an illiterate person, in other words than it was wrote, by which means he seals it. 1 Sid. 312.

If a man play with false dice. R. 2 Rol. 107.

**Addenda.**

By 17 Geo. 2. c. 35. three justices may set the retail price of coals; and if the retailer refuses to sell at that price, they may empower officer to force entrance into any place where such coals are stored up, and to sell them at that price.

By 31 G. 2. c. 24. one justice may bind over a person accused of obtaining money by false pretences.

Herein too of pawning.

By 25 G. 3. c. 48. every person exercising the trade of a pawnbroker shall take out a licence, and shall renew the same annually, ten days at least before the end of the year, on pain of forfeiting 50*l*.

By 65 G. 3. c. 164. sch. part I., upon every licence to be taken out yearly for using or exercising the trade or business of a pawnbroker, within the cities of London and Westminster, or within the limits of the two-penny post, there shall be paid a duty of 15*l*.

And for using or exercising the trade or business of a pawnbroker elsewhere, 7*l*. 10*s*.

The said duties to be under the management of the commissioners of the stamp duties.

By 25 G. 3. c. 48. no person shall keep more than one house or shop by virtue of one licence; but persons in partnership need only take out one licence for one house. s. 7, 8.

Who shall be deemed pawnbrokers. s. 5.

Not to extend to persons lending money at 5 per cent. s. 6.

By 39 & 40 G. 3. c. 99. pawnbrokers are required to write certain words over their shops. s. 23. 26.

The rate of profit to be taken. s. 2, 3. 5.

Pawnbrokers to give farthings in exchange. s. 4.

Tables of rates to be put up. s. 22.

An account of goods pawned to be entered in a book, &c. s. 6.

Profits taken to be indorsed on duplicates. s. 7.

Penalty on pawning goods the property of others. s. 8.

Penalty



- Penalty on forging or counterfeiting notes or memorandums. s. 9.  
Arrest of persons offering goods in pawn not giving a good account of themselves. s. 10.  
Penalty on receiving goods in pawn in a state of manufacture, or linen, &c. put out to wash, &c. s. 11.  
Such goods may be searched for, by warrant from a justice. s. 12.  
Owners of goods unlawfully pawned may search for the same. s. 13.  
Penalty on pawnbrokers refusing to deliver up goods pawned. s. 14.  
Persons producing notes or memorandums deemed the owners. s. 15.  
Where notes, &c. are lost, a copy to be delivered. s. 16.  
Pawned goods may be sold at the end of one year. s. 17.  
Certain goods to be sold separately from other goods. s. 18.  
Unless notice be given, before the end of the year, not to sell. s. 19.  
An account of goods sold to be entered in a book. s. 20.  
Pawnbroker not to purchase goods whilst they are under pawn. s. 21.  
Time for taking in pawns limited; and the age of the persons employed. Ibid.  
Consequences of selling goods before the time limited, or the same being damaged. s. 24.  
Pawnbrokers to produce their books. s. 25.  
Informations against pawnbrokers limited to 12 months. s. 27.  
Churchwardens to prosecute. s. 28.  
But not certain convicted persons. s. 29.  
Not to extend to lending money at 5 per cent. s. 30.  
To extend to executors. s. 31.  
Recovery, and application of penalties. s. 26.  
Inhabitants may be witnesses. s. 33.

(B 34.) Tithes neglected.

By the st. 27 H. 8. 20. on request of the spiritual judge in a suit of tithes, two justices of peace (1 Qu.) may attach the defendant and commit him without bail, till he find surety by recognizance to obey the proceedings, &c. of the ecclesiastical court. Vide Dismes, (M 4.)

So, by the st. 32 H. 8. 7. till he find surety by recognizance to obey the sentence definitive, &c.

By the st. 7 & 8 W. 3. 6. (continued by the st. 10 & 11 W. 3. 15. and perpetuated by the st. 3 & 4 Ann. c. 18.) if any substract small tithes, &c. or composition, not above the value of 40s. for twenty days after demand, unless in London, or town where settled by act of parliament, on complaint within two years, in writing, to two justices of peace, neither interested in the tithes, nor patron, &c., they may summon in writing the party, and on appearance or default, the summons being proved by oath, may examine evidences, and in writing under hand and seal determine the cause, and give costs, not above 10s. And on non-payment by ten days after notice may by warrant to constables, &c. distrain for the money adjudged, and if not paid in three days, sell, &c. And if the party remove into another county, &c. may certify the judgment to the justices of peace there, who shall levy, &c. But the party grieved may appeal to the quarter sessions, who shall finally determine, and if they affirm, may give what costs they think fit, to be levied by distress and sale, &c.

And no writ, &c. shall remove or supersede, &c. unless the title of the tithes come in question; but if the party insist before the two justices on a prescription, modus, &c. in writing under his hand, and give security to pay all costs if the modus, &c. be found against him, the justices shall make no judgment, or if a suit hath been for the same matter in the exchequer, or ecclesiastical court. And the party shall inroll the judgment of the two justices at the quarter sessions, which shall be a bar, &c.

to

to another suit: but if the complaint be frivolous, the justices may give costs, not above 10s. against the complainant:

By the st. 7 & 8 W. 3. 34. (made perpetual by st. 1 Geo. 6.) if a quaker refuse great or small tithes or church rates, the two next justices of peace may convene him, examine the truth of the complaint, state what is due not above 10l., and by order under hand and seal appoint payment, and on refusal, &c. levy by warrant from any of the said justices by distress and sale, &c. unless he appeal, as he may, to the next quarter sessions of the county or corporation, who shall finally determine, and, if judgment continued, give costs against the appellant, to be levied by distress and sale, &c.

### Addenda.

If the order under 7 & 8 W. does not specify that the complaint was in writing, it will be quashed. Str. 264.

By 53 G. 3. c. 127, reciting that whereas by 7 & 8 W. 3. it is enacted, where any quaker shall refuse to pay for or compound for his great or small tithes, or to pay any church rates, two or more of his majesty's justices of the peace are authorized to hear and determine the same, not exceeding the value of 10l.: and that whereas by 1 G. 1. the said act is extended to other objects, and that it is become expedient to enlarge the said sum; it is enacted, that all the provisions of the said acts shall be deemed to extend to any value not exceeding 50l.; provided that one justice shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth.

#### (B 35.) Extortion.

So justices of peace have authority by their commission to inquire of extortion. Vide Extortion.

#### (B 36.) What fees are allowed.

Vide Extortion, (D).

#### (B 37.) What not.

Vide Extortion, (E).

#### (B 38.) Forestalling.

By the st. 5 & 6 Ed. 6. 14. justices of peace may inquire, &c. of forestalling, regrating, and ingrossing against the statute at the quarter sessions, by presentment, and examination of two witnesses, &c. and may award process as on an indictment, and estreat fines, &c. and for the moiety of the informer award execution by *feri facias*, or *capias*.

By the st. 31 Ed. 1. Rast. a forestaller is declared to be *depressor pauperum* and a public enemy, who shall not be suffered in any town, but for the first offence shall be amerced and lose the goods bought, for the second be set in the pillory, for the third imprisoned and ransomed, for the fourth abjure the realm. 3. Inst. 196.

By the st. 25 Ed. 3. 3. a forestaller of victuals or merchandize, coming by land or water, shall forfeit the goods or value, and, if not responsible, suffer two years imprisonment; if convict at the suit of the party, a moiety to the king, and a moiety to the party.

By the st. 5 & 6 Ed. 6. 14. he that buys merchandize, victuals, or other thing, coming by land or water to a market, fair, or port to be sold, or makes a bargain or promise for any thing so coming, or by message  
or

or otherwise motions the enhancing the price, or dissuades any coming from bringing such things to market, fair, or port, is a forestaller; and being convict within two years after, shall, for the first offence, suffer two months imprisonment without bail, and forfeit the value of the goods; for the second offence half a year's imprisonment, and double the value of the goods; for the third offence be set in the pillory, lose all his goods, and be imprisoned during the king's pleasure.

By the st. 5 El. 5. no statute against forestalling shall extend to buying so much unsalted fish, or mud-fish, wine, oil, or salt by way of forestalling, as shall be brought in an English vessel into some port in this realm.

Forestall is derived from *fare, via, and stall, impedimentum*: and, by the common law, regrating and ingrossing were comprehended within forestallment. 3 Inst. 195.

But it is no forestallment to buy at Billingsgate; for it is a market. R. Sho. 292.

### Addenda.

There have been several statutes made, from time to time, against forestalling, ingrossing, and regrating in general; and also especially with respect to particular species of goods, according to their several circumstances; almost all of which from the 5 & 6 Edw. 6. c. 14., and others downwards, made for enforcing the same, are repealed by 12 G. 3. c. 71. But these offences still continue punishable upon indictment at the common law, by fine and imprisonment.

To forestall any commodity, which is become a common victual and necessary of life, or is used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. 1 East, 143.

So much of st. 15 Car. 2. c. 7. as prohibits the buying of corn to sell again, and the laying of it up in granaries, is repealed by 31 G. 3. c. 30. s. 2.

### (B 39.) Regrating.

By the st. 5 & 6 Ed. 6. 14. he that regrates, or gets into his possession in any fair or market, any corn, wine, fish, butter, cheese, tallow, candles, sheep, lambs, &c. or dead victual brought there to be sold, and sells the same again in the same, or other fair or market within four miles, is a regrator, and being convict within two years after shall suffer, &c. *ut* Forestaller, ante, (B 38.)

Provided a subject, dwelling within a mile of the main sea, may buy fresh or salted fish, and sell the same again at reasonable prices.

And if any buy any oxen, &c. sheep, lambs, calves, or goats living, and sell the same alive, without keeping them five weeks on his own grounds, he shall forfeit double the value of the cattle, a moiety to the king, a moiety to the prosecutor, &c. unless a drover, licensed by three justices of peace (1 Qu.) who may buy cattle, and sell them again in fairs or markets, at forty miles distance.

By the st. 5 El. 5. the statutes against regrators shall not extend to buying out of any English vessel so much unsalted or mud-fish, wine, oil, or salt, by way of regrating, as shall be brought into port in this realm.

A regrator, *alias dicitur* a chopper, or jobber. 3 Inst. 195. marg.

## (B 40.) Ingrossing.—What shall be.

By the st. 5 & 6 Ed. 6. 14. he that gets into his hands by buying or contract (and not as tithes or lessee) any corn, butter, cheese, fish, or other dead victual within the realm, with intent to sell again, is an ingrosser.

Ingrossing was an offence, and indictable by the common law. 3 Inst. 195, 196.

As, if a merchant foreigner, or subject, buy victuals or merchandize within the realm in gross, and sell them presently in the gross. R. by all the J. 3 Inst. 196.

An ingrosser by the common law was comprehended under the word forestaller. Ibid.

And every enhancement of prices was an offence; for it was *quasi* a forestallment. Ibid.

As if a man had sold corn in sheafs. 3 Inst. 197.

If by false rumours he enhances the prices. 3 Inst. 196.

So a fishmonger, or any in trade, may be indicted for ingrossing, if he buys going to market, or by retail, to enhance the price. 1 Rol. 11.

Within the stat. 5 & 6 Ed. 6. 14. salt is a victual, and the ingrossing punishable. R. 3 Inst. 195. Dub. Cro. Car. 231.

And every thing for the necessary use of man, in eating and drinking. 3 Inst. 195.

An indictment for buying, *ea intentione ad revendendum*, is sufficient, and after verdict it shall not be intended of a revendition by retail. R. Cro. Car. 315. Jon. 320.

And it need not say, that he had it not by demise, &c. for that shall be shewed on the other side in evidence. R. Jon. 157.

If the informer pray the forfeiture *ad valorem* of the thing ingrossed, without saying the sum, it is sufficient. Ibid.

And it is sufficient, if he pray the moiety for himself, and demand nothing for the king. Ibid.

## Addenda.

An article though only an ingredient in preserving victuals, salt, or hops for instance, is itself a victual and necessary of life, the ingrossing, &c. of which, or using of any undue practices to enhance its price to the public, is an offence at common law, independent of the statute 5 & 6 Ed. 6. c. 14., which only declared the common law, and superadded penalties to the offence. See the case for instances of this crime, 1 East, 145. 167.

Since the st. 9 Ann. c. 12. s. 24. hops are a victual. 1 East, 143.

An indictment for ingrossing, &c. a great quantity of fish, geese, and ducks, without ascertaining the quantity of each, is bad. 1 East, 593.

Whether the purchase of part of a commodity is sufficient to raise the price of the residue, is a question of fact, depending on the state of the demand; therefore an indictment for ingrossing need not state what the quantity was from which the purchase was made. 1 East, 143.

It seems that those statutes only against forestalling, &c. are repealed, which are enumerated in the repealing act of 12 Geo. 3. c. 71. 1 East, 150.

## (B 41.) What not.

But it will not be ingrossing by the common law, if a merchant buy out of the realm, and import and sell in the gross. R. 3 Inst. 196.

[The sale of a standing crop of corn, hops, or the like, is legal, unless made with intent to sell again. 2 N. R. 355.]

So, by the st. 13 El. 25. he shall not be an ingrosser, who buys wine, oil, sugar, currants, spice, or other foreign victuals.

So, by the st. 5 & 6 Ed. 6. 14. he shall not be an ingrosser, if he buy barley or oats, and convert it into malt or oatmeal in his own house, and then sell it.

Though he buy foreign oats. R. Hard. 231.

So, if he buy corn, with intent to convert it to meal, and then sell it. Per two J. Mo. 595.

Or to convert it to starch. R. Bridg. 6.

So, by the same statute of 5 & 6 Ed. 6. 14. if a fishmonger, butcher, poulterer, innholder, or victualler, buy what belongs to their trade or employ, to sell by retail.

Or, if any buy salted or dried fish, herrings, or sprats, and sell at reasonable prices. Vide 2 Bul. 249.

So, by the same statute, if any buy corn to seed his ground; but if he have of his own corn sufficient to seed his ground and find his house for a year, and brings not to market as much as he bought, he shall forfeit double the value of what he bought.

Or, if a badger, &c. allowed by three justices, buy corn, butter, cheese, or fish to be sold within a month in a fair, or market, or to any person for provision of his house, or buying for the provision of a corporation, ship, or fort, &c. it is no offence, without forestalling.

And by the st. 5 El. 12. a badger, drover, &c. must be, or have been married, be an householder thirty years old, and allowed in the quarter sessions.

By the st. 15 Car. 2. 7. every person may buy corn in open market to lay up and sell again at these prices, viz. wheat 48s. rye 32s. barley or malt 28s., buck-wheat 28s. oats 13s. 4d. peas and beans 32s. per quarter (not forestalling, nor selling again in the same market within three months.)

So apples, plums, cherries, or other fruit are not victual, being more for pleasure than necessity. R. & Aff. in Error, 3 Inst. 196. Cro. Car. 231. 2 Cro. 214.

Nor hops. Cro. Car. 231. [Sed vide supra, et 9 Ann. c. 12. s. 24.]

### (B 42.) Game.—Unlawful sports.

By the common law recreations by cards, dice, &c. were not prohibited. 11 Co. 87. b.

And therefore the king cannot prohibit the making of cards, dice, &c. Ibid.

And such recreations are not *mala in se*, for the king may license them. Ibid.

But by the st. 33 H. 8. 9. none shall keep a common house, or alley, for bowls, coys, tennis, dice, cards, or other unlawful game, without a placard, &c. on pain of 40s. for every day. Vide infra, 2 & 3 Ph. & M. 9. Vide Leet, (L 14.)

And none shall haunt or play at such houses or games on pain of 6s. 8d. for every time.

No artificer, husbandman, labourer, apprentice, journeyman, mariner, fisherman, or servant, shall play at such games, unless at Christmas,



in the master's house, or in his presence by his licence, on pain of 20s. for every time.

And justices of peace, mayor, &c. shall search once a month (if need be) on pain of 40s. after such houses or games, and shall imprison the keepers or haunters of them, till they find surety by recognizance not to do so.

And by the st. 2 & 3 Ph. & M. 9. every placard, for keeping a bowling alley, dicing house, or other unlawful game, shall be void.

Playing at nine pins is an unlawful game within this statute. Adm. 1 Sid. 247.

So keeping a cockpit.

So, by the st. 10 & 11 W. 3. 17. lotteries are common nuisances, which none shall keep under 500*l*. nor play at, under 20*l*. penalty.

By the st. 16 Car. 2. 7. if any win by cozenage at cards, dice, tables, tennis, bowls, skittles, shovel-board, cock-fighting, dog-match, horse-race, foot-race, or other game or pastime, he forfeits the treble value; a moiety to the king, a moiety to the loser, if he sue in six months; otherwise to any who prosecutes in the courts of Westminster, &c.

So, by the st. 9 Ann. 14. after 1st May 1711, if any lose at any time or sitting by play, or betting to one or more persons, in the whole, the sum or value of 10*l*. and pay the same, he may in three months next recover the money from the winner.

By the st. 16 Car. 2. 7. if any play at any of the said games *supra*, or any other game, (not for ready money), or bet on the side of a player, and lose above 100*l*. on tick at any one time, &c. he shall not be bound to pay, but all judgments, bonds, &c. for the same shall be void; and the winner shall forfeit treble the value of what he wins above 100*l*. a moiety to the king, a moiety to him who will sue by debt, information, &c. and treble costs.

If he lose at the same meeting above 100*l*. to several persons, it will be within the statute. R. 3 Keb. 671. R. Lut. 180. If partners, 1 Sal. 345. Vide *infra*.

If he lose 80*l*. and then agrees to play another time, when he loses 80*l*. more; it shall be said to be all lost at one time and meeting. D. 5 Mod. 6. Dub. 2 Mod. 54.

If there be an agreement for four heats at a horse-race, and the action is for two heats, which was under 100*l*. Per Holt, Com. 6. R. 1 Vent. 253. 2 Lev. 94. Skin. 573.

If a bill be drawn for the money upon B. who accepts it, yet it shall be void. 1 Sal. 344. 5 Mod. 175. Com. 4. S. C.

By the st. 9 Ann. 14. all notes, bonds, judgments, mortgages, &c. where all or any part of the consideration was for money won at cards, dice, tables, tennis, bowls, or other game, or by betting, or lent to any when gaming or betting, shall be void.

And the mortgage, &c. shall enure for the sole benefit of him who would be entitled to the lands after the death of the mortgagor; and all conveyances to prevent the same shall be fraudulent and void.

But, if at play, a man makes a wager above 100*l*. for a thing which relates to the play, it is not within the statute; for it is a collateral matter: as, a wager, whether a cast touch at back-gammon ought to be removed. R. 5 Mod. 6. 4 Mod. 409. 1 Sal. 344. Skin. 572.

So,

So, if a bill be for money at play, to the winner or order, and that is assigned for a just debt, and accepted in the hand of the assignee, it shall not be within the statute, as to the assignee. Per Holt in B. R. 1 Sal. 344. R. 2 Mod. 279. [Dougl. 636. contra. Com. 6. S. C. Str. 1155.]

So, it is not within the statute, if a man lose 100*l.* to one, and afterwards 100*l.* to another; for it is a several contract. R. 1 Sal. 345. Vide supra.

So, if he lose 2000*l.* in ready money, and afterwards 100*l.* more upon tick. R. 1 Sal. 345. R. 1 Sid. 394.

How the st. 16 Car. 2. shall be pleaded in bar, to a debt, &c. (Vide in Pleader, 2 G 8.—2 W 26.)

### **Addenda.**

By 2 G. 2. c. 28. s. 9. where it shall be proved, on the oath of two witnesses before any justice of the peace, as well as where he shall find upon his own view, that any person hath used any unlawful game, contrary to the said statute of H. 8., the said justice shall have power to commit him to prison without bail, unless and until he shall enter into one or more recognizance or recognizances, with sureties or without, at the discretion of the justice, that he shall not from thenceforth play at or use such unlawful game.

By 18 G. 2. c. 34. s. 7. no privilege of parliament shall be allowed to any person against whom a prosecution shall be commenced, for keeping any public or common gaming house, or any house, room, or place for playing at any before or now prohibited game.

By 25 G. 2. c. 36. s. 2. houses of public amusement within London and twenty miles thereof, to be licensed.

Which said licence shall be granted as therein prescribed. s. 3.

Constable's duty upon notice of bawdy-houses, &c. s. 5.

Person keeping bawdy-house, &c. to be bound over. s. 6.

By 58 G. 3. c. 70. notices directed, by 25 G. 2. c. 36. to be given to constables in certain cases, to be given also to the overseers of the poor, who are to prosecute.

By 25 G. 2. c. 36. s. 7. if the constable shall neglect or refuse, upon such notice, to go before a justice, or to enter into recognizance, or shall be wilfully negligent in carrying on the prosecution, he shall forfeit 20*l.* to each of the said inhabitants.

Who shall be deemed master. s. 8.

Parishioner may give evidence. s. 9.

And no indictment for such offence shall be removed by certiorari. s. 10.

By 18 G. 2. c. 34. s. 1. no person shall keep any house, room, or place for playing, or permit any person within any such house, &c. to play at the game of roulette (or roly poly), or at any other game with cards or dice, already prohibited by law; and if any person shall keep such house, &c. for playing, or permit any person to play as aforesaid, he shall incur the penalties of 12 G. 2. c. 28.

And if any person shall play at roulette (or roly poly) or at any game with cards or dice, already prohibited by law, he shall incur the pains and penalties of 12 G. 2. c. 28. s. 2.

Power of justices under 18 G. 2. c. 34. s. 4.

Persons may be witnesses, though they have played, betted, or staked at any such prohibited games.

Persons winning or losing certain sums liable to be indicted, &c. s. 8. Vide 2 Blk. 706.

This act not to invalidate 9 Ann. c. 14.

Horse-racing is within the stat. of Ann. 2 Str. 1159. 2 Wils. 309.

And foot-racing also. 2 Wils. 36. Cowp. 281.

And also a wager that a person did not find within such a time a man who could carry on foot 24 stone weight, ten miles in fifteen hours. 1 Cowp. 282.

So a wager of 10*l.* to 5*l.* upon a horse-race, though the race was for a legal plate. 2 Blk. 706

So cricket, as it seems. 1 Wils. 220.

Where money is to be paid, to enable a horse to start, it will be taken to be entrance money

money within st. 13 G. 2. c. 19. s. 7., unless an opposite intention expressly appears. 1 H. B. 218.

*Bonâ fide* horse-racing only, is legalized by st. 13 G. 2. c. 19. and 18 G. 2. c. 54. 6 T. R. 499. 2 B. & P. 51.

Securities avoided by the statute, are void in the hands of innocent holders. 2 Str. 1155.

But the statute does not extend to loans without security. 2 Str. 1249. Dougl. 743.

The word securities, in the act, means lasting liens upon the estate. 2 Str. 1249. Vide etiam 2 Wils. 309. 2 Burr. 1077. 1 Esp. 18. 2 N. R. 413.

No action lies upon such wagers as in the event may have an influence upon the public policy of the kingdom. 2 Selw. N. P. 1302. 16 East, 150.

Nor upon a wager on a cock-fight. 3 Camp. 140.

Nor upon a wager between two indifferent persons, respecting the sex of a third person. 2 Cowp. 729.

Nor upon a wager whether an unmarried woman had had a child. 4 Camp. 152.

Nor upon a wager respecting the mode of playing an illegal game. 2 H. B. 43.

Under the st. of Ann, if the parties play from Monday evening to Tuesday evening without any interruption, except for an hour or two to dinner, this is all one sitting. 2 Blk. 1226.

And under the same statute, where the loser becomes bankrupt, his assignees may sue. 2 H. Blk. 308.

An action brought by the loser to recover back money lost at play, is remedial and not penal, and a new trial may be had therein. 2 Blk. 1226.

Where several win money at play, they are only liable to the loser jointly, under the st. 9 Ann. c. 14. in claim being founded in contract. 7 T. R. 257.

Money fairly lost at play can only be recovered back under the st. 9 Ann. c. 14. s. 2., and only then on a count referring to the statute. 1 M. & S. 500.

Under 9 Ann. c. 14. s. 2. the loser must sue for the thing lost within the three months, since the contract is made void. 2 N. R. 413.

A bill against the winner of more than 10*l.* at play, must state the plaintiff to be the loser, or that three months have elapsed since the offence. 2 Anst. 504.

As to what evidence is sufficient to convict under st. 12 G. 2. c. 28. 5 T. R. 338.

Semble, that in action for the penalties given by 9 Ann. c. 14. s. 2. a bill of discovery filed against the defendant for the purpose of a former action on the former part of the 2d sect. for the money lost, may be given in evidence. 1 Mars. 497. 6 Taunt. 141.

The st. 32 G. 3. c. 53. s. 5. enacts that penalties levied under that act, except the informer's share, shall be paid to the receiver appointed by the act. It seems that this does not alter the form of adjudication in a conviction. 5 T. R. 541.

Where a defendant is convicted on 9 Ann. c. 14., which gives five times the value to a common informer, the judgment is only *quod convictus est*, and an action for the forfeiture must be brought on the judgment. Str. 1048.

B. R. may give prosecutor leave to compound a prosecution for gaming. 1 Wils. 130.

The st. 9 Ann. c. 14. is not confined to an assault committed at the time of play, and therefore applies to one committed at any time afterwards on account of the money due. 4 East, 175.

Whether an assault was committed on account of money won at play within the st. 9 Ann. c. 14. is a question for the jury, where there are opposite presumptions. 4 East, 175.

By 13 G. 2. c. 19. s. 1. no person shall start any horse at a horse-race, unless his own property, on pain of forfeiture of such horse; nor more than one, on pain of forfeiting all but the first.

By s. 2. no prize to be under 50*l.*; if any person start for less, 200*l.* penalty; and 100*l.* penalty for advertizing a less prize.

By s. 3. five years old were to carry ten stone, six years old eleven stone, and seven years old twelve stone, under 200*l.* penalty. But the 18 G. 2. c. 34. s. 1. has repeated this.

By s. 4. the race must begin and end the same day.

By s. 5. no match shall be for less than 50*l.*, unless run at Newmarket or Blackhambleton, on pain of 200*l.*

By s. 6. penalties are recoverable in Westminster Hall or at the assizes, half to the informer, half to the poor where the offence committed; and in Somersetshire to Bath hospital.

By s. 7. entrance money shall go to the second best horse.

By

By s. 8. this act shall not extend to any prizes then issuing out of lands, or money chargeable therewith.

A horse-race for 25*l.* a side, play or pay, though one gives the other 5*l.* to make the match, is a match for 50*l.* 4 Burr. 2432.

By 10 & 11 W. 3. c. 17. s. 1. all lotteries are declared to be public nuisances; and all grants, patents, and licences for such lotteries to be against law.

And by s. 2, 3. keeping or playing at lotteries, is denounced.

St. 9 Ann. c. 6. s. 56. empowers justices to suppress lotteries.

St. 10 Ann. c. 26. s. 109. 8 G. 1. c. 2. 12 G. 2. c. 28. 15 G. 2. c. 19. denounces certain insurance offices and games.

St. 46 G. 3. c. 148. s. 59. enacts, that all pecuniary penalties for any offence against any law touching or concerning lotteries, shall be applied to the use of his majesty, &c.

By 42 G. 3. c. 119. s. 1. all games or lotteries called little goes, are declared common and public nuisances, and against the law.

And by s. 2. persons keeping any office or place for any game or lottery, not authorized by law, &c. shall forfeit 500*l.*, and be deemed rogues and vagabonds.

Persons so offending, against whom no information shall have been made, shall be punished as rogues and vagabonds. s. 3.

Justices, on information, may authorize persons to break open the doors of places where such offences shall have been committed, and apprehend offenders and others assisting them, and carry them before a justice. s. 4.

Persons employing others, though not discovered in the premises, to be deemed rogues and vagabonds. s. 4.

Persons agreeing to pay any sum, or to deliver any goods, &c. on any event relative to such game or lottery, or publishing any proposal, shall forfeit 100*l.* s. 5.

Offenders may be apprehended on the spot by any person and carried before a justice, who shall, on the penalty not being paid, commit the offender. s. 6.

As to foreign lotteries, see 9 G. 1. c. 19. 6 G. 2. c. 35.

The 27 G. 3. c. 1. was repealed by 46 G. 3. c. 148. It contained a provision something similar to s. 59. of the last-mentioned act; upon which it was held, that 27 G. 3. extended only to state lotteries. Quære therefore if 46 G. 3. has a more extensive operation.

The premium advanced on insurance of lottery tickets may be recovered back, though the money won on the insurance cannot. 3 Blk. 1073.

### (B 43.) Shooting, vide Leet, (L 14.)

By the st. 33 H. 8. 6. none shall use or keep a hand-gun, not a yard long in the stock and barrel, or hagbut not three quarters of a yard long, on pain of 10*l.*

None not having 100*l.* per annum in his own or his wife's right shall shoot in, keep, or carry charged, any cross-bow, hand-gun, &c. unless to shoot at a butt or bank of earth, in a place convenient, on pain of 10*l.*

None shall shoot within a quarter of a mile of a city, borough, or market town, on 10*l.* unless at a butt or bank.

No servant, by command of his master, shall shoot at a deer or fowl on pain of 10*l.* but may carry a gun for his master, or to be mended, if he have licence in writing so to do.

But none shall be punished till twenty days past after proclamation made of this statute in that county; nor any gun-smith, maker, or seller of guns, nor inhabitants within five miles of the sea, twelve miles of Scotland, or in the isles of Jersey, Guernsey, Anglesea, Wight or Man, nor the owner of a ship for trial or necessary use of a gun.

Any, who hath 100*l.* per annum, may take away the cross-bow, from an offender to his own use, and a gun under due length, which he shall break, on pain of 40*s.* and keep to his own use.

And every one may carry an offender to a justice of peace, who may commit till payment of the 10*l.* a moiety to the king, a moiety to the first bringer of the offender to a justice of peace.

And the sessions of peace may hear and determine the offence, and fine not less than 10*l.* on an indictment or information, at the suit of the king within a year, of the party within half a year after the offence: and if the jury wilfully conceal, may summon another jury to inquire of the concealment, and if found, fine the first jurors 20*s.* a-piece.

Pistols, daggs, stone bows, &c. are within the prohibition of this statute. R. 5 Co. 71. b.

The conviction upon it must be before the next justice of peace. Semb. 1 Sand. 263.

It must be alleged certainly, that he had not 100*l.* per annum at the time of the offence. R. 3 Mod. 280.

He must be carried directly before the next justice. 4 Mod. 147.

But carrying a gun by a sheriff or his ministers, in the execution of justice, is not prohibited by the statute. R. 5 Co. 72. a.

So, having a gun in the house without using it, is not within the statute. R. Sho. 48.

By the st. 1 Jac. 27. any convicted before two justices on confession or by two witnesses, for killing with a gun, cross-bow, &c. or shooting at any pheasant, partridge, pigeon, hearn, duck, teal, widgeon, grouse, heathcock, moor-game, or hare, shall be committed (till he pay 20*s.* to the poor of the parish for every pheasant, &c.) for three months without bail, unless after one month he give a recognizance of 20*l.* with surety to two justices to be returned to the quarter sessions, not to shoot at or kill, &c. at any time after; and the justices at quarter sessions may hear, &c.

Provided a person licensed at the quarter sessions may kill small birds for hawks' meat, so he give a recognizance of 20*l.* not to shoot at any game prohibited by this law, nor within six hundred paces of any hearnery, nor one hundred paces of a dove-house, nor in a park or forest.

By the st. 3 Jac. 13. a person not having 40*l.* per annum in land, or 200*l.* in goods, or ground for deer or conies of 40*s.* per annum, using a gun, bow, &c. to kill deer, &c. any having 100*l.* per annum in land may take such gun, &c. to his own use.

By the st. 22 & 23 Car. 2. 25. persons not having an inheritance of their own, or their wife's, of 100*l.* per annum, or 150*l.* per annum in an estate for lives or years, above ninety-nine, or heir apparent of an esquire or higher degree, or owner, or keeper of a forest, park, or warren stocked with deer or conies for necessary use, shall not keep or use any gun, bow, &c. And a lord of a manor, not under an esquire, may, under hand and seal, license a game-keeper, who may within his manor seize any gun, bow, &c. or with warrant of a justice of peace, may in day-time search and seize to the use of the lord any gun, bow, &c. found in the house of a person not qualified.

By the st. 4 & 5 W. & M. 23. a person not qualified, &c. convict before justices of peace on search by constable, &c. for keeping or using bows or other instruments for destruction of fish, fowl, or other game, shall



shall pay not less than 5s. nor above 20s. a moiety to the informer, a moiety to the poor, to be levied by distress and sale, &c. And for want of distress, &c. shall be sent to the house of correction for no less than ten days nor above a month.

### **Addenda.**

The statute 22 & 23 Car. 2. c. 25., requiring certain qualifications to kill game, has this exception, "other than the son and heir apparent of an esquire, or other person of higher degree, and the owners or keepers of forests," &c. The words "or other person of higher degree," are in the genitive, not the nominative case, as appears, not from grammatical construction only, but from the following conjunction, "and." Therefore, an esquire, or other person of higher degree, is not as such qualified, though their eldest sons are. The reason for not extending the qualification to the father, may be, because from his rank in life he is supposed to be qualified by property. 1 T. R. 44.

A lease for ninety-nine years, if the defendant should so long live, qualifies to kill game, under stat. 22 & 23 Car. 2. c. 25. s. 3. 8 T. R. 506.

By 25 G. 3. c. 30. s. 2. every deputation of a game-keeper shall be registered with the clerk of the peace for the county or place where the manor shall lie, and such game-keeper shall take out a certificate thereof annually.

And if any game-keeper to whom such deputation shall be granted shall, for twenty days next after the granting thereof, neglect or refuse to register the same, and take out the certificate thereon as aforesaid, he shall forfeit 20l. s. 9.

And in case of a new deputation of a game-keeper, the same shall be registered with the clerk of the peace, and a certificate thereon obtained as aforesaid; whereupon the former certificate shall be void, and the person acting under the same, after notice to him given of such new certificate, shall be liable to the penalties prescribed by this act, in the same manner as if no certificate had been granted to him. s. 14.

No certificate obtained under any such deputation shall authorise any such game-keeper to take or destroy game out of the precincts or limits of the manor for which such deputation was given. s. 17.

A gamekeeper, by his deputation, has no authority to seize game, or take it from an unqualified person. 1 Moore, 290.

A justice of the peace has no right to seize the gun of a game-keeper, although he is sporting for the purpose of killing game in another manor than that for which he has received his deputation. 2 Wils. 387.

By 48 G. 3. c. 93. (repealing 2 Jac. 1. c. 27. s. 2. and 3 G. 1. c. 11.) lords of manors may appoint game-keepers, whether qualified or not.

And game-keepers, so appointed, shall have the same rights as if qualified. s. 3.

A college or a corporation may appoint a gamekeeper; and it is not necessary that it should appear in the deputation that he was to kill game for the sole use and benefit of the lord of a manor. Although unqualified, he is protected, unless it be proved that he killed game otherwise than for the use of the lord. 1 Camp. 457. 10 East, 413.

As to the appointment, &c. of game-keepers in Wales, see 59 G. 3. c. 102.

The lord of a hundred or wapentake cannot grant a deputation to kill game. Dougl. 28.

The term "servant," in the statute 3 Geo. 1. c. 11. (repealed by 48 G. 3. c. 93. supra) does not mean "domestic" servant. 10 East, 413.

A game-keeper is not empowered to seize game in the possession of an unqualified person, under a general direction given him by the lord of a manor, although such seizure were made within the manor. 1 Moore, 290.

The game-keeper of a lord of the manor has a right to carry a gun any where out of the manor. 2 Wils. 387.

The presumptions are, that a game-keeper in killing game does so for the use of his lord. 10 East, 413.

A servant does not incur the penalty of 9 Ann. c. 25. s. 2. by possessing himself of game killed by third persons, for the use of his master, the lord of the manor. 10 East, 19.

A servant assisting his master, a qualified person, in the pursuit of game, is not liable to the penalty. 15 East, 460.

A party

A party is not using a greyhound to kill game, by joining in the sport with the qualified owner. 16 East, 49.

A. being convicted of sporting contrary to the game laws, is required to bring his dog to the magistrate, who orders it to be immediately shot. Held, that he was justified under 5 Ann. c. 14. s. 4. 1 Mars. 106. 5 Taunt. 416.

A joint action of debt may be brought against several persons to recover one penalty upon the game laws; thus, the penalty of 5*l.* under st. 5 Ann. c. 14. s. 4. for keeping a lurcher to kill and destroy the game. 2 East, 573.

In an action of debt against several for a penalty under the game laws, some may be found guilty, others acquitted. 2 East, 573.

A charge that the defendant on such a day did keep and use a dog and also a gun to kill and destroy game, is of a single offence only; therefore a conviction "for the said offence" is good. 7 T. R. 152.

An information on the game laws need not be *qui tam* as well for the parish as for the informer. 7 T. R. 152.

A description of the dog, as a dog called a lurcher, is sufficient. 15 East, 456.

If conviction for using a gun "being an engine for the destruction of game," is void, unless it add that the party used it for the destruction of game. Dougl. 683.

Declaration that the defendant used a gun, being an engine to kill and destroy the game, held well, being after verdict. Cowp. 825.

The information on a conviction on the game laws must negative the qualification enumerated in st. 22 & 23 Car. 2. c. 25. 1 East, 643. Dougl. 545.

Negating that the defendant had not any estate, &c., nor was in any other manner qualified, does not sufficiently negative that he had not an estate in right of his wife. 15 East, 456.

The rule, with one exception only, is, that the evidence must be set out in a conviction particularly. The exception is a conviction upon the game act, 5 Ann. c. 14. 9 East, 358.

In convictions the general rule is, that particular facts, to which the defendant deposes, must be stated, and not the conclusion from those facts, in order that the court may see whether the magistrate has convicted properly. An exception to this rule occurs in convictions under the game laws, where a statement that the defendant kept a gun to destroy game, has been held sufficient; but upon this ground only, that such has been long established form, which it would be dangerous to overturn. 2 T. R. 18.

In convictions upon the st. 5 Ann. c. 14. for killing game, &c. the evidence may state generally that the defendant is not qualified, without specifically negating each particular qualification. 1 T. R. 125.

Declaration in debt, that the defendant kept a snare for killing hares, *contra formam statuti*, whereby, and by force of the statute, an action hath accrued to demand 5*l.*, held good, the offence being created by one statute, and the action for the whole penalty to the informer being given by several subsequent statutes, incorporated in the st. 2 Geo. 3. c. 19. 3 Smith, 506. 7 East, 516.

A penal action is not an appropriate form of proceeding to determine a question of right. If, therefore, a defendant in an action on the game laws can shew a colourable right either in himself or another (of which a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim, or the single act, with which he is charged, is not evidence), he will succeed, even though the parties have agreed to determine the right in this form. 4 T. R. 681, 682. 5 T. R. 19.

In actions on the game laws, though it is necessary to allege that the defendant is not qualified, yet the plaintiff need only prove the offence. 1 T. R. 648. 1 T. R. 144. 1 B. & P. 468. 3 B. & P. 507. 1 East, 650.

Held that justices, before whom an information was exhibited on the game laws, were justified in finding the want of the defendant's qualification, upon the fact of his having sworn before them, acting in another capacity, as commissioners of the income tax, to an estate of 100*l.* a year. 8 T. R. 220.

A snare can only be kept for the purpose of killing game. But the act of keeping a gun is ambiguous. 2 T. R. 19.

It cannot be inferred from the bare act of keeping a sporting dog, that it was kept to destroy game. 15 East, 271. Lofft. 179. 2 T. R. 19.

By 25 G. 3. c. 50. persons killing game must annually take out a certificate. The duties upon which are now regulated by 52 G. 3. c. 93.

St. 58 G. 3. c. 75. prohibits, under penalties, the purchasing of game.

(B 44.) Fishing.

**(B 44.) Fishing.**

By the st. W. 1. 3 Ed. 1. 1, none, without licence, shall fish in another's vivary, (a place where fish are kept, 2 Inst. 162.) on pain of imprisonment, ransom, and double damages to the party, if he will sue, if not, the king shall have the suit as against the peace; and persons indicted shall be attached, and distrained to appear within a month, then a second distringas to appear in six weeks, and on default shall be convict and fined.

By the st. W. 1. 20. misfeasors in fish-ponds shall make good amends, &c.

By these statutes, fishing in any fish-ponds, though no fish taken, is punished. 2 Inst. 200.

By the st. W. 2. 13 Ed. 1. 47. and 13 R. 2. 19. none shall take salmon between 8th September and 11th November, nor young salmon with engines at mill pools between the middle of April and 24th June, nor with nets or engines destroy the fry of fish, on pain of having the nets burnt for the first offence, of imprisonment for a quarter of a year for the second, and of a whole year for the third offence. 2 Inst. 478.

By the st. 17 R. 2. 9. justices of peace shall be conservators of the st. W. 2. 47. and 13 R. 2. 9. and may appoint under conservators, and at sessions inquire of defaults, &c.

By the st. 1 El. 17. none shall take the young fry or spawn of fish, nor kill pike under ten, salmon under sixteen, trout under eight, or barbel under twelve inches fish; nor fish, unless for smelts, loaches, minnies, bullheads, gudgeons, or eels, but with an angle, or a net of a meash of two inches and half, on pain of 20*l.* of which justices of peace may inquire, if no presentment in the leet within a year. Vide Leet, (L. 14.)

By the st. 5 El. 21. justices of peace may inquire of such, who break heads of fish ponds, or fish in several ponds, &c. who shall pay treble damages, three months imprisonment and seven years good behaviour, unless the justices think fit to remit it on confession of the fault, or unless the party release such surety.

By the st. 3 Jac. 12. none shall erect a wear, &c. in five miles of an haven, on pain of 10*l.*, nor fish with a net of a less meash than three inches, or with a canvas net, to destroy the fry or spawn of sea fish, on pain of forfeiting the net and 10*s.* to the poor and prosecutor, to be levied by distress and sale, on warrant of one justice or more, rendering the overplus, &c.

By the st. 13 & 14 Car. 2. 28. persons flocking about boats, &c. of pilchard craft in Cornwall and Devon, who refuse to depart being warned, on complaint to a justice of peace, shall forfeit 5*s.* to the poor, or be set in the stocks five hours.

By the st. 22 & 23 Car. 2. 25. a person convict, by confession or one witness, within a month after the offence, before any justice of peace, of taking fish in a river, pond, &c. or assisting thereto, without consent of the lord or owner, shall pay to the party, not exceeding treble damage, and to the poor not exceeding 10*s.*, what the justice thinks meet,  
to

to be levied by distress and sale, &c. And in default, to be committed, not exceeding a month, unless he give bond with surety not above 10*l*. never to offend more.

And the justice may destroy the nets, &c. taken: but the party may appeal to the sessions which shall be final, unless the title to the land or fishery be in question.

By the st. 4 & 5 W. & M. 23. none shall keep any net, &c. for taking fish, other than the owner or occupier of a river or fishery, or the maker or seller of such nets for better sale of them; and the owner of a river or fishery, or occupier, or any authorized by them, may seize to their own use nets, &c. used, or in the possession of a person fishing, &c. without consent, &c. And any, authorized by warrant from a justice of peace, may search houses of suspected persons, and seize nets, &c. to their own use, or destroy them. Provided fishermen, and apprentices, may fish in navigable rivers with lawful nets, &c.

### Addenda.

The following (see 2 Chetwynd's Burn, 388.) are the acts connected with this subject:

The penalty of fishing in ponds and other private fisheries. 3 Edw. 1. c. 20. 5 Eli c. 21. 22 & 23 Car. 2. c. 25. 4 & 5 W. & M. c. 23. 9 G. 1. c. 22. 5 G. 3. c. 14.

Rules concerning the size and preserving the breed of fish. 13 Edw. 1. st. 1. c. 47. 13 R. 2. st. 1. c. 19. 17 R. 2. c. 9. 2 H. 6. c. 15. 1 Eliz. c. 17. 1 G. 1. st. 2. c. 18. 33 G. 2. c. 27. 43 G. 3. c. lxi. 45 G. 3. c. xxxiii. 58 G. 3. c. 45.

Of the herring and other fisheries. 28 G. 2. c. 14. 26 G. 3. c. 81. 27 G. 3. c. 10. 48 G. 3. c. 110. 51 G. 3. c. 101. 52 G. 3. c. 153. 55 G. 3. c. 94.

Of the oyster fisheries. 31 G. 3. c. 51. 48 G. 3. c. 144.

Rules concerning fishing in or near the sea. 3 Jac. 1. c. 12. 1 G. 1. st. 2. c. 18. 9 G. 1. c. 33. 33 G. 3. c. 27. 42 G. 3. c. 22.

Importing fish. 18 Car. 2. c. 2. 1 G. 1. st. 2. c. 18. 9 G. 2. c. 38.

A conviction on 22 & 23 Car. 2. c. 25., for taking and killing fish, not setting forth, amongst other particulars, that the defendant had not the licence or consent of the owner, was held bad. 2 Burr. 679.

As to the construction of the words, "bred, kept, or preserved," in 5 G. 3. c. 14. & 1. see 2 Chetw. Burn, 390. 2 Russ. 1199.

A person who fishes in the fishery of another, for the avowed purpose of giving rise to an action to try the right, is not liable to a penalty under this statute. Dougl. 517.

A conviction on this act must shew that the fishing was without the consent of the owner. 4 Burr. 2279. 2 Burr. 679.

And who the owner was, must appear upon oath. Ibid.

And it must be distinctly stated in the information and in the evidence, that the proceeding was at the instance of the owner of the fishery. 2 B. & A. 378. 1 Chetw. Rep. 147.

A stream of water running by the side of a piece of ground, and forming part of the inclosure of the ground, is not a stream "in inclosed ground" within the meaning of 14. 3. 1 Mars. 127. 5 Taunt. 440.

But the fish need not be stated to be the goods, &c. of the owner. 2 East, P. C. 611.

It is not an offence within 9 G. 1. c. 22. to break down the head or mound of a fish pond, in order to let the water out and steal the fish. 2 East, P. C. 1067.

31 G. 3. c. 51, having made the offence a misdemeanour only, has negatived the idea of a felony. 5 Esp. 62.

3 Jac. 1. c. 12. s. 2. seems to be confined to floating, and does not comprehend shell fish. 2 M. & S. 568.

And the taking, to come under the act, must be a taking for the purpose of destroying the fish, not of preserving it. Ibid.

**(B 45.) Fowling-hawks.**

By Ch. de For. 9 H. 3. 13. every freeman shall have the ayries of hawks in his own woods in the forest of the king.

By the st. 34. Ed. 3. 22. he that finds an hawk, &c. shall bring it to the sheriff, who shall make proclamation of it, and the owner proving it to be his, shall have it, paying the charge; if none challenge it in four months, the finder if a gentleman, otherwise the sheriff, shall have it; but if any conceal or take away an hawk, &c. he shall suffer two years imprisonment, and pay the value of it. And by the st. 37 Ed. 3. 19. stealing of an hawk is felony.

By the st. 11 H. 7. 17. none shall take the eggs of a falcon, &c. out of the nest, be it on his own or another's ground, on pain of imprisonment for a year and a day, and fine at the king's will; a moiety to the king, a moiety to the owner of the ground where the eggs were taken, and to be determined by justices of peace, &c. Nor shall any take or drive to other coverts to breed in, or kill any falcon, &c. on pain of 10*l.* a moiety to him that will sue, by action of debt, by examination before justices of peace, information or otherwise, and a moiety to the king.

By the st. 23 El. 10. none shall hawk where eared corn is, without licence, on pain of 40*s.* to the owner, to be recovered by action, information, &c. Vide Leet, (L 14.)

By the st. 7 Jac. 11. any convict by confession, or two witnesses, before two justices of peace within six months, of hawking at a pheasant or partridge, between the first of July and last of August, shall be committed for one month without bail, unless he pay 40*s.* for hawking, and 20*s.* for every pheasant and partridge killed, to the poor.

**(B 46.) Pheasants, partridges, &c.**

By the st. 11 H. 7. 17. none of whatever degree shall take pheasants or partridges on the freehold of another, without his licence, on pain of 10*l.* a moiety to the owner of the land, a moiety to the prosecutor by action of debt, or by bill or otherwise; nor the eggs of swans out of the nest, on pain of imprisonment for a year and a day, and fine at the king's will, a moiety to the king, a moiety to the owner of the swans.

By the st. 23 El. 10. none shall in the night take a pheasant, or partridge, on pain of 20*s.* for every pheasant, and 10*s.* for every partridge, a moiety to the lord of the manor, a moiety to the prosecutor, (or if either release his moiety,) to the poor, by action, &c. And justices of peace at sessions may hear, &c. and any justice bind the offender to sessions, and if he pay not the penalty in ten days, shall be committed for a month without bail, and find surety not to offend in two years. Vide Leet, (L 14.)

And none shall hunt with a spaniel, where eared corn is, without licence, on pain of 46*s.* to the owner.

By the st. 1 Jac. 27. any convict by confession, or two witnesses at sessions, or before two justices of peace, of taking, &c. any pheasant, partridge, or house-dove, or eggs of pheasant, partridge, or swan, shall be committed for three months without bail, unless he pays 20*s.* for every fowl and egg to the poor, or after a month's commitment shall find two sureties of 20*l.* by recognizance before a justice not to offend more.



more. (So, by the st. 7 Jac. 11. if convict by one witness of taking a partridge, or pheasant.)

And any not having 10*l.* per annum inheritance, 30*l.* per annum for life, or 200*l.* in goods, or the son of an esquire, &c. convict, &c. for keeping a setting dog, or net for partridge or pheasant, shall be committed, &c. unless he pay 40*s.* to the poor.

And he who sells, or buys to sell, any pheasant, or partridge, not reared up in the house, or brought from beyond sea, forfeits 20*s.* for every pheasant, and 10*s.* for every partridge.

By the st. 7 Jac. 11. any convict, within six months, by confession of two witnesses before two justices, for hawking at a partridge or pheasant between the first July and last of August, shall be committed for one month without bail, unless he pay 40*s.* for every hawking, and 20*s.* for every pheasant, and partridge killed, to the poor of the parish.

And a constable, by warrant of two justices, may search houses of persons not qualified, and seize setting dogs, and nets; but persons having a warren, or lords of a manor, or inheritance of 40*l.* per annum, 80*l.* per annum for life, or goods of 400*l.* value, or their servants, may take pheasants, or partridges, on their own ground, between Michaelmas and Christmas.

By the st. 22 & 23 Car. 2. 25. a lord of a manor, not under an esquire, may under hand and seal authorise game-keepers within his royalty, who may seize setting dogs, nets, &c. for killing pheasants, partridges, or other game used within his manor by any unqualified by this act, (ut ante, (B 43.) for shooting,) or by warrant of justice of peace, may in the day-time search houses of suspected persons unqualified, and seize setting dogs, nets, &c. to the use of the lord, or destroy them.

A manor is a royalty named by the statute. (Vide Lut. 1506.)

So an hundred with a leet. Semb. Lut. 1506.

By the st. 9 An. 25. but one game-keeper in one manor.

By the st. 3 Geo. 11. one qualified, or a servant.

By the st. 4 & 5 W. & M. 23. a constable, by warrant of a justice of peace, may enter and search houses, &c. of suspected persons unqualified: and if pheasant, partridge, pigeon, fowl, or other game be found, may carry the offender to the justice of peace; and if he cannot satisfy the justice how he came by it, or in a set time produce the seller, or prove the sale, he shall pay for every fowl, not less than 5*s.* nor more than 20*s.*; a moiety to the informer, a moiety to the poor, to be levied by distress and sale, &c. And if no distress, shall be committed to the house of correction, not less than ten days nor more than a month, there to be whipt, and a person produced, &c. who shall not give such evidence to the justice of his innocence, and a person convict of having or using any setting dog, nets, &c. for destruction of fowl, shall forfeit, &c.

### Addenda. Vide supra, (B 43.)

By 2 G. 3. c. 19. no person shall, upon any pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession or use any partridge (between 1 Feb. and 1 Sept. 59 G. 3. c. 34. s. 3.), or any pheasant between 1 Feb. and 1 Oct. yearly, on of forfeiting, &c.

And it is no defence to an action for penalties that defendant had a deputation from

from a person claiming to be lord of the manor, if there appeared to be no ground for the claim. 4 T. R. 681. 5 T. R. 19.

By 2 G. 3. c. 29. persons wilfully shooting at or destroying any house doves or pigeons belonging to others, forfeit, &c.

By 13 G. 3. c. 55. no black game shall be killed between 10 Dec. and 20 Aug., nor red game between 10 Dec. and 12 Aug., nor bustard between 1 March and 1 Sept. on pain of forfeiting, &c.

Nor, by 13 G. 3. c. 80., at any season within certain hours.

And the heath fowl in Somerset and Devonshire, and the black game in the New Forest, are protected by 43 G. 3. c. 112. and 50 G. 3. c. 67.

By 57 G. 3. c. 90. persons found at certain times within any forest, &c. with intent to destroy, take, or kill game, are to be deemed guilty of a misdemeanour, and transported, &c.

Under which provision, it is not necessary that the accused should have their arms in actual possession at the time they are discovered. 2 Chetw. Burn. 536.

By 13 G. 3. c. 80. if any person shall knowingly and wilfully kill, take, or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill, take, or destroy any pheasant or partridge in the night, that is, between seven at night and six in the morning, from 12 Oct. to 12 Feb., and between nine at night and four in the morning, from 12 Feb. to 12 Oct., or in the day-time on Sunday or Christmas-day, he shall forfeit, &c.

### (B 47.) Hunting, deer-stealing.

As to hunting in a forest, vide Chase, (H 1, &c.)

By the st. 13 R. 2. 13. he that hath not 40s. per annum lands, or a clerk that hath not 10*l.* per annum revenue, shall not keep a dog to hunt, or engines to take or destroy deer, &c. on pain of a year's imprisonment, which justices of peace may determine.

By the st. 19 H. 7. 11. none shall keep deer-hays or buckstall, save for his own park, &c. on pain of 10*l.* per month; nor use stalking for deer in other park, &c. without licence, on pain of 10*l.* of which justices of peace may inquire, and commit till surety found for payment of the forfeiture, the 10th whereof shall go to the justices.

By the st. 5 El. 21. and 3 Jac. 13. none shall kill or chase deer in a park, or inclosed ground, without licence, on pain of treble damages to be assessed by the justices, (or, by the st. 7 Jac. 13. of 10*l.* at election of the owner), three months imprisonment, and surety for good behaviour for seven years, which the owner, or justice, on confession, may release.

And if any person not having 40*l.* per annum, nor 200*l.* in goods, nor inclosed ground of 40s. per annum for deer, keep dogs, &c. to kill deer, &c. any having 100*l.* per annum, may take them for his own use. Vide post, (B 48.) [Vide the st. 7 Jac. 13.]

So, by the st. 13 Car. 2. 10. any convict by confession of one witness before any justice of peace, being prosecuted within six months (or by the st. 9 Geo. 22. in three years) of hunting, &c. deer, &c. in park, &c. without consent, or of aiding, &c. forfeits 20*l.* a moiety to the owner, a moiety to the informer, to be levied by distress, &c. and in default to be committed to the house of correction for six months, or to gaol for a year, and find sureties, &c. for another year.

And he who aids by his dogs, &c. will be within the statute, though he be not present. Per three J. Holt. cont. Sal. 542.

So, by the st. 5 Geo. 15. he shall give bond of 50*l.* to be of good behaviour and not offend again. And a park-keeper, &c. convict shall pay 50*l.*

By the st. 3 & 4 W. & M. 10. any convict, &c. *ut supra*, being prosecuted

secuted in twelve months (or three years by the st. 9 Geo.22.) for hunting in any chase, park, &c. shall forfeit 20*l.*, &c.

If for wounding, taking, killing, 30*l.* for every deer, a third to the informer, a third to the poor, a third to the owner, to be levied, &c. *ut supra* by warrant of justices, &c. And he may be detained till the return of the warrant, not exceeding two days, and if no distress, shall be imprisoned a year, and pilloried an hour some market day in the next town. (And by the st. 4 Geo. 28. he shall be transported for seven years.)

And by the same st. 3 & 4 W. & M. 10. a constable by warrant of justices of peace may enter and search, (as in case of stolen goods,) houses of any suspected, and apprehend the person, if he finds venison, skins, toils, who shall forfeit 30*l.* to be levied, &c. if he cannot satisfy the justice how he came by or bought them.

And any convict by one witness of pulling down in the night, pales, &c. of a park, chase, &c. shall be imprisoned three months.

And by the st. 5 Geo. 15. shall also pay the penalty of killing a deer. The justice of peace ought to make the conviction for an offence against these statutes pursuant to the statutes. 2 Sho. 489.

If several are convicted of the same offence, each of them forfeits 30*l.* R. 1 Sal. 182. 2 Sho. 490.

If the party has not sufficient distress, the justice ought to make an adjudication, and then determine, that he be committed after two days for the space of six, or twelve months. R. Carth. 509.

If the party be absent, he ought to make a warrant to distrain: and if he has no distress, after two days a warrant for commitment. Ibid.

If a glover has skins found upon him, and says, that A. sold them to him; A. may be convicted unless he give a good account, &c. R. 1 Sal. 383.

The conviction ought to shew the offence to be strictly within the statute. 1 Sal. 378.

That he had no lands, &c. (where that is a qualification required) at the time of the offence. R. 3 Mod. 280.

It ought to shew the day of the fact. R. 1 Sal. 369. Vide 5 Mod. 447. Vide *infra*.

Or, that he killed three deer between such a day and such a day. R. 1 Sal. 378. Carth. 502. [Ld. R. 581.]

That the prosecution was commenced within twelve months, though the conviction need not be within that time. R. 1 Sal. 383.

It ought to shew the summons and appearance, or default. 6 Mod. 41.

And it will be bad, if it shew a summons upon which he appeared Tuesday 7th April, which was impossible, for 7th April was Friday. R. Ibid. 1 Sal. 181.

But the conviction need not recite all the circumstances at large. R. 1 Sal. 369.

If it say, that he unlawfully killed, it is sufficient, without shewing how. R. 1 Sal. 378. Carth. 503. [Ld. R. 583.]

That it was done *in forestâ usitata*; for that imports that it was then used. R. 1 Sal. 377.

*In loco in ambulacro chascæ*; for it imports that it was in the chase. R. 1 Sal. 383.

So, it is not necessary to say *contra pacem*; for it is the suit of the party, not of the king. R. 1 Sal. 378. Carth. 503. [Ld. R. 581.]

Nor, to shew, whether convicted by evidence, or confession. 5 Mod. 447.

Nor, to shew the oath. R. 1 Sal. 369.

So a summons is not necessary, if the defendant appears. R. 1 Sal. 383. Carth. 501.

So it is sufficient to say, *quod convictus est*, without adding *quod forisfaciet*, &c. for that is only execution and consequence. R. 1 Sal. 378. 383. 8 Mod. 175. [Vide infra.]

Nor is it necessary to shew the day of the fact, if it be within a year. 5 Mod. 446, 447. Vide Sal. 369. Vide supra.

Nor the distribution of the penalty, viz. a third to the poor, &c. R. 1 Sal. 383.

So, a man is not within the statutes, if he hunt, &c. where he claims a title. R. 1 Sal. 369.

But that shall not be proved by affidavit, where he is convicted. 1 Sal. 369.

If a conviction be affirmed in B. R. execution shall be there by *levari facias*, *fieri facias*, or *capias*. 1 Sal. 369. 379. [Ld. R. 583.]

And if the owner die before execution, upon an affidavit and suggestion upon the roll, his executor shall have it. R. 1 Sal. 378.

The process by *levari* or *fieri facias* out of B. R. shall be to the sheriff, who may thereupon make sale. R. 1 Sal. 379.

But an attachment does not lie for non-payment of the penalty. R. 1 Sal. 369.

If a statute say, a penalty shall be levied by distress, without more, it may be sold. R. 2 Jon. 25. 1 Sal. 379.

### Addenda:

Though by the 1 H. 7. c. 7, unlawful hunting in a forest or park is under certain circumstances made felony;

Yet this statute was superseded by the black act, 9 G. 2. c. 22., which itself was virtually repealed so far as respects stealing or hunting deer, by 16 G. 3. c. 30., and this latter has been in part repealed, and in part amended by 42 G. 3. c. 107.; which statutes therefore contain the law upon the subject; except that by 51 G. 3. c. 120., on conviction of offenders under the 42 G. 3., the penalty of 50*l.* may be mitigated to 20*l.*

Cross breeds are within the 16 G. 3. 2 East, P. C. 609.

St. 28 G. 2. c. 19. s. 3. denounces the destroying of covert for deer.

The following points connected with this subject have been resolved:

If the justice in the warrant to commit offender for want of distress, on st. 3 & 4 W. & M. say, it has been certified to him by the constable that there is not a sufficient distress, it is good, without reciting the warrant of distress and the return, for the word certified imports it to be in a legal manner. Str. 263.

If conviction is removed by certiorari and confirmed, the prosecutor has his election to take execution by a *levari*, or to apply to the justice. Ibid.

And if the prosecutor applies to the justice, the warrant of commitment need not set out the confirmation, for the court will take notice of their own records; and the statute here does not give the justice a new jurisdiction, but only revives the old, which was suspended by the certiorari. Ibid.

If the defendant be convicted on the evidence of the informer, it is bad. Str. 316. Ld. Raym. 1545.

If the conviction be only *convictus est*, without *quod forisfaciet*, it will be quashed. Str. 858. Vide supra.

In conviction for killing deer in a purlieu, it cannot be averred that it is a place where deer are usually kept, and need not be averred that the purlieu was not the defendant's. Str. 1119.

A man may be convicted on his confession to a witness, who deposes it before the justice. Andr. 301.

### (B 48.) Conies.

By the st. 13 R. 2. 13. none (*ut ante*), shall keep dogs, or nets, or ferrets, to destroy conies, &c. on pain of a year's imprisonment, (*ut ante*, (B 47.) for deer-stealing.)

By the st. 3 Jac. 13. none shall kill conies in an inclosed ground, without licence, &c. on pain, (*ut ante*, for deer). And a person having 100*l.* per annum, may seize the dog, ferret, net, &c. kept to kill conies by a person not having 40*l.* per annum, &c. provided not to extend to chasing in day-time.

By the st. 22 & 23 Car. 2. 25. any convict by confession or one witness, within a month, before a justice of peace, for chasing or taking any conies in any ground, lawfully used for keeping them, though not inclosed, without authority, &c., shall pay treble damage, have imprisonment for three months, and after, till they find surety for good abearing.

And any convict, &c. for taking conies in the night on the border of a warren, &c. unless the owner or occupier of the soil, or employed by him, shall pay damage to the party as the justice thinks fit, and to the poor not exceeding 10*s.*, and for non-payment shall be committed to the house of correction not above a month.

And a lord of manor, &c. may appoint a game-keeper, who may seize dogs, ferrets, &c. for taking conies, &c. (*ut ante*, B 46.) for pheasants.

### Addenda.

By 5 G. 3. c. 14. persons convicted of entering warrens in the night-time, and taking or killing conies there, or aiding or assisting therein, may be punished by transportation, or by whipping, fine, or imprisonment. s. 6.

But the act is not to extend to the destroying of conies in the day-time on the sea and river banks in the county of Lincoln, &c. s. 8.

By 52 G. 3. c. 93. the necessity for taking out a certificate to kill game, is now extended to killing conies.

A person who has a right of common may kill conies, when they are out of the warren and destroy the common; but he cannot have an action on the case against the lord, for that would create a multiplicity of actions. Cro. El. 548. Cro. Jac. 195. Cro. Car. 388.

But if the lord has a right to put conies on the common, and by an excess in the number surcharges the common, and by the number of burrows made by the conies the commoner's cattle are prevented from depasturing the common; an action in such a case is the proper remedy, and the tenant may not of his own accord fill up the burrows and remove the nuisance. 1 Bur. 252.

### (B 49.) Hares, &c.

By the st. 13 R. 2. 13. none not qualified, *ut ante*, shall keep a grey-hound, hound, &c. to destroy hares or other gentleman's game, on pain of a year's imprisonment.

By the st. 14 H. 8. 10. justices of peace at sessions may inquire of those who trace hares in the snow, who shall pay 6*s.* 8*d.* to the king. Vide Leet, (L 14.)

By



By the st. 1 Jac. 27. any convict, by confession or two witnesses, before two justices of peace, for taking hares by guns, snares, tracing in snow, &c. shall be committed for three months without bail, unless he pay to the poor 20s. for every hare, &c. or in a month after commitment shall give surety of 20l. to two justices of peace not to offend more.

None shall sell, or buy to sell, any hare, on pain of 10s., a moiety to the prosecutor, a moiety to the poor.

And any not having 10l. per annum inheritance, 30l. per annum for life, 200l. in goods, or the son of an esquire, &c. convict, &c. for keeping a greyhound, &c. to destroy hares, &c. shall be committed, &c. unless he pay 40s. to the poor.

By the st. 22 & 23 Car. 2. 25. a lord of manor, &c. may appoint gamekeepers, who may seize grey-hounds, &c. used by a person not qualified, (*ut ante*, (B 45.) for shooting,) and may search, (*ut ante*, (B 46.) for pheasants and partridges).

And any convict, by confession, or one witness, in a month, before any justice of peace, for setting snares, &c. shall pay to the party what the justice thinks fit, and to the poor not above 10s., and for non-payment be committed not above a month to the house of correction.

By the st. 4 & 5 W. & M. 23. a constable by warrant, &c. may enter and search houses, &c. of suspected persons unqualified, and if an hare, &c. be found, may carry the offender to a justice of peace, and if he cannot satisfy the justice how he came by it, or produce the seller, or prove the sale, or if, by the same evidence, he be convicted of having or using a greyhound, ferrets, &c. or if the person produced cannot give such evidence to the justice of his innocence, he shall pay (*ut ante*, (B. 46.) for pheasants).

The st. 4 & 5 W. & M. 23. does not alter the manner of conviction for having a greyhound, &c. which was prescribed by the st. 22 & 23 Car. 2. 25.; and therefore the conviction ought to be within a month, and by confession, or one witness. Per Cur. Trin. 2 Ann. B. R.

By the st. 5 Ann. 14. (which confirms all the former statutes *in esse*, and is made perpetual by the st. 9 Ann. 25.) if any, not qualified, keep or use any greyhound, setting dog, &c. to destroy the game, and be convict by one or two witnesses, before a justice of peace where the offence was committed, he shall forfeit 5l., a moiety to the informer, a moiety to the poor, to be levied by distress and sale by warrant of such justice; or, if no goods, to be sent to the house of correction for three months, and for any subsequent offence for four months.

So, if he be convicted by his confession. Per three J. 2 Mod. Ca. 64.

The conviction shall be quashed, if it does not shew that the party was not qualified. R. Mod. Ca. 40.

Though it says that he was *persona dissoluta*. Mod. Ca. 40.

If there be not proof that the hare, &c. was found upon him. Mo. Ca. 57.

### Addenda.

St. 48 Geo. 3. c. 93. s. 1. repeals the provision of 1 Jac. 1. c. 27. as relates to the penalties of shooting at hares.

Conviction for keeping greyhound and killing hares, quashed for not setting forth that defendant was not qualified, as he has not 100l., &c. The defendant appeared.

Conviction for keeping a lurcher, good. Str. 496. Vide post, 388.

May be on confession. Str. 546.

If the conviction only avers generally that defendant is not qualified, without averring that he has not the particular qualifications in the statute, it is bad. 2 Ld. Raym. 1415.

If the justice commits the person convicted, without endeavouring to levy the penalty by distress, an action for false imprisonment lies. Str. 710.

A conviction on the 4 & 5 W. & M. is good, without saying the party is a dissolute person, or that he did unlawfully hunt, or that the justice was then a justice. Str. 711.

A clothier and alehouse-keeper was found by jury to be an inferior tradesman within 4 & 5 W. & M. Barnes, 125.

A clothier was determined so to be by B. R. It is said Holt C. J. held every tradesman not qualified to be an inferior tradesman. So thought Bathurst J. and Clive J. contra Willes C. J. and Noel J. 2 Wils. 70.

A conviction is good which lays the offence to be done in a vill, without naming the parish; and if the vill is extraparochial, the informer shall have the whole penalty. Ld. Raym. 1478.

A conviction for keeping a gun, on st. 5 Ann. c. 14. is ill, and must be quashed. Str. 1098. Andr. 255.

Hound is not within stat. 5 Ann. c. 14. Str. 1126.

The conviction must set out the summons. B. R. H. 150.

Indictment does not lie for killing hares.

If a game-keeper shoot an unqualified person's dog, who thereupon shoots the game-keeper's, and behaves insolently, the judge will direct very considerable damages. Per Hardwicke C. 2 Atkyns, 190.

A gun is not necessarily to be taken to be an engine to kill game, and if on trover defendants justify, they must allege and shew the use. 1 Wils. 315.

By stat. 26 G. 2. c. 2. actions for the recovery of any penalty may be brought before the end of the second term after the offence.

By stat. 28 G. 2. c. 12. every person, qualified or not, who offers to sale game, is liable to the penalties on higlers, &c. offering to sale by 5 Ann. c. 14.; and game found in the possession of poulterer, &c. is deemed exposing to sale.

By stat. 10 G. 3. c. 18. person stealing any dog, or receiving it knowing it to be stolen, convicted before two justices, forfeits from 20*l.* to 20*l.* or imprisonment from twelve to six months, and for second offence from 50*l.* to 30*l.*, or from eighteen to twelve months, and whipping.

Justices may grant search warrant, and if dog or dog-skin found, to restore it, the party knowing it stolen, or the skin to be the skin of a dog stolen, subject to same penalties; appeal final, and no certiorari.

By stat. 15 G. 3. c. 80. person killing hare, pheasant, &c., or using gun, dog, engine, &c. to kill or take, between seven at night and six in the morning from 12th October to 12th February, and between nine at night and four in the morning from 12th February to 12th October, convicted before one justice, forfeits for first offence from 20*l.* to 10*l.*, and for second from 30*l.* to 20*l.* and costs, or for want of distress shall be committed for three months; and for offence after second conviction, shall be committed till quarter session, or give surety to appear to indictment, and if convicted forfeits 50*l.* and costs, or for want of distress, committed from twelve to six months, and publicly whipt. Half forfeiture to informer, half to poor.

Killing or using engine on Sunday or Christmas-day, liable to like penalty.

Justice where offence committed, may grant warrant, to be indorsed by justice in another county where offender lives, and the offender thereby be brought before the first justice, or distress made. Appeal, no certiorari.

### Highway.

As to highway, vide Chimin.

### Hue and cry.

As to hue and cry, vide Hundred, (C 1, &c.)—Pleader, (2 S 1, &c.)

(B 50.) Labourers.—Who are compellable to work.

By the st. 5 El. 4. in hay or harvest-time, any justice of peace, or constable, on request, &c. may cause all artificers, meet to labour, to serve

serve by the day for reaping or inning of corn or hay, and on refusal complained of to the constable, &c. he shall set him in the stocks for two days and a night, and for neglect himself shall lose 40s. Vide Apprentices, post, (B 53, &c.)—Servants, post, (B 58, &c.)

Persons accustomed to go into other shires for harvest-work, and having none in their own town or county, may still do so, if not retained in service, and having a testimonial from a justice of peace or mayor, for which they shall give but one penny.

**(B 51.) For what wages.**

Justices of peace, or mayor, by the st. 5 El. 4. at Easter sessions, &c. may appoint wages of all labourers, artificers and workmen, by the day, week, month, or year, with meat or without, and by the great, for mowing, reaping, threshing, ditching, &c. by the rod, foot, &c. and certify the same into Chancery, &c., or by the st. 1 Jac. 6. cause the same ingrossed under their hands and seals to be proclaimed, &c.; and if any give more wages, on conviction, before the said justices of peace or head officers, he shall forfeit 5*l.* and be imprisoned ten days without bail: and any person taking more wages, on conviction before the said justices or two of them, shall be imprisoned twenty-one days without bail. And every promise, gift, &c. contrary, is void.

**(B 52.) Misdemeanor.**

By the st. 5 El. 4. all labourers, hired by the day or week, betwixt the midst of March and September, shall continue at work from five in the morning till between seven and eight at night, unless two hours and an half for meals; and from spring of day till night betwixt the midst of September and March, on pain of 1*d.* for every hour absent.

And none, retained for any work in the great, shall depart without finishing it, unless for non-payment of hire, for the service of the queen, with licence of the master, or for other lawful cause, on pain of imprisonment for a month without bail, and forfeiture of 5*l.*, to be recovered by action of debt in the king's courts of record.

And if a labourer maliciously make an assault or affray on his master, mistress, or dame, or other who hath the charge or oversight of him, on conviction before two justices of peace, or mayor, &c. by confession or two witnesses, he shall suffer imprisonment for a year, or less, at the discretion of the said justices, or mayor, and two others of the corporation: and, if the offence require, shall receive such other open punishment, as the justices of peace at the quarter sessions, or the mayor, and four of the corporation, shall think meet, so as not to extend to life or limb.

**Addenda.**

By 20 G. 2. c. 19. one justice may hear master's complaint of misdemeanors, mis-carriage, or ill behaviour of yearly servant in husbandry, or any artificer, handicraft, miner, collier, keelman, pitman, glassman, potter, or other labourer, and punish by commitment to hard labour, not exceeding a month, or by abating wages, or by discharge from service; and so to hear servant's complaint, and discharge him gratis.

Appeal lies to quarter sessions, which determines finally, with costs to 40*s.*; and no certiorari lies.

By st. 31 G. 2. c. 11. this act is extended to servants in husbandry, for any time less than a year.

No demand need be made previous to issuing the warrant of distress under 42 G. 3. c. 90. s. 61. 6 East, 75.

As to the construction of the words 'other labourers' in this statute, see 8 East, 113.

Where a magistrate, in his adjudication on this act, avers a complaint made on oath, and an examination on oath, it is not competent, in replevin for taking the plaintiff's goods, for the plaintiff to plead in bar of a cognizance made under a warrant of distress and sale founded on that adjudication, that the servant did not duly make oath before the magistrate that the sum claimed was justly due to him for wages. Nor can he plead that the sum claimed was not due. 1 Bro. & Bing. 57.

A maid servant may be discharged by her master for being with child. Cald. 11.

And if a servant hired for a year refuse to obey his master's orders, the master is justified in dismissing him before the end of the year. 2 Stark. 256.

So a master may discharge his servant at a moment's warning for misconduct. 5 Esp. 235. 2 Selw. N. P. 1032.

As for being absent when wanted, sleeping from home at night, &c. Ibid.

So for criminality. Cald. 57.

Unless committed prior to retainer. Cald. 129.

Whether for insanity, quære. 5 T. R. 659. 6 T. R. 587.

When a magistrate discharges a servant from the service of his master, it must appear on the face of the order itself to be a case within the jurisdiction of the magistrate. T. R. 583.

By 6 G. 3. c. 25. jurisdiction is given to magistrates against labourers, artificers, and others, not fulfilling their contract, or being guilty of any misdemeanor.

And the remedy thereby afforded is cumulative to, and not in lieu of that given by 20 G. 2. 16 East, 13.

A complaint in writing preferred by the master and verified by the oath of another, is sufficient to give magistrates jurisdiction under 20 G. 2. 12 East, 248.

A servant sentenced by a magistrate to imprisonment under st. 20 G. 2. c. 19. s. 2. must likewise be sentenced to correction and hard labour. 14 East, 605.

A magistrate cannot, under st. 6 G. 3. c. 25. sentence an offender to be corrected. 14 East, 605.

The punishments which a magistrate may inflict under st. 20 G. 2. c. 19. s. 2. and 6 G. 3. c. 25. cannot be blended in the same sentence. 14 East, 605.

By 57 G. 3. c. 122. the provisions of 12 G. 1. c. 34. and of 22 G. 2. c. 27. are extended to labourers in collieries.

By 58 G. 3. c. 51. wages may be paid in bank notes, if the party consents.

### (B 53.) Apprentices.

So, justices of peace have jurisdiction by several statutes for the good order or regulation of apprentices. Vide Labourers, ante, (B 50, &c.)

Servants, post, (B 58, &c.)

By the st. 5 E. 4. justices of peace, and mayor, &c. shall meet yearly between Michaelmas and Christmas, and between Lady-day and Midsummer, to inquire of and execute all articles of that statute; and shall have 5s. per diem a-piece for every day (not exceeding three days at a time) whereon they shall meet for such purposes, to be paid out of the forfeitures, &c. in such manner as at quarter sessions: and two justices of peace, (1 quor.) and mayor, &c. may hear and determine all offences, &c. by indictment, &c. at the sessions, and award execution and estreat fines, &c.; a moiety whereof shall go to the queen, and a moiety to the prosecutor; but, in a corporation, shall go to the corporation, to be levied by a person appointed by the mayor, &c. in such manner as any fines, &c. granted to them by charter.

Though the statute gives the forfeitures in a borough to the corporation, yet that shall be intended only of the king's moiety, and not the moiety of the informer. Dub. Mo. 886. Hob. 183. R. Cro. Car. 316.

(B 54.) Who

**(B 54.) Who may take them.**

By the st. 5 El. 4. every householder twenty-four years of age, using an art, mystery, or manual occupation in a city or town corporate, may take as apprentice, by indenture for seven years at least, as in the city of London, the son of a freeman not using husbandry, nor being a labourer, but dwelling in the same or other city or corporation, so as his time expire not till his age of twenty-four years; and in a market town may take apprentice, &c. the child of an artificer in the same or other market town, not using husbandry, nor being a labourer.

Provided, a merchant, mercer, draper, goldsmith, ironmonger, embroiderer, or clothier, in a city or corporation, shall not take an apprentice (unless his own son) whose parent hath not 40s. per annum inheritance, or freehold; nor, in a market town, &c. whose parent hath not 3*l*. per annum, &c.; to be certified under the hands and seals of three justices of peace where the estate lies, to the head officer of the city, corporation, or market town, to be enrolled, &c.; but twenty-six, viz. a smith, wheelwright, ploughwright, millwright, carpenter, &c. may take an apprentice, though the parent hath no lands.

An householder using half a plowland in tillage, may take apprentice any above ten and under eighteen years old, to serve in husbandry till the age of twenty-four, or twenty-one years at least.

And every contract, &c. to take an apprentice contrary to this act, is void; and he who takes, forfeits for every apprentice 10*l*.

By the same statute, a clothmaker, fuller, shereman, weaver, tailor, or shoemaker, having three apprentices, shall keep one journeyman, and for every other apprentice, another journeyman, on pain of 10*l*.

**Addenda.**

By 54 G. 3. c. 96: reciting, whereas by 5 Eliz. c. 4. divers rules and regulations were enacted respecting the qualifications of persons entitled to take and become apprentices, and the term of years for which such apprentices shall be bound, and as to the mode of binding such apprentices; and it was also enacted by the said statute, that all indentures, covenants, promises, and bargains of and for the having, taking, or keeping of any apprentice, otherwise thereafter to be made or taken, than is by the said statute limited, ordained, and appointed, should be clearly void in the law to all intents and purposes; and that every person that should from thenceforth take or newly retain any apprentice contrary to the tenor and true meaning of the said act, should forfeit and lose for every apprentice so by him taken 10*l*.: and whereas it is expedient that so much of the said recited act should be repealed, it is enacted, that so much of the said recited act shall be and the same is hereby repealed; and that it shall and may be lawful for any person to take or retain or become an apprentice, though not according to the provisions of the said act; and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise valid and effectual, shall be valid and effectual in law, the repeal of so much of the said act as is herein last above recited notwithstanding.

Provided that this act shall not extend to defeat, alter, or prejudice the custom, &c. of the city of London concerning apprentices, or the ancient custom, &c. of any city, town, corporation, or company lawfully constituted, or any bye-law or regulation of any corporation or company.

By 5 Eliz. c. 5. s. 12. every owner of a ship or vessel, and every householder exercising the trade of the seas by fishing or otherwise, and every gunner, commonly called a cannoneer, and every shipwright, may take apprentices for ten years or under; and every apprentice so taken, being above seven years of age, shall be by the same covenants bound, or ordered and used to all intents, according to the custom of London, so that the covenant or bond of apprenticeship be made by writing indented, and



enrolled in the town where the apprentice shall be inhabiting, if it be a town corporate, if not, then in the next town corporate, for which enrolment shall be paid not above 12d.

The indentures of a mariner's apprentice, bound under this section, must be enrolled in the next corporate town according to the statute, in order to sustain an action of covenant, and not in the Trinity House, according to the charter of that company. 3 Lev. 389. 1 Bott, 654. 6 Mod. 69. 1 Bott, 527.

The provision, however, contained in this clause is intended for the benefit of the apprentice, and as a check upon the master. Therefore where the indenture was not enrolled in the town where the apprentice was then inhabiting, nor in the next corporate town to the habitation of the apprentice, pursuant to the statute of Elizabeth, nor with the collector of the customs pursuant to 2 & 3 Ann. c. 6., it was holden that the apprentice should not be prejudiced by the neglect of the master to enrol the indenture, although the stamp duties were thereby evaded. Burr. S. C. 586. 1 Bott, 635.

The relation of master and apprentice is not established for any purpose, unless the master is a householder, and aged 24. 4 Taunt. 876. Vide 2 Bott, 377. 4 T.R. 196.

(B 55.) Who may be bound apprentices—By the parent, &c.  
—[Assignment of.]

By the common law, after his full age, a man may bind himself apprentice.

So, he may be bound by his parent before.

So, by the custom of London, an infant, after his age of fourteen, and before twenty-one, may bind himself to be apprentice by indenture to a freeman of London. Vide 21 Ed. 4. 6. a. if he be not married. 2 Rol. 305. Vide Cro. El. 653.

So, by custom, in other cities, boroughs, &c. 9 H. 6. 8. a.

And, by the custom of London, he shall be bound by his covenant to serve for seven years; and the master shall have such remedy as if he was of full age; and therefore, the master shall have covenant, if he depart from his service. R. 1 Mod. 271. Semb. Mo. 125. Vide 2 Keb. 687.

So, the master may give him correction, or bring him before a justice of peace. Vide 21 Ed. 4. 6. a. 1 Mod. 271.

And it is sufficient to say, that by the custom he shall have *tale remedium*, &c. without saying expressly that he shall have covenant. R. 1 Mod. 271.

So, now, by the st. 5 El. 4. an apprentice bound under the age of 21 years to serve, shall be obliged as if of full age.

And covenant lies for not serving. Adm. Hut. 63. R. cont. Cro. Car. 179. Vide infra.

So, covenant lies by the custom of London, though the indenture be not enrolled pursuant to the custom. R. 2 Rol. 305. Pal. 361.

But by the common law, without special custom, an infant cannot bind himself to be an apprentice. R. 21 Ed. 4. 6. a. D. 2 Cro. 494.

So, though bound by a custom, covenant does not lie upon a collateral covenant, though usual in an indenture of apprenticeship; as, that he shall not use unlawful games, embezzle the goods of his master, &c. R. per two J. Winch. cont. Hut. 63, 64. Win. Rep. 64.

So, covenant does not lie for not serving, where an infant binds himself, since the st. 5 El. 4. R. Cro. Car. 179. Vide supra.

If the apprentice marry, it is a breach of the covenant, but he shall not be discarded. 2 Ver. 492.

So, by the custom of London, if the indenture be not enrolled within  
a year.

a year, upon a petition in French, to the mayor and aldermen, and a *scire facias* against the master, if the omission of enrolment was not by default of the apprentice, (for it shall not be enrolled if the apprentice does not appear in person,) the apprentice shall be discharged, and may serve another master. R. Pal. 361. 2 Rol. 305.

None shall be bound apprentice, or discharged without deed. 1 Sal. 68.

And the deed ought to be enrolled. 2 Ver. 492. 64.

Nor can he be assigned but by custom. 1 Sal. 68.

So, an apprentice to a waterman, which is a voluntary society, is not within the custom of London, and cannot be bound under age. R. Mod. Ca. 69.

By the st. 5 El. 4. if any required to serve in husbandry, or other art, refuse, on complaint to a justice of peace, or mayor, &c., he may send for him, and if he find him meet for that art, may commit him till he will be bound as an apprentice. Provided, none above twenty-one years of age be compelled to be bound.

When a man shall not use a trade, unless he was an apprentice for seven years, vide in Trade, (D 5, &c.)

### Appendenda.

The binding cannot be by deed poll. 1 Sess. Ca. 222 1 Bott, 528.

But only by indenture. 3 Esp. C. 189.

Though under 31 G. 2. c. 11. a binding by deed not indented, is sufficient to gain a settlement.

An agreement to execute an indenture, is not a sufficient binding. Burr. S. C. 872. 1 Bott, 530.

Still less a parol binding. Burr. S. C. 290. 1 Bott, 531. 4 T. R. 769. 2 Bott, 377.

Infants may bind themselves. 2 Bott, 363. 1 Bott, 613.

And the master may be an infant. 2 Bott, 377. 4 T. R. 196.

And if the binding be *bonâ fide*, the master's condition is immaterial. 1 Bott, 610.

In the case of a voluntary binding, the person bound must be a party. 8 East, 25. 1 Bott, 527. 9 East, 295.—Secus a parish binding, with service. 2 T. R. 726. 2 Bott, 373. 1 Bott, 606.

Under 8 & 9 W. 3. c. 30. s. 5. it is not necessary that the master should execute a counterpart to enable the pauper to gain a settlement. Cald. 31. 2 Bott, 371. 367.

Every indenture of an infant, except of such apprentices as are bound under 5 Eliz., is voidable, at his election, on attaining his majority. 5 T. R. 715. 1 Bott, 623.

But *quære* if before. 6 T. R. 652.

No technical expressions are essential, provided the parties shew, by the words used in the instrument, an evident intention to constitute the relation of master and apprentice. 8 T. R. 579.

If, by any intendment, an indenture of apprenticeship, in the manner in which it is executed, might be sufficient, it lies on the party disputing its validity to impeach it by evidence. 12 East, 361.

An indenture executed thirty years ago, was proved to have been delivered to the apprentice at the expiration of his time, and lost. The parish, in which he was settled by service under it, had relieved and otherwise treated him as a parishioner for the last twelve years previous to the appeal. Held, that the indenture might be presumed to have been regularly enrolled and stamped, although it was proved by the deputy register and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp, or enrolled from the time of the date to the present time. 7 East, 45. 3 Smith, 92.

An indenture was entered into and executed by the master and the father of H., then fourteen years old, to teach him the art and mystery of weaving, for five years; H. was

H. was no party to the indenture, and his father entered into no covenant that he should serve. This is no binding as an apprentice. 8 East, 25. 4

An apprenticeship, void for the first half of the period contracted for, by reason that the apprentice is not, during that period, *vis juris*, is not valid for the latter half 4 M. & S. 383.

An apprentice is not bound to serve the executor of the master. Str. 1206.

But if he continues with his own consent, and that of all other parties, it is a continuation of the apprenticeship. Dougl. 70.

And though indentures of apprenticeship be not assignable in strict law, yet for the purposes of gaining a settlement at least, such assignment is not void, but voidable only, and amounts to a contract between the two masters. Ld. Ray. 683. 1 Bott, 580.

And such assignment requires a stamp. 6 T. R. 452.

### (B 56.) By the parish.

By the st. 43 El. 2. the churchwardens and overseers, with the assent of two justices of peace, (1 Qu.) may raise a stock to put out poor children apprentices, and may bind such children where they see convenient, till such man-child be twenty-four years old, such woman-child twenty-one years, or till her marriage.

And the justices of peace shall compel the master to receive an apprentice in husbandry though not in trade. Per three J. Holt. cont. Carth. 94. R. 1 Sid. 99. [Vide Sal. 67.]

By the st. 3 Car. 4. all to whom the overseers shall bind any children apprentices, may receive and keep them as such, and were compellable to receive them. Per three J. 1 Lev. 84. 3 Mod. 270. R. 1 Sal. 67. Sho. 77.

By the st. 8 & 9 W. 3. 30. any person to whom a poor child is appointed to be bound, pursuant to the st. 43 El. 2. refusing to receive and provide for it, and execute a counterpart of the indenture, shall, on conviction before two justices of peace by oath of one churchwarden or overseer, forfeit 10*l.*, to be levied by distress and sale, &c. to the use of the poor: saving an appeal to the next quarter sessions.

If the sessions upon appeal disallow the order, because the matter is a merchant, it will be good: for they are the judges who are proper. R. Sal. 491. vid. acc. Bott, 389. Loft. 79.

### Addenda.

Under st. 43 Eliz. c. 2. "justices are to bind apprentices where the justices shall see convenient;" this provision, therefore, empowers them to bind to a master resident in a different county to their own: and the 9th section, which directs that "the justices shall only act within their respective limits," only means that they shall not interfere where the apprentice resides in another county. The st. 8 & 9 W. 3. c. 30. s. 5. is so far restrictive of this power, that the binding is not valid unless the master assents. If the apprentice assent by serving under the indenture, it is sufficient, though he do not execute it. 2 T. R. 726.

By 56 G. 3. c. 130. entitled An act to regulate the binding of parish apprentices, after reciting that whereas many grievances have arisen from the binding of poor children as apprentices by parish officers to improper persons, and to persons residing at a distance from the parishes to which such poor children belong, whereby the said parish officers and the parents of such children are deprived of the opportunity of knowing the manner in which such children are treated, and the parents and children have in many instances become estranged from each other; and also from the permission given to apprentices, by the persons to whom such apprentices have been bound, to serve others without a formal assignment, whereby the discretion to be exercised by magistrates in placing out apprentices to suitable persons, is frequently rendered of no avail; for remedy thereof enacts various provisions, namely,

That the child shall be first carried before two justices of the peace, who are to enquire

enquire whether the person to whom it is intended to bind the apprentice resides within a reasonable distance, or other circumstances. They may examine parents as to distance, &c. and also enquire into the character and circumstances of the master, and make an order that the overseers may bind, &c.; which order is to be referred to in the indenture, and signed by justices before execution of the indenture. No child to be bound beyond forty miles out of the county, unless it be the child's parish, or be more than forty miles from London; and the special grounds for allowing a more distant binding shall be stated by the justices. s. 1.

Indenture to be allowed by two justices of the county or jurisdiction into which apprentice is to be bound, as well as by two justices of the county or jurisdiction from which he is bound. s. 2.

The allowance by county magistrates to be valid in towns and places having exclusive jurisdiction. s. 3.

Distance to which apprentices may be bound not to be limited to cities which are counties of themselves. s. 4.

No settlement shall be gained unless directions complied with. s. 5.

Penalty on overseers binding apprentices contrary hereto. s. 6.

Children not to be bound till they have attained nine years. s. 7.

On master's removing out of the county, or forty miles from the parish where apprentice was bound, fourteen days notice shall be given to the parish where apprentice resides, or by which he is certificated. And apprentice shall appear before two justices of the county, who shall enquire, &c. and make order for apprentice's continuance or otherwise. s. 9.

Indentures not valid unless approved by two justices. s. 11.

Recovery and application of penalties, &c. s. 12, &c.

An indenture binding out a poor apprentice executed by W. S. churchwarden, and J. G. overseer, is sufficient. 12 East, 361.

So, an indenture signed by one churchwarden and one overseer. 1 B. & A. 275.

A binding by two persons, styling themselves churchwardens and overseers, who had been appointed overseers while one of them was churchwarden, is void. 13 East, 143.

But to remedy the serious inconveniences which might arise from this decision, the st. 51 G. 3. c. 80. entitled An act to render valid certain indentures for the binding of parish apprentices, was passed.

Which enacts that indentures and certificates, which have heretofore been signed by two persons only, acting as churchwardens and overseers, shall be valid.

Which statute extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer. 2 B. & A. 200.

By 54 G. 3. c. 107., entitled An act to render valid certain indentures for the binding of parish apprentices, and certificates of the settlement of poor persons, it is enacted, that indentures and certificates shall be valid, although the churchwardens, &c. were not sworn in. So, indentures and certificates executed by the overseers of the poor of any township, &c.

The churchwardens of the parish at large (in which the township is situated) need not join in the execution of an indenture of apprenticeship, executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately. 16 East, 228.

The assent of justices to the binding of parish apprentices is a judicial act; therefore it cannot be given by each separately. 3 T. R. 580. 1 Bott, 620.

But it is sufficient although one magistrate signs the indenture when alone, provided he is present afterwards when the other signs it. 8 T. R. 454. 1 Bott, 625.

And the provision as to the assent applies only to a compulsory binding. 1 Bott, 605. Sett. Ca. 77.

A master having executed the counterpart of the indenture, is estopped from proving any prior informality in such indentures. Cald. 444. 1 Bott, 615.

It is discretionary in the parish officers to select those children whom they shall think their parents are not able to maintain. Comb. 289. 1 Bott, 604.

And 52 G. 3. c. 57. prescribes certain rules in regard to indentures.

Gentlemen of fortune and clergymen are equally liable with others to take parish apprentices. 1 Com. 426.

So, persons occupying lands in the parish, but residing out of it. 3 T. R. 107. 1 Bott, 619.

And where several persons hold lands in partnership, some of whom actually reside upon and occupy the same, and others reside at a distance in another parish, the latter as well as the former are obliged to take apprentices. 7 T. R. 33. 1 Bott, 624.

By

By 32 G. 3. c. 57. master having been convicted of misusing his apprentice, is not to have another put upon him, but is to pay not exceeding 10*l*. nor less than 5*l*.

A master is not compellable to give to his apprentice, forced upon him, wages or clothes at the end of the term. Fol. 205. 1 Sess. c. 49. 1 Bott, 605.

A child eleven years old is taken before a magistrate by parish officers, for the purpose of binding him to a master chosen by his parent. Upon a refusal by the justice, on the ground that the master had a sufficient number of apprentices already, the parties meet at an inn and execute an indenture of apprenticeship for seven years, all the expences of the binding being paid by the parish. Held, that since the binding did not appear to be intended a binding as a parish apprentice (the parish officers having declared, on the justice's refusal, that if they could not have him bound there, they would in another place), it was valid, and capable of conferring a settlement 2 M. & S. 501.

As to the registry of parish apprentices, see 42 G. 3. c. 46.

As to binding in incorporated districts, see 20 G. 3. c. 36. 42 G. 3. c. 46. 3 T. R. 523. 1 Bott, 622. 9 East, 211.

As to the assignment of parish apprentices, see 32 G. 3. c. 57. 56 G. 3. c. 139.

As to binding apprentices to the sea service, see 2 & 3 Ann. c. 6. 12 G. 3. c. 17.

Chimney sweepers, see 28 G. 3. c. 48.

### (B 57.) How punished, or discharged.

By the st. 5 El. 4. if the master misuse, or give cause of complaint to the apprentice, or he do not his duty to his master, a justice of peace, or mayor, may take order between them as equity requires; and if, for want of conformity in the master, the justice of peace or mayor cannot compound the matter, he may bind the master to the next quarter sessions of the county or corporation, where, if they think meet, four justices of peace, (1 Qu.) or mayor, with three of his brethren, may under hand and seal to be inrolled, &c. declare the apprentice discharged and the cause thereof: and if fault be in the apprentice, such justices, or mayor, with his assistants, may order such correction as they think meet.

Though the statute says (for want of conformity in the master, &c.) yet the justices at quarter sessions may discharge an apprentice upon his complaint, as well as upon complaint of the master. R. 1 Sand. 315. 1 Sal 67

And the parties may come originally to the sessions, without coming first to a justice of peace, or mayor. Dub. 1 Saund. 316. Per two J. Holt. cont. 1 Sal. 67. R. Sal. 68. 491, Carth. 198. cont.

If the master license a servant to depart, he cannot afterwards revoke it. R. Mod. Ca. 70.

The justices of peace may discharge an apprentice, though the master does not appear, by which his recognizance is forfeited. R. Sal. 67. 490.

If the apprentice be discharged, the master shall be discharged of course. R. Sal. 471.

If the justices discharge the apprentice, the covenants are discharged of course. 5 Mod. 140.

If the justices discharge the apprenticeship, they may order restitution of the money as consequent. R. P. 13 W. 3. Sal. 67, 68. 490. [Contra Str. 69. accord 1 Atk. 149.]

But the justices cannot discharge an apprentice to a trade, not expressed in the statute. R. 5 Mod. 140. R. Sal. 471. 490. [2 Ld. Raym. 1410. 1 Str. 663. contra]

They



They cannot order an executor to maintain the apprentice, where the master dies. R. Sh. 405. 1 Sal. 66.

They cannot discharge, unless it be by order under the seals of the justices. R. Carth. 198.

Yet quoad his maintenance, the covenant is not discharged by the death of the master. Semb. 1 Sal. 66.

### Addenda.

Sessions have original jurisdiction to discharge apprentices. Str. 704. B. R. H. 101.

It must appear on an original order of sessions to discharge an apprentice, that the master was present, or summoned. Str. 1013. B. R. H. 101.

Using him unkindly, and refusing to provide for and entertain him, is not sufficient ground; there is a power to oblige the master to entertain him; and using unkindly is too loose. Ibid.

Cannot discharge the master from his apprentice for the apprentice's incurable sickness; the master is to provide for him in sickness and in health. Str. 99.

Apprentice shall not be discharged, only because his master declares he will not take him again. Str. 704.

The justices have a concurrent jurisdiction with the mayor's court over apprentices to freemen of London, bound and enrolled there but living in another county. Str. 663. 2 Ld. Raym. 1410.

By st. 20 G. 2. c. 19. on complaint of a parish apprentice, or one with whom not more than 5*l.* was paid, two justices may summon master and discharge apprentice, without fee.

So, on complaint of master, they may commit apprentice to hard labour for a month, or discharge him.

By st. 6 G. 3. c. 25. if apprentice absents himself from service before time expired, he shall serve for so long time as he has absented himself, or make satisfaction, or be committed to the house of correction for three months: this extends not to apprentices giving more than 10*l.* or after seven years elapsed beyond their term.

See 32 G. 3. c. 57.

### (B 58.) Servants.—Retainer.

But the st. 5 El. 4. every retainer contrary to that statute is void. And every servant retained in husbandry, or any of the thirty arts there mentioned, shall at his departure have a testimonial under the seal of the corporation, or of the constable and two other householders of the parish, declaring the place of his last service and lawful departure; and if retained again, without shewing such testimonial to the head officer of the parish, he shall be imprisoned till he procure one, and if not procured in twenty-one days, be whipped as a vagabond; and any, retaining such servant without shewing such testimonial, shall forfeit 5*l.* Vide Labourers, ante, (B 50, &c.)—Apprentices, (B 53, &c.)

If a man retain another generally, it shall be intended for a year. F. N. B. 168. H. Co. L. 42. b.

If he retain another for forty days, another may retain the same person; for the first retainer was not according to the statute. F. N. B. 168. F.

If a man retain another *juxta formam statuti* without mention of wages, the retainer is good, and he shall have the wages, which are limited by the justices pursuant to the statute. Semb. Bro. Labourer, 1.

So, if a man retain a servant, without saying for what office, it is good. Dalt. 185.

So, a retainer conditionally is good. Semb. Bro. Labourer, 23. Dalt. 185.

So,

So, a retainer for two or three years. F. N. B. 168. K.

But a retainer by an insufficient man is void. Semb. Bro. Labourer, 85. F. N. B. 168. H.

A retainer to serve when required, is good only upon covenant. F. N. B. 168. F.

By a retainer a man is in service by law, though he does not actually come to his service. Awarded, Bro. Labourer, 9. 11.

### Addenda.

Many of the provisions of the statute of Elizabeth are repealed by 49 G. 5. c. 109.

#### (B 59.) For what time.

By the st. 5 El. 4. none shall be retained in any of the sciences of clothier, clothweaver, tucker, fuller, clothworker, sherman, dyer, hosier, tailor, shoemaker, tanner, pewterer, baker, brewer, glover, cutler, smith, farrier, currier, sadler, spurrier, turner, capper, hat or felt-maker, bowyer, fletcher, arrowhead-maker, butcher, cook or miller, for less time than a year.

A retainer generally shall be intended for a year, for that is pursuant to the statute. F. N. B. 168. H. Co. L. 42. b.

Yet a man may retain another for two or three years. F. N. B. 168. K.

Or, for life; but such retainer is out of the statute. Bro. Labourer, 44.

#### (B 60.) For what wages.

By the st. 5 El. 4. justices of peace, or mayor, &c. at Easter sessions, or in six weeks after Easter, on pain of 10*l.* a-piece, (unless out of the county or absent by sickness, &c.) shall appoint the wages of any servant whose wages by any law in time past, have been rated by the year, &c. and before the 12th of July certify the same with the causes thereof into Chancery, whereupon proclamations may issue for the observance, &c. which shall be recorded, &c. and proclaimed and posted on market day before Michaelmas. But the justices may certify the continuance of the last year's wages, and then the first proclamation shall be in force till a new proclamation for new rates be sent down.

And if any person, after such proclamation published, shall give more wages, on conviction before the said justices of peace or head officers, he shall forfeit 5*l.* and be imprisoned ten days, without bail; and any person taking more wages, on conviction before the said justices, or two of them, shall be imprisoned twenty-one days, without bail.

By the st. 1 Jac. 6. the wages, being rated and ingrossed under hands and seals of those who rated them, need not be certified into Chancery, but the sheriff or mayor, &c. may cause proclamation of them in as many places as they think convenient, which every one shall be bound to observe, as if the proclamation had been sent down after a certificate, &c.

But the st. 5 El. does not extend to wages of a coachman, or other servant, not retained in husbandry. R. 2 Jon. 47. R. Sal. 442. Mod. Ca. 204. Vide infra.

And justices of peace cannot imprison for non-payment of wages, without an indictment. 5 Mod. 419.

Yet for wages in husbandry, settled by the sessions, the justices have taken upon them, and are allowed to order the payment. Sal. 441.

And if it appears that they are wages in husbandry, though not what are settled, it is sufficient, if nothing appears to the contrary. Per two J. Sal. 441. Semb. Sal. 442.

So, it shall be intended wages in husbandry, unless the contrary appears. R. Sal. 484.

But justices of peace have no authority to make an order for servants' wages, except where the party is retained in husbandry for a year, according to the st. 5 El. 4. R. Carth. 156.

### **Addenda.**

By 53 G. 3. c. 40. the statutes 5 Eliz. c. 4. and 1 Jac. 1. c. 6. empowering magistrates to fix wages, are repealed.

#### **(B 61.) Who are compellable to serve.**

By the st. 5 El. 4. every person unmarried, or under thirty years of age, brought up in any of the said thirty trades, and not allowed under the hands and seals of two justices of peace, or mayor and two aldermen, to have 40s. per annum, or 10*l.* value in goods, nor being otherwise retained, nor having any farm or tillage, on request by any using the trade he was brought up in, shall not refuse to serve for the wages mited, &c. on pain as for departing from service. Vide post, (B 63.)

And persons, between the age of twelve and sixty, not being an apprentice or otherwise retained, nor a gentleman born, nor a scholar in an university or school, who hath not 40s. per annum, nor 10*l.* in goods, nor a parent living worth 10*l.* per annum, or 40*l.* in goods, nor any farm, on request, &c. shall be compelled to serve in husbandry for a year, at the set wages, on the like pain.

And two justices of peace, or mayor and two aldermen, may appoint a woman, between the age of twelve and forty, unmarried, and out of service, to serve by the year, week, or day, for such wages and in such manner as they think meet, and on refusal, &c. may commit her to ward, till she shall be bound to serve.

Gentlemen, &c. who cannot be compelled to serve, if they covenant to serve, are bound by it; and an action lies for breach of covenant. F. N. B. 168. E.

#### **(B 62.) Misdemeanor in service.**

By the st. 5 El. 4. if a servant maliciously assault or make affray on his master, mistress, or dame, or other who hath the charge or oversight of him, on conviction before two justices of peace, or mayor, &c. by confession or two witnesses, he shall suffer imprisonment for a year or less, at the discretion of the said justices, or mayor and two others of the corporation; and, if the offence require, shall receive such other open punishment as the justices at quarter sessions, or mayor and four of the corporation shall think meet, so as not to extend to life or limb.

If a servant promise or covenant to serve, and do not serve, he shall suffer as for departing from service.

## Addenda.

By 6 Ann. c. 31. if any menial or other servant, through negligence or carelessness, shall fire or cause to be fired any dwelling-house or outhouse, he shall forfeit 100l. Vide 14 G. 3. c. 78.

Combinations amongst workmen are provided against by 39 & 40 G. 3. c. 106.

## (B. 63.) Departure from service.

By the st. 5 El. 4. none shall put away a servant, or depart from service before the end of his term, unless for cause to be allowed by a justice of peace, or mayor, &c.; and none shall put away a servant, or depart from service at the end of his term, without a quarter's warning before, on pain that the master forfeit 40s., unless he prove sufficient cause for such putting away, before justices of *oyer and terminer*, of assise, or of the peace, at quarter sessions, or before mayor and two aldermen of a corporation; and the servant, if found faulty on proofs, and examination before two justices of peace, or mayor and two aldermen, shall be committed without bail, till bound to continue in the service, and then delivered without fee to the gaoler. And if a servant depart into another shire, the justices of the peace of the county or corporation may grant a *capias* to the sheriff, or head officer of the place where such servant is, returnable before them when they please, so as they commit the servant come by such process, till he find surety honestly to serve, &c. Vide st. 24 G. 2. c. 55.

None shall depart, and be retained again, without a testimonial, &c. Vide Retainer, ante, (B 58.)

If a servant depart from his service, he shall lose his whole wages. Bro. Labourer, 40.

But if he depart with the consent of his master, he shall have his wages for the time he served. Ibid. 38.

Before the st. 5 El. a denial of wages, meat or drink, was cause for a servant to depart from service. F. N. B. 168. L.

So, a battery. F. N. B. 168. L. Q.

Or, licence of the master. F. N. B. 168. L.

But marriage was not, and the husband could not take the wife out of service. Bro. Labourer, 18. F. N. B. 168. N.

If a servant be drawn away, the master may re-apprehend him, and keep him in spite of him. F. N. B. 168. P.

## Addenda.

The discharge of a servant by a justice is an act of jurisdiction, and should be by order in writing. B. S. C. No. 115.

It was holden that an order for discharging a servant from her master's service under this statute was void (and not merely voidable); because it did not appear on the order itself that she was a servant in husbandry. 6 T. R. 583.

There must be a hearing, and ordering (in writing), and a reasonable cause. B. S. C. No. 115.

Qu. Whether the insanity of a servant be a good cause of discharge? 6 T. R. 583.

A servant's marrying is no reasonable cause for discharge; for it is not a misdemeanour; and nothing else is a cause. B. S. C. No. 115.

The following statutes have reference to particular classes of servants. (See 5 Chanc. Burn, 111.)

Disputes between silk masters and their workmen. 13 & 14 Car. 2. c. 13. 20 Car. 2. c. 6. 3 & 9 W. 3. c. 36. 13 G. 3. c. 68. 32 G. 3. c. 44. 51 G. 3. c. 7.

Dispute

Disputes between clothiers and their workmen. 7 Jac. 1. c. 7. 15 G. 1. c. 23. 29 G. 2. c. 33. 30 G. 2. c. 12. 14 G. 3. c. 25. 22 G. 3. c. 40. 58 G. 3. c. 51.

Disputes between masters and servants in the woollen, linen, fustian, cotton, and iron manufactures. 1 Ann. st. 2. c. 18. 13 G. 2. c. 8. 58 G. 3. c. 51.

Disputes between masters and their workmen in the leathern manufactures. 13 G. 2. c. 8. 58 G. 3. c. 51.

Disputes between masters and their workmen in the making of hats, or in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures. 12 G. 1. c. 34. 13 G. 1. c. 23. 22 G. 2. c. 27. 4 G. 3. c. 37. 14 G. 3. c. 44. 15 G. 3. c. 14. 17 G. 3. c. 11. 17 G. 3. c. 56. 22 G. 3. c. 40. 39 & 40 G. 3. c. 90. 41 G. 3. c. 38. 44 G. 3. c. 37. 58 G. 3. c. 51.

Disputes between masters and their workmen in the bone and thread lace manufactory. 19 G. 3. c. 49.

Disputes between masters and their workmen in the manufacture of clocks and watches. 27 G. 2. c. 7.

Disputes between pipe-makers and their workmen. 36 G. 3. c. 111.

Disputes between masters and servants in husbandry, artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers. 20 G. 2. c. 19. 31 G. 2. c. 11. 6 G. 3. c. 25. 57 G. 3. c. 122. 58 G. 3. c. 51.

Ship-masters and their seamen. 2 G. 2. c. 36. 31 G. 3. c. 39. 45 G. 3. c. 81. 59 G. 3. c. 58.

Tailors and their workmen within the bills. 7 G. 1. st. 1. c. 13. 8 G. 3. c. 17.

Shoemakers and their workmen within the bills. 9 G. 1. c. 27.

Payment of the wages of workmen, labourers in certain trades, in bank notes. 58 G. 3. c. 51.

**(B 64.) Poor.—Overseers of the poor, who are.**

By the st. 43 El. 2. the churchwardens, and four, three, or two substantial householders to be nominated in Easter week, or a month after, under the hands and seals of two or more justices of peace (1 quorum) in or near the parish, shall be called overseers of the poor.

And if no such nomination, every justice in the division, and every mayor, alderman, and head officer, shall forfeit 5*l.* for the relief of the poor, to be levied by warrant from the quarter sessions.

But a citizen and inhabitant in London, who resides for part of the year in the country, ought not to be chosen there. Carth. 161.

**(B 65.) Their authority in relief of the poor.**

By the st. 43 El. 2. the overseers, or the greater part, shall take order, with consent of two such justices of peace, for setting to work the children of all parents they think unable to maintain them, and all persons having no means or trade to get their living by.

And to raise weekly, or otherwise, by taxation of inhabitant, parson, vicar, &c. occupier of lands, houses, tithes, coal-mines, &c. a stock for setting the poor to work, relief of the impotent, and putting out apprentices, &c.

And by warrant of two such justices to the present or subsequent overseers, to levy such tax by distress and sale of the offender's goods; and in defect of distress, such two justices may commit to the county gaol without bail, till payment.

And shall meet once a month, in the church after afternoon service, (unless let by excuse allowed by two justices), to take course in the premises.

And in four days after the year and others nominated, shall account for all monies received or assessed, and their stock, and deliver what is in hand to the new overseers, on pain of 20*s.* if negligent in office, or the orders aforesaid made with assent of two justices.



And the monies or stock behind on such account, may be levied by distress and sale, &c.; and two justices may commit the churchwarden or overseer refusing to account, till he account, and pay what is due on such account.

Provided, if any be aggrieved, &c. the justices of peace at the quarter sessions may make a final order.

And the head officers of a corporation, being justices of peace, shall have, in and out of sessions, the authority of justices in the county.

If an overseer be in arrear upon an account, he shall not be committed but upon default of a distress. R. Sal. 533.

Though it be by the quarter sessions. Sal. 533.

If he be in arrear upon an account, the justices may order payment to the successor. R. Sal. 484.

But a *mandamus* to account to the successor will be quashed; for he ought to account to the justices. R. Sal. 525.

So, a *mandamus* for a rate for reimbursement of the predecessor. R. Sal. 531.

If an overseer gives a general account, he cannot be committed for not giving a particular account. R. Sho. 395.

By the st. 43 El. 2. the churchwardens and overseers, with agreement of the lord of the manor and order of quarter sessions, may build houses on the waste, for the impotent poor, and no other, to dwell in.

Overseers ought to relieve impotent persons only. 2 Bul. 348.

By the st. 3 Car. 4. churchwardens and overseers, with assent of two justices of peace (1 quorum), or of one, if no more in that division, may set up and use any trade, &c. for setting on work, and relief of the poor of that parish.

By the st. 3 & 4 W. & M. 11. a register shall be kept, at the charge of the parish, of all relieved, and when first, and for what cause, which at Easter, or oftener, shall be examined, &c. and none relieved unless registered, or by order of quarter sessions, or under the hand of a justice of peace, or in case of small pox, plague, or pestilential diseases. Or, by st. 9 Geo. 7. upon sudden occasions.

So, by the st. 8 & 9 W. 3. 30. a poor person, his wife and children in the same house, (unless there to nurse an impotent parent,) shall wear a P. with the first letter of the parish in blue or red cloth on the right shoulder of the upper garment; and for neglect the justices of peace may abridge or take away the relief, or send to the house of correction for twenty-one days; and no other shall be relieved on pain of 20s. to be levied by the justices, on conviction by one witness, by distress and sale, a moiety to the poor, a moiety to the informer.

By the st. 9 Geo. 7. justices shall not order relief, till oath of a reasonable cause for it, and of refusal by the vestry, &c. and till hearing overseers, or summons of them, and their default to appear.

Generally the justices ought to determine who are impotent. 1 Vent. 69.

And an order for relief shall not be quashed though the party be able to work. 1 Vent. 69.

Though the party be a bastard, for such a one may be relieved as impotent. 1 Sal. 123.

Yet the order for relief must say, that the party is poor and impotent, otherwise it will be quashed. R. 5 Mod. 397.

And justices cannot order the finding of an house for the poor. 5 Mod. 397.

(B 66.) In charging the parish.

Every parish ought to be charged for the relief of their own poor.

So, a parish in reputation, which in the 43 El. and ever since had churchwardens, &c. Per 2 J. Houghton cont. 2 Rol. 160. R. Cro. Car. 93. 395. Jon. 356.

So, by the st. 13 & 14 Car. 2. 12. s. 21. it is enacted, that where in Lancashire, &c. and many other counties, for the largeness of the parishes, the inhabitants cannot reap the benefit of the st. 43 El. 2. the poor in every township or village in the said counties shall be maintained, kept, &c. in the township or village where he inhabits or was last settled; and there shall be yearly chosen two or more overseers of such township, &c. who shall execute all powers for relief of the poor, &c.; and the justices shall have the same powers to do every act in such township or village, &c. as they might do in any parish, &c. by the st. 43 El. 2.

And extraparochial places, having several houses, that may have the denomination of a vill, shall be within the benefit of that statute. R. 11 Ann. Sal. 486. in marg.

So an extraparochial place may be charged in aid of another parish unable, &c. Per Holt, Sal. 486. Carth. 515.

So a mandamus lies to justices of peace to appoint overseers in an extraparochial place to provide for the poor there. R. 2 Mod. Ca. 39.

But an extraparochial place, that has no appearance of a parish or vill, will not be within the provision of these statutes. R. Sal. 486.

So, generally, all vills within a parish may be charged for the relief of the poor of the whole parish. R. 1 Sid. 292.

Though there was an ancient chapel there, and some rates there; if it has not the reputation of a parish. R. 4 Mod. 157.

Though the parish lies in several counties, if every part has not distinct officers and rates, and the reputation of a distinct parish. R. Ray. 477.

So the whole parish ought to be charged together, and not a single part or vill. R. Jon. 356.

The rate may be levied before the quarter expires. Semb. Mod. Ca. 214.

If the justice of peace refuse to allow the rates, B. R. will send an attachment. 1 Sid. 377.

There shall be an appeal upon an account before two justices. Sal. 533.

Upon an appeal by particular persons, the sessions may quash the whole rate, and order a new one by themselves, or direct the officers to make it. R. Sal. 483. 524.

But they cannot order a standing rate. R. Sal. 526.

Every inhabitant shall be rated according to his visible estate, real or personal, in the same parish only. Per all the J. 2 Bul. 354.

Things real, which render an annual revenue, shall be rated as well as land: as, shops and sheds.

Quit-rents. Semb. Carth. 14.

Salt-pits, and the toll of a market.

Tithes; for the clergy are subject to all charges imposed by Parliament. R. 5 Car. 1. Per all the J. in England, *ut dicitur* 1 r'Hale. 1 Vent. 273.

Lands, which belong to an hospital. R. Sal. 527.

But the occupier pays the tax to the poor, not the lessor. Per all the J. in England. 2 Bul. 354.

Though the lessor covenants to pay taxes upon the land; for lies upon the occupier. R. 2 Mod. Ca. 314.

And if an occupier of land in B. has no goods there, he may be distrained where he inhabits, in another parish. Per Holt, at Hertford, 1698.

If it be in the same county. Adm. Mod. Ca. 214, 215.

So, if rated in A. and he afterwards removes to B. Per Holt, Mod. Ca. 214, 215.

The lessee of a stall in a market shall not be charged. 2 Rol. 238. 2 Rol. 289. l. 35. [This was for repairs of a church.]

Several families shall be rated severally. R. Sal. 532. Mod. Ca. 214.

The rate shall be only for a month. Sal. 532. Mod. Ca. 214.

#### (B 67.) In charging the hundred or county.

By the st. 43 El. 2. if the parish be not able, &c. such two justices of peace may rate any of another parish in the hundred as they think fit; and if the hundred is not able, the justices at the quarter session shall rate any of another parish in the county to pay such sum, &c. as they think fit.

Two parishes cannot be rated together for relief of the poor of both, but if one be insufficient, the other may be charged in aid of it. Per Holt. M. 3 W. & M. Vide Sal. 480, 481.

The charge may be upon one or more inhabitants in a parish, for aiding of the other parish. 2 Bul. 353. R. 1 Vent. 350. Sal. 481.

If a parish be taxed in aid of another, the tax may be enlarged or diminished, when the poor in the other parish increases or decreases. Per Jon. 2 Bul. 353.

So, a tax may be assessed in gross upon a parish to the relief of another. Sal. 480, 481.

Or, any in such parish, without assessing the whole parish. R. 1 Vent. 350. Sal. 481.

Or, an extraparochial place. Per Holt, Carth. 515. Sal. 486.

But the justices at the sessions cannot make a parish contributory to another, unless it be first ordered by two justices. R. 5 Mod. 397.

#### (B 68.) In charging the relations.

By the st. 43 El. 2. the father, grandfather, mother, grandmother, and children of a poor impotent person, being of ability, shall at their own charge maintain such person, according to the rate, that the justices of peace of the county, where the sufficient person dwells, at the quarter

quarter sessions shall assess, on pain of 20s. per month, to be levied by two justices of peace, or mayor, &c. by distress and sale, &c.

An order upon a relation for relief, shall be made at the quarter sessions of the county where the party charged inhabits, otherwise it is void. R. 2 Bul. 345.

And it is not good, unless it appears that the party relieved is not able to work. Semb. 2 Bul. 344.

The putative grandfather of a bastard is not chargeable within this statute; for the law knows no such person. Semb. 2 Bul. 344. R. 1 Vent. 310.

Nor the wife of the putative father; for a bastard is not within the statute. Vide 2 Bul. 346. Per two J. 2 Bul. 350.

If a man marry the grandmother of an impotent person, with whom he has a substance, he is chargeable in respect of the substance which he had with his wife, and shall be said to be grandfather. 2 Bul. 345. R. 2 Bul. 346.

So, if land descend to the wife, after marriage. 2 Bul. 347.

Otherwise, if he had not any substance with her in marriage. Per Cro. 2 Bul. 345. Per two J. 2 Bul. 346.

Though he afterwards becomes able by the industry of his wife. Per Cro. Whitl. cont. 2 Bul. 347.

Nor shall he be charged after the death of his wife, though he had a substance with her. Per Cro. 2 Bul. 347. cont. Comb. 405.

By the st. 5 Geo. 8. churchwardens or overseers, by order of two justices, may take goods or rents of lands, &c. of the husband, father, or mother, who leaves his wife or children a charge to the parish: and the order being confirmed by the quarter sessions, the justices there may direct a sale of the goods; and the overseers shall be accountable to the quarter sessions.

A father charged is not to be committed, till an order made and a refusal by him to pay the 20s. per mensem, and a default of distress. Vide 2 Bul. 344.

The quarter sessions may order a father to pay 2s. a week till other order. R. Sal. 534.

If there be a bond to save a town harmless from A. his wife and children, it extends to children born afterwards, or before. R. Skin. 556.

And to the children of the son during his life, not afterwards. Skin. 557.

**(B 69.) Relief of poor prisoners, maimed soldiers, and mariners, &c.**

By the st. 43 El. 2. justices of peace at Easter sessions shall rate every parish in a county or corporation, at a weekly sum not above 6d. nor less than a half in any parish, nor above 2d. for every parish, one with another through the county, to be assessed by agreement among the parishioners, or in default by the churchwardens and petty constables of the parish, or in their default by order of a justice of peace in or near the parish, and to be levied by the churchwarden or constable, or in their default by a justice of peace by distress and sale of the offender's goods, and for want of distress, a justice of peace may commit without bail, till payment. And the justices of peace at such quarter ses-

sions shall set down what sum shall be sent quarterly to the prisoners of the king's bench, and marshalsea, and each hospital and alms-house in the county, so as 20s. yearly be sent to each of the said prisons out of each county; and the residue employed to the relief of hospitals in the county, and of sufferers by fire, water, and other casualties, and such other charitable purposes as the justices at quarter sessions shall think meet; which sums rateably assessed on every parish, the churchwardens shall collect and pay to the high constable quarterly, ten days before every quarter ends, on pain of 10s. and the high constable at the quarter sessions to the treasurer of the county, on pain of 20s., to be levied with the said sums for the said charitable purposes by the treasurer, by distress and sale; and the treasurer shall pay the sum for the prisons to the chief justice of England, or if none, to the next ancient judge, and the knight marshal, equally to be divided, taking their acquittance for the same.

By the st. 43 El. 3. justices of peace at Easter sessions in a county or corporation, shall charge on every parish a weekly sum for relief of soldiers and mariners, sick and hurt in her majesty's service, not above 10d., nor less than 2d. in any parish, nor above 6d. for every parish, one with another, where there be above 50 parishes in a county, to be assessed and levied, *ut supra*, for prisons, &c. And to be collected and paid by the churchwarden and petty constable of the parish, to the high constable, ten days before every quarter sessions, on pain of 20s., and by the high constable at the quarter sessions to the treasurer of the county, on pain of 40s. to be levied *ut supra*, for augmentation of the stock.

And such soldier or mariner shall go to the treasurer of the county whence prest, or if not prest, of the county where born, or last dwelt for three years, at election, or if not able to travel, of the county where he lands; and bring a certificate under the hand and seal of the general of the camp, or governor of the town, or his marshal or deputy, and of the captain under whom he served, or his lieutenant, or of the admiral or other general at sea, or captain of the ship; which certificate shall be allowed by the general muster master in this realm, or treasurer and comptroller of the navy; on which certificate such treasurer shall allow him a convenient subsistence till the quarter sessions, when the justices of peace may grant him an annual pension for his life, if no officer not above 10l., if an officer under a lieutenant not above 15l., if a lieutenant not above 20l., to be paid quarterly by any treasurer of a county; but the justices of peace may alter or revoke such pension.

And till such soldier or mariner can arrive to a county where they may have such pension, or to the muster master general, who is to allow such certificate, the treasurer of the county where he lands, and so of every county, before such allowance, may give them relief for their journey through that county, and a testimonial to pass to the place of pension.

And the residue of the stock shall, at the discretion of the justices at the quarter sessions, be bestowed for the charitable designs of the statutes for relief of the poor and punishment of rogues, or reserved for the future relief of maimed soldiers and mariners.

By the st. 14 El. 5. justices of peace at the quarter sessions in a county or corporation, may rate every parish not above 6d. or 8d. per week  
for



for relief of the common gaols, which the churchwardens shall levy every Sunday, and pay once a quarter to the high constable, who shall pay at the quarter sessions to such as the justices of peace shall direct, who shall weekly distribute the same to the relief of the prisoners, on pain of 5*l.* for default in any officer, a moiety to the queen, a moiety to the prisoners. [Vide the st. 19 Car. 2. 4.]

By the st. 5 Ann. 32. if the gaol or marshalsea money be not sufficient, the justices at quarter sessions may assess what they think reasonable for the constable's time and expence in passing vagrants.

If the money for the prisoners in the marshalsea, and maimed soldiers, is not duly paid, B. R. upon motion will grant an attachment against the sheriff of the county, and take any of the county in withernam for it, if the sheriff does not pay for it. R. Skin. 227.

But justices of peace cannot limit the stock of the county to the charge of the prosecution of a barretor. R. B. R. 2 Ann. 2. between the queen and inhabitants of Hertford. Sal. 605.

They cannot, by the same order, direct the payment to gaols, upon the st. 14 El. and the st. 19 Car. 2. R. Sal. 487.

(B 70.) Treasurer of a county.

By the stats. 43 El. 2. & 3. justices of peace at Easter sessions shall elect, of themselves or others, two treasurers, who shall continue one year, and then give up their accounts to their successors.

And if the treasurer refuse the office, or to relieve maimed soldiers or mariners, &c. or neglect his duty, or refuse to account as the justices direct, the justices of peace, or in their default the judges of assise, may fine him, to be levied by distress and sale, &c. and may appoint any two justices of peace to prosecute him.

Mayor and justices of a corporation may appoint one to receive and pay money within the corporation, who shall do and be subject to the penalties of an high constable.

By the st. 5 Ann. 32. treasurers shall obey orders of quarter sessions for paying sums to pass vagrants, if they have money in hand to pay.

(B 71.) Settlement of poor.—By the common law.

By the common law, the place of birth, or last habitation, are proper for the settlement of poor persons. Per J. of assise. 2 Bul. 350. 352.

And therefore, a bastard, who has gained a settlement, shall be sent thither, and not to the place of his birth. R. 2 Bul. 350.

A child born in an house of correction, shall be sent to the place where the mother had a settlement. 2 Bul. 358.

The son or daughter of a vagrant, who has no settlement, shall be sent to the place of the birth, not being seven years of age; for it cannot gain a settlement where the parents die. 2 Bul. 351. Ray. 477.

A poor child shall be sent to the place of settlement, and not of birth. Ray. 477.

So an ideot. Sal. 427.

And if one be sent as a vagrant, he may afterwards be sent to the place of settlement. R. Sal. 526.

The settlement of the parent settles his child. R. Sal. 528, 9.

Though under seven years. Sal. 527.

An order for the settlement of a child after the age of seven, with its parent, is not good, unless it shews, that it had no other settlement; for it might have gained a new settlement. R. Sal. 470.

And if a child be sent with the mother till the age of seven years, it shall be only for nurture, and it shall be maintained at the charge of the parish where it is settled. Sal. 482, 522.

But an order by two justices to the overseers of B. for the relief of a poor person, does not determine, but presumes his settlement there. R. 1 Sal. 123.

So a bastard shall be sent to the place of his birth, if he has not gained another settlement, and not with the mother. R. Sal. 485.

So there cannot be any order for sending a poor person to an extra-parochial place. R. Sal. 486, 487. Carth. 515.

(B 72.) By statute.

By the st. 13 & 14 Car. 2. 12. on complaint of the churchwardens and overseers to a justice of peace, within forty days after any persons coming to settle in a tenement under 10*l.* per annum; two justices of the peace (1 quor.) of the division may remove such person likely to be chargeable, to the parish where last legally settled as a native, householder, sojourner, apprentice, or servant for forty days at least, unless he give security to be allowed by such justices for the discharge of the parish. Vide Appeal, post, (B 74.)

Provided if any come to any parish for harvest or other work, with a certificate from the minister and a churchwarden and overseer of another parish, declaring him an inhabitant there, though he stay after the work done, or fall sick; he shall not gain a settlement, but be sent by two justices to his habitation in the other parish. Vide Appeal, post, (B 74.)

If the continuance of forty days be by request, and money given by the parishioners of the other parish, the party shall be settled where he lived the forty days. R. 3 Mod. 67.

If one hire a mill of 10*l.* per annum, it makes a settlement; for it is a tenement. R. Sal. 536.

If he hire 5*l.* per annum of one, and another 5*l.* per annum of another in the same parish. Sal. 535.

By the st. 1 Jac. 2. 17. the forty days to make a settlement shall be accounted from delivery of notice in writing of the abode and number of the family, if any, to one of the churchwardens or overseers of the parish.

And, by an equitable construction of the statute, an act shall be accounted equivalent to notice: as, if he pay parish rates, for then he does not conceal himself. R. P. 1 W. & M. B. R. Sho. 12; Carth. 26.

Or lives in the parish for four years, and works in the highway. Semb. T. 3 W. & M.

Or, be a servant or apprentice there. Per Cur. M. 3 W. & M.

By the st. 3 & 4 W. & M. 11. the forty days to make a settlement shall be accounted from the publication of notice in writing of the abode and number of the family, delivered to the churchwarden or overseer, which he shall cause to be read publicly in the church next Lord's day,

day, and to be registered, on pain of 40s. for neglect of each to the party grieved, to be levied on proof by two witnesses before a justice of peace, by distress and sale, and for want of distress, &c. by commitment to gaol.

But no soldier or workman in their majesties service, shall gain a settlement by publishing such notice, unless it be after his dismission from their majesties service. Nor service in a ship, boat, &c. R. g. 255.

Provided, no notice needful, if any on his own account execute in a parish any annual office, or charge for a year; or be rated, and pay his share to the public taxes of the parish, &c. or, being unmarried and childless, be lawfully hired for a year, (and as it is declared by the st. 8 & 9 W. 3. 30. abide in the same service during one whole year; but that goes only to future times. R. Sal. 525.) Or be bound apprentice by indenture, and inhabit in any parish.

Nor an collateral act amounts to notice; as, banns of marriage published in the church. 5 Mod. 454.

If he board, or be nursed in a parish. Sal. 524. [Fortesc. 812.]

So notice shall not be presumed; for it is matter of evidence. Sal. 472.

Nor shall be supplied. R. Sal. 476.

It is sufficient, if the house be rated, and he pays. R. Sal. 478. for he must pay. R. Sal. 523. Skin. 620.

If he be chosen parish clerk, and has it for a year. R. Sal. 536.

The hiring must be for a year at the first; for an hiring for half a year, and afterwards for another half year, by the same master and in the same place, is not sufficient. R. Sal. 535.

Marriage in service is not a discharge from the master, without his will. R. Sal. 527.

Nor does it prevent the settlement. Sal. 527, 8.

If he be married in the service, it will be a settlement, if he was not so at the time of the hiring. Sal. 527.

If a man serve a barber for a year for 6l. to be instructed, without being bound, he will be a servant there. R. Skin. 671. [Sal. 479. S. C. cont.]

If an apprentice be assigned to a master in another parish, though it is not a proper assignment, the settlement will be good. R. 1 Sal. 66.

Otherwise, if put apprentice by his master by agreement, without indenture. R. Sal. 479. [Skin. 671. S. C. cont.]

An apprentice, or servant, continuing with his master in B. shall be settled there, though the master is not settled there. R. Sal. 538.

By the st. 8 & 9 W. 3. 30. if any person bring a certificate to the churchwardens or overseers, under the hands and seals of the major part of the churchwardens and overseers of the other parish, with two witnesses, and allowed by two justices of peace, owning such person or persons to be settled there, such certificate shall oblige the parish that gave it, to receive such persons and their children, though born in the other parish, not having otherwise acquired a legal settlement, (which is acquired by the st. 9 & 10 W. 3. 11. only if he *bonâ fide* hire 10l. per annum, or execute an annual office there,) when they become a charge

charge, to, or ask relief of the parish to which the certificate was given, and not before.

If a man, resident by certificate, took an apprentice by indenture, he would have been settled there. Adm. in the st. 12 Ann. 18.

But by the st. 12 Ann. 18. any, on or after 24th June 1713, bound apprentice, or hired in a service to one, who resides by certificate only, shall gain no settlement thereby.

A man who settles in a tenement under 10%. per annum of his own inheritance, shall not be removed. Per 2 J. Herbert cont. H. 2 & 3 Jac. 2. Per Holt, 5 Mod. 419.

Or a copyhold. R. Tr. 4 Geo.

Or a leasehold for 500 years.

Yet if a man has land in B. and never inhabits there, it is no settlement. Sal. 524.

If he works, but does not lodge there. 2 Mod. Ca. 308. 369.

If a certificate be allowed, no appeal lies for the allowance. Sal. 530.

Nor shall a man be removed, till he is an actual charge. Sal. 530.

And there must be an adjudication, that he was chargeable; for it is not sufficient to say, that there was a complaint that he was a charge. R. Sal. 530.

A certificate does not make a settlement, if he had it not before, but is evidence of a settlement with the parish which gives it. R. Sal. 530, 531.—R. cont. 9 Ann.; for it will be conclusive to all the world. Sal. 535.

### (B 73.) Order of removal.

The proper way for a removal is to make a record of the complaint and an adjudication, and then grant a warrant for removing, and return the record to the sessions. 1 Sal. 406.

If the order of the two justices does not pursue the statute, it shall be quashed in B. R.; as, if it does not shew that one of the justices was of the quorum. R. Sal. 473. 475. 481.

Or, that the party removed was in danger of being chargeable. R. Sal. 485. 491. Mod. Ca. 163. Vide ante, (B 72.)

Or, that complaint was made by the officers of the parish. R. 5 Mod. 149. Sal. 492.

Or, that the place to which he is removed was his last settlement. Vide Sal. 478, 9.

Or, that the order was made by justices of the county. R. Sal. 474.

Or, that the examination, as well as the order, was by two justices. R. Sal. 488.

Or, if the order be to the officers of D., whither he is removed, to remove him. R. Sal. 493.

If there be an order to remove him to B., and afterwards B. removes him to C. without appeal; that admits him settled at B., and they cannot remove him to C. but upon a subsequent settlement. R. in B. R. P. 12 W. 3. Semb. Sal. 481, 488.

But a subsequent settlement shall be intended, where it can. R. Sal. 489, 492.

If an order to send him to B. be affirmed upon appeal, they cannot remove him. R. Sal. 524. 488. 492. 527.

If an order be uncertain, it will be quashed; as, to remove A. and his family. R. Sal. 482. 485.

Or, A. and his children. Comyns's Rep. 86. R. Sal. 488.

If it does not mention the ages of the children. 2 Mod. Ca. 337.

If there be no adjudication of the settlement; as, if it says, as informed. R. Sal. 473. 490.

Or, whereas oath hath been made. R. Sal. 478.

On complaint, that A. was the last settlement. R. Sal. 479.

So it cannot be referred to the opinion of B. R. R. Sal. 486.

If the first order be defective, it will not be made valid, by the order upon appeal. R. Sal. 482. 608.

Nor, by the return of the certiorari. R. Sal. 499.

But B. R. will not quash an order nine years afterwards. 5 Mod. 205.

Nor, if the order be, that he endeavoured to settle there, though it does not say, in a tenement under 10*l.* per ann. R. 5 Mod. 150. Sal. 493.

Or, that it was his settlement; for that is tantamount to his last settlement. Sal. 473.

Or, does not say, that they are justices of the division; for that is only directory. R. Sal. 473. 480.

So, if an order for sending to B. be reversed upon appeal, that does not conclude to the sending to D. R. Sal. 486. 492. 524.

So another parish may afterwards send to B. R. Carth. 516.

So an order shall not be quashed, for not shewing the cause of the order. R. Sal. 607. F, g. 254.

### (B 74.) Appeal.

By the st. 13 & 14 Car. 2. 12. the party aggrieved may appeal to the justices of the county at the next quarter sessions. By the st. 3 & 4 W. & M. 11. to the justices of the place whence removed. But by the st. 8 & 9 W. 3. 30. the appeal shall be to the justices of the county, division, or riding, and not elsewhere. R. Sal. 490.

An order upon appeal is final, though the statute does not say so. Per Cur. P. 4 W. & M.

An appeal *ad generalem sessionem*, omitting, *quarterialem*, is not good, per Holt. But it shall be intended; per 2 J. P. 4 W. & M. Vide Carth. 222. R. Sal. 474. 476. not to be good.

If an order be repealed upon an appeal, a child born in the parish to which its mother was removed by the order, shall be sent with the mother to the other parish. 1 Sal. 121. 2 Sal. 474.

After an order confirmed upon an appeal, if the party goes to another parish, he shall be removed upon an original order. R. Sal. 481. 489.

If an order be quashed upon appeal, it cannot be afterwards confirmed at the same sessions; for the court has executed its authority. R. 5 Mod. 396. [Cont. Sal. 494. R. cont. Sal. 607. (Vide Sal. 477. Comb. 418.)

If there be an appeal to the next sessions, it may be adjourned to a subsequent one. Sal. 605.

An order by the sessions must appear to be upon appeal. Sal. 479. Carth. 58.



The sessions cannot make an order to another to determine, though by consent. R. Sal. 477.

The sessions upon an appeal cannot send to a third parish. R. Sal. 475.

The sessions cannot supersede an order of two justices; for they shall only quash or affirm. Sal. 472.

By the st. 8 & 9 W. 3. 30. justices of peace at quarter sessions on an appeal about a settlement, or proof of notice of it by a proper officer to the churchwardens or overseers, shall award such costs as they think fit to him, for whom the appeal went, or notice was given; and if the party to pay costs live in another county, a justice of peace of that county, on proof of a true copy of such order, shall by warrant levy such costs by distress and sale, &c., and for want of distress, by commitment for twenty days to prison.

### (B 75.) Officer or party refusing. &c.

By the st. 13 & 14 Car. 2. 12. if the person removed, &c. refuse to go, or come back of his own accord to the parish, any justice of peace may send him to the house of correction; and if the churchwardens and overseers of the parish, to which he is sent, refuse to receive and provide for him, any justice of peace may bind them to the quarter sessions or assizes, there to be indicted for contempt.

By the st. 3 & 4 W. & M. 11. churchwardens and overseers refusing to receive him, &c. on proof by two witnesses before a justice of peace of the county, &c. to which sent, forfeit 5*l.* to the poor of the parish whence removed, to be levied by distress and sale, and for want of distress, by commitment for forty days.

## Addenda.

### Poor.—Sect. I. Of overseers.—For what places overseers may be.

Antiently the maintenance of the poor was chiefly an ecclesiastical concern. A fourth part of the tithes in every parish was set apart for that purpose. The minister, under the bishop, had the principal direction in the disposal thereof, assisted by the churchwardens and other principal inhabitants. Hence naturally became established the parochial settlement. Afterwards, when the tithes of many of the parishes became appropriated to the monasteries, those societies had some share likewise (by reason of the said tithes and other donations for that purpose) in the relief of the poor; and the rest was made up by voluntary contributions. But, though the relief of the poor was in a great degree an ecclesiastical concern, it is not true, as some have imagined, that the common law of England made no provision for the poor; the Mirror shews the contrary; how it was done indeed does not appear. Vide 1 Burr. 450.

By the stat. 27 H. 8. c. 25. the churchwardens or two other of every parish were to make collections for the poor on Sundays.

By the 5 & 6 Edw. 6. c. 2. the minister and churchwardens were annually to appoint two able persons or more to be gatherers and collectors of alms for the poor.

By the 5 Eliz. c. 5. the parishioners were to choose the said collectors and gatherers for the poor.

By the 14 Eliz. c. 5. the justices were to appoint collectors for the poor within every parish; and were also to appoint the overseer of the poor, whose office was nearly the same as it is at present, except only for collecting the money, which was done by the aforesaid gatherers or collectors.

By the 18 Eliz. c. 3. the justices were to appoint collectors and governors of the poor.

By the 39 Eliz. c. 3. the churchwardens of every parish, and four substantial householders there, being subsidy men, or, for want of subsidy men, four other substantial house-

householders, to be nominated yearly in Easter week by two justices, were to be called overseers of the poor of the same parish.

And so it continues with some small variation by the stat. 43 Eliz. c. 2. which is the great constitution of the system of law concerning the poor, and is as follows:

The churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week, or within one month after Easter. (but now by stat. 54 G. 3. c. 91. on the 25th of March, or within fourteen days next after), under the hand and seal of two or more justices of the peace in the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the poor of the same parish.

By this statute a parish was the only district bound or entitled to the separate maintenance of its poor; but townships and villages, whether parochial or extra-parochial, are now brought within the same system, by the construction put upon the stat. 15 & 14 C. 2. s. 21., by which, after reciting that whereas the inhabitants of the counties of Lancashire, Cheshire, Derbyshire, Yorkshire, Northumberland, the bishoprick of Durham, Cumberland, and Westmoreland, and many other counties in England and Wales, by reason of the largeness of the parishes within the same, have not nor cannot reap the benefit of the act of the 43 Eliz., it is enacted, that all and every the poor, needy, impotent, and lame person and persons within every township or village within the several counties aforesaid, shall from and after the passing of this act be maintained, kept, provided for, and set on work within the several and respective township and village wherein he, she, or they shall inhabit, or wherein he, she, and they was or were last lawfully settled, according to the true intent and meaning of this act; and that there shall be yearly chosen and appointed two or more overseers within every of the said townships or villages, in manner as is by the said act of Eliz. directed, and liable to the same duties and pains and penalties for non-performance thereof.

Stat. 43. Eliz. c. 2. s. 8. enacts, that the mayors, bailiffs, or other head officers of every town and place corporate and city within this realm, being justice or justices of the peace, shall have the same authority, by virtue of this act, within the limits and precincts of their jurisdictions, as well out of sessions as at their sessions, if they hold any, as is herein limited, prescribed, and appointed to justices of the peace of the county, or any two or more of them, or to the justices of peace in their quarter sessions, to do and execute for all the uses and purposes in this act prescribed, and no other justice or justices of peace to enter or meddle there; and that every alderman of the city of London within his ward shall and may do and execute in every respect so much as is appointed and allowed by this act to be done and executed by one or two justices of peace of any county within this realm.

And by s. 9. if a parish extend into more counties than one, and a part be within the liberties of a corporate place, and part without, the justices of every county and the head officers of such place corporate, shall intermeddle only with their liberties, and not any further; and every of them respectively within their several jurisdictions shall execute the ordinances before mentioned concerning the nomination of overseers, &c.; and the said churchwardens and overseers, or the most part of them, of the said parishes, that do extend into such several limits and jurisdictions, shall, without dividing themselves, duly execute their office in all places within the said parish in all things to them belonging, and shall duly exhibit and make one account before the said head officer of the town or place corporate, and one other before the said justices of peace, or any such two of them as is aforesaid.

No district can possess a right of separately providing for the poor, unless it be either a parish within the 43 Eliz. (which it may be, though anciently but parcel of another parish), or a township or village within the 15 & 14 C. 2.; and no district not already possessing that right can claim it, unless such district be not only within some of the descriptions, but likewise if a township or vill unable to reap the benefit of 43 Eliz. without a separate establishment. Cro. Car. 92. 1 Bott, 32. Cro. Car. 394. 1 Bott, 35.

Every churchwarden is also an overseer, by 43 Eliz.

The 43 Eliz. is deemed to be satisfied, although the district be not, in the precise sense, a parish; so that it were at the time of passing that act, and have been ever since, a parish by reputation. Cro. Car. 394. Vide id. 92. 4 Mod. 157.

The appointment of overseers must be for a parish, township, or vill, not for a precinct. 1 Bott, 4.

But

But a precinct, which is a parish or vill by reputation, may be good. Cro. Car. 92. 394.

But the township or vill may be extraparochial. Str. 512.

But the place must be a township or village. 1 Bott, 57. Str. 1143. Burr. 1591.

The place must either be a vill or a reputed vill. Cald. 167.

And if a place be found by the sessions to be a vill, the appointment of separate overseers is of course. 2 T. R. 207.

## 2. What is a township or vill.

Vill, village, and township are considered as synonymous, and a place so called may be such, either in strictness or by reputation. In one of these two modes it must have been a vill at least as early as st. 15 & 14 C. 2., which, as the stat. 43 Eliz. c. 2. has been decided to embrace only parishes in case in the 43d year of that reign, must be taken to embrace only such vills as had an existence in 1662, which was the 15 & 14 of C. 2. Vide Jacob's Law Dict. tit. parish. 1 Blk. Com. 114. 1 Nol. P. L. c. 1.

Lord Hardwicke observes in B. S. C. 57. that it is very hard to define exactly what is a township or a village, and that it must be left to the judgment of the court upon the circumstances of the case stated. Lord Coke says '*villa est ex pluribus mansionibus vicinata, et collata ex pluribus vicinis.*'

In 1 Bott. 57. it was held, that a single house, or two houses, cannot amount to the notion of a town or village, and that if it had been formerly a town or village, if the houses were in fact decayed and gone, it would cease to be a town or village.

Where there is a constable, there there is a township. 1 Bott, 54.

Five dwelling houses and farms, held not a township or village, to which a removal may be made. B. S. C. 101. Str. 1071.

And the fact of their being substantial householders is immaterial, if it appear not to be a vill. 1 Bott. 58.

Hence one capital messuage and four labourers cottages, held not to constitute a vill for the purpose of having separate overseers. Burr. 1591.

The site of a cathedral and its area do not constitute a vill, though there be many houses, &c. upon it. Cald. 258.

Vill and hamlet are synonymous terms. 4 T. R. 550.

If a place be found by the sessions to be a vill by reputation, it may be taken to be such, though there be extant but three houses, and no other characterising circumstances. 2 T. R. 207.

## 3. What number may be appointed

The number of overseers for any one parish, exclusively of the churchwardens, must be, not more than four, nor fewer than two; except where it is subdivided into townships, in which case each township may have four, three, or two overseers; or when a greater latitude is given by some special statute. 4 Chetw. Burn. 8.

## 4. Who may be appointed.

They must be substantial householders. 1 Bott, 5. Str. 1261.

Substantial, however, is a relative term. 2 T. R. 408.

Though it has no reference to sex. 2 T. R. 395.

Occasional residents are eligible in cases of necessity. Carth. 161. 1 Bott, 9.

Of which necessity the justices are the judges. 2 T. R. 395.

But they are not at liberty in any case to make a nomination from the following classes.

Churchwardens. 13 East, 143.

Clergymen. 1 Bott, 9.

Dissenting ministers. Will. 463. 1 Gibs. Cod. 215.

Peers. Ibid.

Members of parliament. Ibid.

Aldermen of London. Cro. Car. 585.

Justices of the peace. Burr. 245. 1 Bott, 9. 2 T. R. 779.

Practising barristers and attorneys. Cro. Car. 589.

Physicians, (in the city of London). St. 32 H. 8. c. 40.

Freemen of the corporation of surgeons in London. St. 12 G. 2. c. 15. & 10.

Apothecaries using their art in, or within seven miles of London. St. 6 & 7 W. 3. c. 4. s. 2, 3.

Non-commissioned officers, &c. of militia. 42 G. 3. c. 90. s. 174.

Captains

Captains in the guards. 1 Bott, 9. n.

Yeomen in ordinary. Ibid. 2 East, 245.

Officers in the army, navy, or marine. 1 Bott, 9.

Persons apprehending felons. St. 10 & 11 W. 3. c. 23. s. 2. 58 G. 3. c. 70. s. 2.

Officers of the customs, tide-waiters, revenue officers. 8 T. R. 375. 2 Ch. Rep. 196. 1 Bott. 8. 1 Anst. 216.

59 G. 3. c. 12. s. 6. gives power to appoint non-resident overseers.

And assistant overseer. s. 7. 35.

### 5. At what time to be nominated, and by whom.

By 54 G. 3. c. 91. the appointment of overseers of the poor, so directed by the said act of queen Elizabeth, shall, in every year, be made on the 25th day of March, or within fourteen days next after the said 25th day of March, in all and every the same manner as directed, by the said act to be made in Easter week.

Quære whether an appointment on a Sunday be valid. Vide 1 Bott, 29. fol. 4. 1 Blk. 649. Cowp. 159. Semble not. 4 Burn, 12.

Where two or more appointments are made on the same day, that which is prior in point of time shall stand. 1 Bott, 24, 29.

If the appointment be not made within the time limited by statute, but afterwards, it is not therefore void; the statute is only directory. 2 Sess. C. 140. Str. 1125.

But appointment once made cannot be changed or superseded, except on appeal to the quarter sessions. 2 East, 244.

Sessions cannot appoint overseers, because appeal is given. 1 Sess. C. 260. fol. 7.

Where the parish is part within and part without a corporation, though all the overseers, when appointed, may act indiscriminately for the whole parish, yet their original appointment should be made by four justices, two for the part within the county at large, and two for the part within the corporate jurisdiction. 1 Bott, 16.

### 6. Of the 13 & 14 C. 2.

This statute extends to all counties. 1 Bott, 35. 1 Nol. P. L. overruling 2 Lev. 142.

The phrase, that a parish cannot reap the benefit of the statute of 45 Eliz. does not mean that it is absolutely impossible for them to maintain their own poor as a parish, but that it is inconvenient for them so to do. 3 T. R. 746.

If this inconvenience be trifling, which it will probably be considered where the parish has immemorially, or until a recent and unnecessary alteration, maintained its own poor collectively and integrally out of one fund for all its component districts, the parish is capable of reaping the benefit of 45 Eliz., and ought not to be divided; but where the districts have maintained their respective poor from distinct funds immemorially, as from the date of the 13 & 14 C. 2. (or even from a later date, if increase of population or other changes made it really inconvenient to continue the union), or where the court of K. B., with knowledge of the facts, has directed a separation, there the parish is considered incapable of reaping the benefit of 45 Eliz., and the townships become entitled to separate overseers. Thus, where all the townships of a parish have always maintained their poor collectively as one parish, with one rate, one workhouse, and two overseers appointed for the whole, who superintend the workhouse alternate weeks, there, although such overseer have made his levies and payments within his own division, yet if each have always brought the surplus in his hands at the year's end into a common account, the parish, under these arrangements so long established, has been considered quite capable of conveniently maintaining its poor without subdivision. 4 T. R. 266. 1 Bott, 60. 1 Nol. P. L. 16, 17. 22. 1 Bott, 39. 1 Nol. P. L. 16. 5 Burr. 1610. 1 Bott. 42. 1 Nol. P. L. 16.

So, although there have been overseers acting separately for the different townships, from a time even preceding the date of 13 & 14 Car. 2. yet if the maintenance of the poor have been from a joint fund, the parish is considered capable of supporting its poor undivided. 4 T. R. 266. Dougl. 546. Cald. 84.

Nor does it make any difference, that this joint fund is separately raised within each township, in proportions fixed upon by the sessions, on a reference to them from the townships themselves. 4 T. R. 266.

Even the fact of there having been usually more than four overseers for all the townships, from the date of 13 & 14 C. 2. to the present time, though material, as affording an inference that the parish could not enjoy the benefit of 45 Eliz., which allows only four, yet is not decisive, where there has been always but one fund for all. 1 T. R. 374. 1 Bott, 54.

The maintenance of the poor out of a common fund, from a date earlier than the

st. 13 & 14 C. 2. until seventy or more years after that statute, is a circumstance so strong in favour of the collective mode of maintenance, that even the actual existence of a separate establishment, with separate funds and overseers, for the last forty years, or for any term of less than sixty years, will not entitle the townships to a continuance of distinct overseers, unless some great change have taken place in the population or other circumstances of the place, however peaceable may have been the acquiescence of all the districts, and however regular the separation in point of form. 3 Burr. 1610. 1 Bott, 42. 7 East, 214. 1 Bott, 714. 1 Nol. P. L. 24. 35. 4 T. R. 266.

Nay, the confirmation by the court of K. B. itself, of the separate appointments, or even the mandamus of that court, where the antient usage, from the date of 13 & 14 C. 2. had been to maintain the poor from a joint fund, will not be an authority for the continuance of a separate establishment, resorted to within sixty years before the 59 G. 3. c. 95, unless the question whether the parish was unable conveniently to maintain the poor from a joint fund, appear to have been raised at the time of such confirmation or mandamus. Obs. of Mr. Chetw.

Nor is a parish entitled to a separation, merely because its different districts lie each in different jurisdictions, or even counties. Dougl. 346.

On the other hand, where the district is extra-parochial, or where, being part of a parish, it has maintained its own poor on a distinct account 'time out of mind,' or for sixty or seventy years, and before for any thing that appears to the contrary, or only from the time of 13 & 14 C. 2. or from a still more modern date, if change of circumstances required the separation, it has a clear right to a distinct set of overseers. 1 Bott, 63. n. 3 T. R. 746. 1 Bott, 58. 1 Nol. P. L. 34. 36. 2 B. & A. 157.

The two districts of which a parish consisted had, from the 43 Eliz. down to the 13 & 14 C. 2., maintained their poor jointly, and at the time of the passing of the latter act, agreed to separate in the maintenance of their poor, and that separate overseers should be appointed, upon condition that the rateable property in the parish, whether situated in the one or the other district, should be rated where the occupiers resided. In consequence of that agreement, they had ever since uniformly maintained their own poor separately, and had had separate overseers, constables, &c. The court held, that this clearly shewed that the parish, at the time of the agreement, could not reap the full benefit of the stat. of Eliz., and that therefore the separation of the two districts was valid, and that an appointment of overseers for the whole parish was now bad. It was held also, that the agreement consisted of two distinct parts, and that the invalidity of the latter part as to rating property not situate within the district rated, did not affect the question on the former part.

Where one or more, but not all of several townships composing a parish, have obtained a separate appointment by *mandamus*, or have been accustomed to maintain their poor from separate funds, under circumstances authorising such separation, and the remaining township have maintained their poor jointly, every one of them has a right to a separate appointment also. 1 T. R. 374.

The habitual appointment of more overseers than four, has likewise (though not absolutely decisive in favour of a separate appointment, where there was clear proof of convenient maintenance by all the townships from a single fund) been held, where actual necessity requires such a number of officers, to furnish a strong argument for division, as shewing that the parish could not, as a parish, enjoy the benefit of 43 Eliz., which allows only four overseers to each fund. Ibid. 4 T. R. 266.

It was at one time supposed that parishes, which were in a condition to receive the benefit of 43 Eliz. at the time of 13 & 14 C. 2., ought not to be divided by reason of any thing which may have happened since. 1 Bott, 39. Dougl. 348. 3 T. R. 747.

But it is now determined, that the statute of C. 2. did not oblige districts then immediately to adopt a mode of maintenance for their poor, from which they should not afterwards be at liberty to depart; and that therefore, if from increase of population or other cause, a parish, which at the time of 13 & 14 C. 2. enjoyed the benefit of 43 Eliz. as a parish, has since become incapable of conveniently reaping that benefit, distinct appointments may be made for its component townships. 3 T. R. 748. 1 T. R. 376, 377. Vide 3 Burr. 1610.

By 59 G. 3. c. 95. separation of towns from parishes, and distinct appointment of overseers, lawful.

But with respect to the poor, such separation must have commenced within sixty years. Ibid.

Townships of the same parish, though separated under the st. of C. 2., are at liberty, if decrease of population or other change of circumstances make it desirable, to return by agreement to the collective system of 43 Eliz. 8 East, 416. 7 East, 1.

The appointment of overseers must be made by the justices. 3 T. R. 138.



The name of the jurisdiction must appear in the order. B. S. C. 198. 25. 8 T. R. 178. Say. 278. 1 Bott, 4.

And the magistrates must be described as justices. 5 Mod. 322. 1 Bott, 367.

But need not be ascertained as of the peace. 2 Hawk. c. 8. s. 32.

See further 4 Chetw. Burn, 20—23.

7. Of the remedies, as well to obtain as to enforce or avoid an appointment, and herein of appeals, &c.

See 4 Chetw. Burn. 23—25.

8. Of the constitution and incidents of the office.—8. a. Of the jurisdiction belonging to it.

Where a parish or township extends into more counties than one, or part lies within the liberties of a corporate place and part without, by 43 Eliz. c. 2. s. 9., the said churchwardens and overseers, or most part of them, of the said parishes that do extend into such several limits and jurisdictions, shall, without dividing themselves, duly execute their office in all places within the said parish in all things to them belonging.

All acts which the churchwardens and overseers have power to do, are done with sufficient jurisdiction, if done by a majority. 1 Bott, 420.

This body thus far resembling, though not technically amounting to a corporation. 14 East, 488.

Power of overseers where there are no churchwardens, vide 17 G. 3. c. 38. s. 15. 59 G. 3. c. 12. s. 55.

Overseers have by law the custody of the instruments by which they are appointed. 1 B & A. 173.

General duties and powers of overseers are declared by 45 Eliz. c. 2. s. 1 & 2.

And for protection of the churchwardens and overseers against vexatious actions, which the execution of their various duties seemed likely to bring upon them, the legislature passed the several enactments of 43 Eliz. c. 2. s. 19. 7 J. 1. c. 5. 21 J. 1. c. 12. 17 G. 2. c. 5. s. 34. 17 G. 2. c. 38. s. 8. 10. and 24 G. 2. c. 44. s. 6, 7, 8.

Punishment for neglect of duty.

Appeal.

Witnesses.

By 55 G. 3. c. 137. s. 6. persons having the management of the poor, are not to be concerned in contracts, &c. whilst in office. Vide 3 B. & A. 145.

9. Of recovering possession of parish houses or lands.

By 59 G. 3. c. 12. justices are empowered in certain cases to deliver the possession of parish houses to overseers.

Sect. II. Of the poor rate.—1. Who are to make the rate.

Concurrence of the inhabitants not necessary. Ld. Raym. 1009. Salk. 531. 1 Bott. 77.

Mandamus lies to compel the making a rate. 1 Barnard, 137.

But not the making of an equal rate. Ibid.

2. What are the purposes, and what the time for which it may be made; and also of the reimbursement of overseers.

Vide 45 Eliz. c. 2. s. 2. 9 G. 1. c. 7. 18 G. 3. c. 19.

Expence of litigating questions of settlement. Vide 4 T. R. 595.

After overseers are out of office, a rate cannot be made to reimburse money laid out by them whilst in office; but an overseer may make a new rate for the relief of the poor, and out of that retain to pay himself. Salk. 531.

An overseer for several successive years cannot in the last year make a rate to reimburse himself for the preceding years. 6 T. R. 159.

By 41 G. 3. c. 23. s. 9. succeeding churchwardens and overseers empowered to repay money expended by some preceding churchwardens, &c. for the maintenance of the poor while there was no rate, or during an appeal; and in default of such repayment, the quarter sessions, on application being made to them, shall make an order for payment.

Rate cannot be made to repay money borrowed, though for building or repairing workhouses. Dougl. 116.

Nor for payment of overseer's salary. 2 M. & S. 323.

By 59 G. 3. c. 12. s. 7. assistant overseers may be appointed and paid.

Expences of indictment for assault on constable, not allowable out of poor rate. 2 B. & A. 522.

## 2. a. For what time a poor rate may be made.

Rate may be prospective. 6 T. R. 580.

A standing rate cannot be made by the justices. Salk. 526.

## 3. Upon whom (in respect of themselves personally) the rate may be made.

Occupiers residing in another parish. Vide 1 Bott, 122.

Corporate body. Vide 5 East, 455.

The farmer or occupier is rateable, not the landlord. Fitzg. 207.

By 59 G. 3. c. 12. s. 19. power is given to rate owners of certain houses, instead of the occupiers.

Goods of occupiers may be distrained for rates to the amount of the rate actually due. s. 20.

Occupiers paying rates empowered to deduct the amount out of their rent. Ibid.

Receivers in certain cases may be rated as owners. s. 21.

Persons rated as owners may appeal. s. 22.

And may vote in vestries. Ibid.

No owner, not being an occupier, to be rated in places where the right of voting for members to serve in parliament depends on the rating. s. 23.

The court will not decide who should be inserted in the rate, and who should not. Str. 1259.

Inhabitant not to be rated for estate in another parish. 1 Bott, 124.

If the owner of a house occupy a part thereof only, but his servants occupy other parts, and no one reside in the house, but a poor person permitted to do so out of charity, the owner is rateable as occupying the whole. 4 T. R. 477. vide 10 East, 554.

A person who builds an almshouse is not rateable, if no profit be made of it. Cald 358.

Persons living on a charitable foundation for their own benefit, are rateable. 1 East, 584.

Hospital lands are rateable. Salk. 527.

The officer of a college is rateable for the apartment he inhabits in the college. 1 Bott, 131.

Those parts of lunatic hospital which are appropriated to its peculiar objects are not rateable, but such as are occupied by others (excepting servants, who attend for their livelihood) are rateable. Burr. 1053.

The rate must be charged upon the occupiers and the governors of an hospital for the poor persons, or the servants, are not such occupiers as can be rated. Burr. 2435.

By 48 G. 3. c. 96. assessment to rates for land taken for lunatic asylums not to be increased.

A corporate body are occupiers and inhabitants for the purpose of being rated, and the master and fellows of a college are therefore rateable, as a corporation, for what they beneficially occupy. 1 Bott, 143.

A schoolmaster occupying a house and garden belonging to the school is rateable, and although they were held by him as a recompence for teaching, &c. he being a beneficial occupant. 6 T. R. 352.

Royal palaces in the occupation of the royal family are not rateable, but servants occupying house and land belonging to the crown are rateable. Cald. 1.

A beneficial occupier of the king's lands, whether by gift or for wages, is rateable for the same. 1 T. R. 358.

Stables rented by order of the crown for the use of a regiment, are not rateable where the lessee himself does not occupy them on his own particular account. 2 T. R. 572.

A master gunner appointed by the crown, and stated to be occupier of the king's battery-house is rateable. 3 T. R. 497.

But though soldiers are not occupiers in the legal sense of the word, they may become so. 3 East, 506.

Where residence is merely as a servant of the crown, and for public offices only, there the occupation is not rateable.

The

The rule as to public servants. 3 East, 506.

The trustees of a meeting-house of which no profit is made, are not rateable. T. R. 79.

A private building used as a chapel is rateable, if a profit be made of it. Cald. 310.

The trustees of a methodist chapel, receiving money annually for the rent of the pews, are rateable for the profits made of the building, though in fact they expend the whole of what they receive in making disbursements for repairs, &c. and to attendants in the chapel, and in paying the salaries of the preachers. 14 East, 256.

There must be a beneficial occupant. 4 T. R. 730. 12 East, 416.

Occupancy by a servant. Vide 5 T. R. 79.

#### 4. What property is rateable.

A farmer is not rateable for his stock. Ld. R. 1280.

Stock in trade of tradesmen, &c. rateable.

Quere—If property which the sessions consider to be rateable be not rated, they ought to amend the rate by inserting it, and not to quash the whole rate. Burr. 2634.

Same point—Whether stock in trade be rateable, quere. Cowp. 326.

If personal estate be rateable, it must be local visible property within the parish. Cowp. 550.

The sessions cannot add to rate the names of those who have not notice of the appeal, or do not litigate the question at the sessions. Ibid.

Stock in trade may be rated. Cowp. 613. Cald. 147.

Personal property is rateable, and the bare possession of it is evidence, from which the justices may draw the conclusion that the possessor is rateable. 6 T. R. 53. 8 East, 537.

If the sessions are of opinion, that certain persons, who are left out of the rate, ought to be inserted, they must quash the rate. 6 T. R. 468.

The court will not alter the conclusion drawn by the sessions from the evidence stated. Ibid.

On an appeal against a rate, on the ground that A. is not rated for his stock in trade, the sessions ought to amend the rate, and not quash it. 16 East, 380.

Stock in trade is rateable to the poor, notwithstanding it has never been rated, unless there be some circumstances to take it out of the general rule. Ibid.

Household furniture is not rateable. 4 T. R. 771.

Money out at interest, or not, is not rateable. 6 East, 182.

Vested in the public funds.

Salaries are not rateable. Burr. 2011. 4 T. R. 771.

So the profits of an attorney. 7 T. R. 60.

The vicar is chargeable in respect of his tithes. Str. 77.

The parson who lets his tithes is occupier, and should be rated. 16 Vin. 427.

The farmer of tithes, who lets the tithes again, is *prima facie* liable to the poor rate Str. 525.

If one be entitled to the tithe of all fish caught in the parish, he is rateable in respect thereof. 3 T. R. 385.

Oblations and other offerings are rateable. Ibid.

Quere.—Whether quit rents and casual profits of manors? Carth. 14. Comb. 264.

The rents and casual profits of a manor are not rateable to the poor. Burr. 991.

Iron mines are not rateable. 5 East, 478.

Lead mines not rateable. Burr. 1341. 1 Blk. 589.

The lessee of a lead mine under the crown, with the lot and cope, is rateable in respect of the lot and cope. Cowp. 481.

The lessee of a coal-mine rateable, although he derive no profit from the mine 5 T. R. 593. N.B. There was a prospective advantage to be obtained by the lessee independently of present profits.

Coal mine ceasing to be productive, is not rateable. 8 East, 387.

Toll, tin, and farm duties are rateable. 5 T. R. 480.

Landlords, not resident within the parish, having leased lead mines and other minerals, with liberty to the tenants to dig, &c., reserving a certain annual rent, and also certain proportions of the ore which should be raised, are at any rate not assessable to the relief of the poor for such certain rent or ore being raised, whatever the question might be as to the proportion of ore reserved, when in fact any should be raised. 12 East, 353.

The lessees under the lord of the manor of lot and free share of all calamine raised within

within the manor, are liable to be rated as to the poor, as occupiers of land in the parish where the manor lies, none of them being resident in the parish. 1 M. & S. 612.

Rent, not the subject of a rate; and therefore a rate by which trustees were rated in one gross sum for rent of certain mines, under certain moors and wastes, and also in respect of their being owners and occupiers of such moors and wastes, was held ill. 4 M. & S. 222.

Portion of lead ore (when smelted) reserved by lease to owner of the mine, held to be in the nature of rent, and not rateable. 5 M. & S. 159.

Lime works are rateable in the hands of the occupier. 1 East, 534.

A slate work is rateable. 2 East, 164.

And a potter's clay likewise. 8 East, 528.

When saleable, underwoods are rateable? Vide 10 East, 219.

Members of a corporate body, which holds in fee certain common lands, exercising their right of common on such lands, are rateable. 5 East, 466.

Quare. Whether a common in gross be rateable. Ibid.

Aftermath, let out in pastures, is rateable. 13 East, 155.

Way-leave (being a bare easement) not rateable. 2 T. R. 90.

Waggon-way, with exclusive occupation of the ground, held rateable. 7 T. R. 598.

Where a farmer lets his dairy of cows, he may be rated for the profits as part of the profits of the farm, or they may be rated in the hands of the dairyman, provided the farmer be not rated for the profit he derives from letting them to hire. 8 East, 528.

The profits of a mineral spring are part of the produce of the land, and therefore the occupier is rateable for the whole as one estate. Cowp. 619.

Land improved in value by a spring of water, liable to be rated as the aggregate annual value of the land and spring together. 1 M. & S. 503.

Where a company were empowered, by act of parliament, to lay under ground, through the streets of a town, main pipes for the conveyance of water, and the inhabitants, with the company's consent, to lay pipes communicating with such main pipes, to their houses, paying to the company a rate for such privilege; held that the company were rateable to the poor in the parish where the main pipes lay, in respect of those pipes, and the rates paid thereon. 1 M. & S. 634.

The profits of a house containing the steel-yard of a weighing machine, are rateable, as arising from the house itself, the machine being annexed to the freehold. Cald. 262.

The profits of a house having a carding machine, are rateable. Cald. 266.

Annual sum paid for privilege of using a building as a canteen, considered as part of the rent, and rateable as such. 4 M. & S. 317.

Lands converted into a cock, are rateable. 1 T. R. 219.

Where canal rates and duties exempt by st. from all taxes and assessments, the land occupied by the canal also held to be exempt from poor's rate. 1 B. & A. 263.

Where tolls are paid for passing a certain barge-way, the way is rateable for those profits. 4 T. R. 21.

Lessee of fishings within the river Severn held rateable, as a beneficial occupier of land. 1 M. & S. 652.

### 5. Where property is rateable.

Tolls, not rateable *per se*, but *contra* when mixed with a rate upon other property which, as having substance and locality within the parish, is properly rateable there. 12 East, 324.

The tolls of a light-house, where rateable. Vide 1 Bott, 142. 12 East, 46.

Tolls taken by a corporation are rateable. 3 Keb. 540.

Tolls taken upon a river for passing a sluice, are rateable where they become due, not where they are received. Cowp. 581.

Tolls are rateable where they are due. 2 T. R. 660. 4 T. R. 26, 27. 543. 8 T. R. 340.

For lands and tenements, the assessment is, of course, made where they lie. Dalt. 165.

Marsh lands drained. See 17 G. 2, c. 37.

So also the artificial profits of lands are rateable where the lands lie. Cald. 316.

Corporation of Bath erected reservoirs of water, and supplied with water the parishes of A. B. and C., held rateable in A. for so much of the profit from these reservoirs as they made in A., but not for the entire profits made in A. B. and C. 14 East, 609.

The eventual profits of land, resulting from some alterations in the surface of the land, are rateable in the parish where the lands receiving the benefit lie, and not where the alteration is.

As land converted into drainage. 12 East, 40.

Ships are rateable at their home. 4 T. R. 711. 8 East, 451.

That is, in the parish where they are locally and visibly domiciled, although out of it at the time of making the rate; but not where they have never been within the parish. 1 B. & A. 109.

As to ships belonging to a parish, in which the owner is not an inhabitant, vide 8 East, 455. n.

The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant, resident within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry; for supposing a ferry to be real property, it is not such real property as is mentioned in the st. 43 El. c. 3., the occupancy of which subjects the party to the relief of the poor of the place. 12 East, 350.

And all the cases, where the parties have been held rateable, in respect of the occupancy or receipt of tolls, (apart from the question of inhabitancy,) have been where they, at the same time, occupied real visible property connected with such tolls, in the place where they were rated. Ibid.

The owner of a ferry, residing in a different parish, but taking the profits of the ferry on the spot, by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground, the soil itself at the landing places being the king's common highway, and the owner of the ferry having no property in or exclusively possession of it. 12 East, 346.

## 6. Of the proportion in which the rate shall be made.

The court will not presume a rate unequal, although houses and lands are not rated alike. Burr. 2491.

Unless a rate manifestly unequal, the court will presume it equal. Cald. 93.

The court of K. B. can lay down no general rule for the proportion to be observed in rating. Cald. 106.

A person must be rated according to the improved value of his property. 6 T. R. 154.

Rent not a certain criterion of value. 7 T. R. 549.

Land tax no rule for the poor rate. Fol. 12.

17 G. 2. c. 38. s. 12. concerning persons removing out of parishes.

## 7. Of allowance by the justices, and of the publication of the rate.

By stat. 43 Eliz. c. 2. s. 1. the said rate and taxation shall be made with the consent of two justices, one whereof is of the quorum, dwelling in or near the parish or division.

And this consent is usually given by the justices signing the same, with their allowance thereupon thus:

We, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, do consent unto and allow of this assessment. Witness our hands the       day of       18       J. P.       H. P.

The sessions have no original power to order an assessment. Ld. Ray. 798.

The justices cannot refuse signing a poor rate. Str. 398.

The allowance of a rate is a ministerial act. 1 Bott, 77. 1 East, 117.

By 43 Eliz. c. 2. officers of corporate towns have the authority of justices of peace. And aldermen of London.

S. 9. relates to a parish extending into two counties or into two liberties.

Rate not to be altered after allowance. 2 Dougl. 465.

Rate for a borough not to be confirmed by justices of a county. 1 Bott, 78. Vide 1 B. & A. 524.

By 59 G. 3. c. 95. separation of towns from parishes, and distinct appointment of overseers, is made lawful.

But with respect to the poor, such separation must have commenced within sixty years. Ibid.

Attachment for evading the signing of a poor rate according to *mandamus*. 1 Blk. 637.

Publication of the rate, see 17 G. 2. c. 3. s. 1. 4 T. R. 638.

Inspecting the rate. Vide 17 G. 2. c. 3. s. 2, 3.

## 8. Remedy by application to two justices out of sessions, with consent of overseers, in cases of inability, through poverty, to pay the rate.

By 54 G. 3. c. 170. s. 11. justices out of sessions, with consent of parish officers, may discharge paupers from the payment of parish rates.



## 9. Appeal, and the power of the sessions thereupon.

Vide 43 Eliz. c. 2. 17 G. 2. c. 38. 41 G. 3. c. 23. And note, that the clause of 43 Eliz. c. 2. gives the justices and sessions of boroughs power over appeals against rates made for the places within the borough, exclusive of the county. 1 Bott, 274.

Appeal must be to the next sessions after the allowance. 4 T. R. 12.

What are the next sessions. Vide 1 Bott, 281. 2 Bott, 727.

One intervening day between the publication of a rate and the next immediate quarter sessions is not sufficient for an effectual notice of appeal. 15 East, 206.

Next sessions means the next practicable sessions at which an effectual appeal can be lodged. Ibid.

Also the next after allowance. 4 T. R. 12.

The appeal may be made to an adjourned sessions. 7 T. R. 107.

Of the notice. Vide 1 Bott, 274.

The sessions cannot award costs, unless the appeal be entered and determined. 8 T. R. 583.

Which party shall begin. Vide 4 T. R. 475.

Where the appellant disputes before the sessions the quantum of the rate, it is not sufficient for the respondent to shew that the appellant is in possession of some rateable property within the parish; they must also shew some probable ground for the amount at which they charge the party in the rate. 12 East, 546.

A parishioner who is liable to be rated, but who is not in fact rated, is a competent witness to prove the rateability of appellants. 4 T. R. 17.

And by 54 G. 3. c. 170. s. 9. inhabitants not to be incompetent witnesses in certain cases, on behalf of or against their parishes.

By 17 G. 2. c. 38., after appeal, rates to be entered in a book.

## 10. Of distraining for the poor rate.

By 43 Eliz. c. 2. rate is to levied by distress. Vide etiam 17 G. 2. c. 38. s. 7. 41 G. 3. c. 23. s. 1, &c. and 54 G. 3. c. 170. s. 12.

Oath of the refusal to pay the rate must be made before the justices previously to distraining for non-payment. Salk. 532.

In what case the court will grant a *mandamus* to levy a rate. 1 Bott, 250.

A summons must precede a warrant of distress for a poor's rate. 6 T. R. 192.

Where defendant, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the house and broke the windows, &c. Held, that they might be sued in trespass without a previous demand of the perusal and copy of the warrant, according to 24 G. 2. c. 44. s. 6. 2 M. & S. 259.

By 17 G. 2. c. 38. distress shall not be deemed unlawful for want of form in the proceedings.

43 Eliz. c. 2. s. 4. gives commitment for want of distress.

And by 17 G. 2. c. 38. s. 11. arrears are to be levied by the succeeding overseers.

In the case of the person assessed dying before payment, see Burr. 1152. 1 Blk. 284.

Certiorari will not lie to remove a poor rate. Str. 952. 1 Sess. Ca. 201. Str. 975.

Nor debt to recover it. Burr. 1152. 1 Blk. 284.

Appeal is the only course. Ibid.

## 11. Rate for taxing others in aid.

Hundred contributory, see 45 E. c. 2. s. 3.

A vill is within the equity of the statute. fol. 25.

The sessions cannot rate in aid. Set. & Rem. 259.

The assessment must be by the justices, and they cannot delegate their power. Str. 1114. Vide 16 Vin. 416. 2 Salk. 480.

The rate in aid may be on particular persons. Comb. 309. 1 Vent. 350. Fol. 29.

It must appear in the order that the parish is within the same hundred. Fol. 27. Sed vide 1 Nol. P. L. 216. n. Vide Fol. 31.

Any division which is equivalent to a hundred is within the equity of the statute. 1 Burr. 576.

Justices cannot rate in aid of a parish out of their jurisdiction. 4 T. R. 778.

The order must be for a time limited. Str. 700.

The sum may be imposed in gross for a year. Comb. 309.

The order must be to raise a sum certain. Str. 314.

The sum may be in gross. Str. 1114.

County contributory. See 43 Eliz. c. 2. s. 3.

ect. **III. Of the relief and ordering of the poor.—1. How far parents and children are liable to maintain each other.**

By 43 Eliz. c. 2. s. 7. poor persons are to be relieved by their parents or children.

By 59 G. 3. c. 12. justices in petty sessions are empowered to order relief by parents &c. as justices in quarter sessions by 45 Eliz. c. 2.

A man is not obliged to maintain his wife's children by a former husband after their mother's death. Fol. 39. 42.

The order should be upon the husband. Fol. 44.

The statute of Elizabeth extends only to natural relations. 4 T. R. 118.

Son's wife, the son being run away, not to be maintained by the son's father. Str. 955.

The grandfather and grandmother are not within the statute. 2 Bulst. 344.

But though the father be living, yet if he be unable, the grandfather being of ability, may be compelled to keep the grandchild. 16 Viner, 423.

A son-in-law is not obliged to maintain his wife's mother. Str. 190.

The word children in the statute extends to grandchildren. Set. & Rem. 210.

**2. Of the order.**

The order must set forth that the person is poor, &c. and not able to work. Ld. Rd. 699.

Must be said to be of sufficient ability. Set. & Rem. 52.

Order to pay indefinitely as to time is good. Salk. 534.

The order must be made by the justices of the county where such sufficient person dwells. Bulst. 344.

Pauper not to be sent to such sufficient person. Fol. 41.

Pauper must be chargeable. 16 Vin. 424. 1 Bott, 366.

Penalty of 20s. a month. Vide Burr. 799.

Indictment will lie for refusing to obey the order of sessions. Ibid.

**3. Of persons deserting their families.**

Vide 1 J. 1. c. 4. s. 8. 5 G. 1. c. 8.

Order of two justices must state how much of the goods, or rents, should be seized, and must specify the quantum of relief to be appropriated out of them; and in case of rents, must limit the period of such appropriation. 6 East, 163.

**4. Of the relief and ordering of the poor.**

Poor to be maintained within their own parishes, vide the statutes, etiam Set. & Rem. 49.

Excepting in the case of bastards, being nurse children. 2 Nol. P. L. 304.

Order to be taken therein. Vide 43 Eliz. c. 2.

By 59 G. 3. c. 12. parishes may provide land for the employment of the poor.

Not exceeding twenty acres. Ibid.

And may let portions of land to poor inhabitants. Ibid.

By 3 W. 3. c. 11. persons relieved are to be entered in a book.

No others to be relieved, but by order of the justices. Ibid.

Vide 9 G. 1. c. 7. 36 G. 3. c. 23. 55 G. 3. c. 137.

By 59 G. 3. c. 12. every order for relief in parishes not having a select vestry shall be made by two or more justices, except in cases of emergency.

St. 8 & 9 W. 3. c. 80. s. 2. relating to bedding the poor, is repealed by 50 G. 3. c. 52.

On an order for relief weekly, the money is due the beginning of the week. 1 T. R. 316.

Sessions have no power to order surgeon's bills to be paid. 1 Barnard, 46.

Nor the justices. 2 Barnard, 207. 247.

By 59 G. 3. c. 12. s. 29. overseers are empowered in certain cases to give relief by way of loan only.

By s. 30. pensions for service in the navy, army, &c. may be assigned in certain cases for the indemnity of parishes.

Such assignment, attested by justice, to be transmitted by churchwardens, &c. to paymaster general, &c. Ibid.

The pension assigned to be paid to churchwardens, &c. Ibid.

Assignments of pensions to become void, by the death of the pensioner before the day of payment. Ibid.

Justices may order payment to overseers of the pensions, &c. of persons leaving their families chargeable. s. 31.

Paymaster general, &c. to make payment accordingly. Ibid.

How churchwardens to apply the same. Ibid.

Justices empowered to order payment of wages of seaman, whose family, during his absence, has become chargeable, for the indemnity of parishes. s. 32.

And the owner, &c. to make such payments to churchwardens, &c. accordingly. Ibid.

And, upon refusal, proceedings may be had against the owner, &c. as in case of poor rates. Ibid.

Setting up trades for benefit of the poor. See 3 C. 1. c. 4. s. 22.

Erecting houses for the poor. See 43 Eliz. c. 2.

By 9 G. 1. c. 7. s. 4. overseers may contract for the maintenance and employment of the poor.

Two or more places may join. Ibid.

Not to acquire a settlement. Ibid.

No contract to be valid, unless the contractor shall be resident in the parish in which the poor shall be maintained, &c. 45 G. 3. c. 54.

Contracts entered into otherwise void. s. 2.

Removal of contractor, not to vacate the security. Ibid.

Contractors for providing for the poor, shall be subject to the jurisdiction of the justices, as overseers of the poor. 50 G. 3. c. 50.

Notice of contracts for supplying workhouses to be given. 55 G. 3. c. 157. s. 7.

A majority will bind the rest. 3 T. R. 592.

Paupers wanting relief, and refusing to go into the parish workhouse, the parish officer may refuse giving weekly allowance. 2 Nol. P. L. 329.

Whether a mother asking relief for her children be compellable to go with them to the poorhouse. Dougl. 331.

An appeal does not lie to the quarter sessions against an order for relief. 4 M. & S. 421.

Power to build, or enlarge workhouses. Vide 59 G. 3. c. 12. s. 8.

Workhouses insufficient may be sold. s. 9.

Where no poorhouse, &c. can be procured in the parish, adjoining parish may be resorted to. s. 10.

Limiting the amount to be raised for buildings and the purchase of lands, &c. s. 14.

Power to raise further sums by loans, or by the sale of annuities. s. 15.

Future rates charged with loans and annuities. Ibid.

No greater rate than 1s. in the pound shall be charged on future rates, unless with consent of two-thirds in value of the proprietors of premises. s. 16.

Churchwardens and overseers may take and sue as bodies corporate. s. 17.

Incapacitated persons empowered to convey. Powers and directions of 22 G. 3. c. 85. 59 G. 3. c. 12. as to sales, &c. applied to this act. s. 18.

When a mother asks for relief for her child only, and not for herself, the parish officers cannot compel her to go into the workhouse; and if she refuse, they cannot refuse the allowance to the child. 3 T. R. 637.

But by 36 G. 3. c. 23. s. 1. poor may be relieved out of workhouses.

One justice may order relief to paupers at their own homes. s. 2.

For not exceeding one month. s. 5.

Two justices may order relief for a further time. Ibid.

By 55 G. 3. c. 137. s. 3. the time for which justices may order relief to poor persons, at their own homes extended.

Further time not to exceed six months. Ibid.

Justices making such orders may direct the payment of relief to be discontinued. Ibid.

Limitations of allowances in certain cases. s. 4.

St. 36 G. 3. c. 23. not to houses established by 22 G. 3. c. 23. s. 4.

By 30 G. 3. c. 49. justices, &c. may visit parish workhouses.

By 50 G. 3. c. 50. s. 3. justices may appoint the keeper of the workhouse to be the governor.

Penalty on embezzling goods. s. 4.

Power of justices to commit offenders. Ibid.

By 54 G. 3. c. 170. s. 7. masters, &c. of poorhouse not to punish or confine beyond limited time.

By 56 G. 3. c. 129. confining the poor by chains, or manacles, is unlawful.

By 55 G. 3. c. 137. s. 1. property in goods, &c. provided for the use of the poor, to be vested in overseers.

Not to repeal provisions in local acts. Ibid.

Parish officers may cause goods, &c. to be marked. s. 2.

Penalty on persons buying or receiving into pawn any property provided for the poor by parish officers. s. 2.

Or defacing marks. Ibid.

Application of penalty. Ibid.

On non-payment of penalty, offenders to be committed. Ibid.

Persons absconding with workhouse property, to be committed. Ibid.

Mark or stamp on articles to be evidence of the right of property. Ibid.

Mark not to be put out on the outside of wearing apparel. Ibid.

Persons guilty of misbehaviour in workhouses, may be committed. s. 5.

Form of conviction. s. 8.

Conviction not to be set aside for want of form. Ibid.

Appeal to the quarter sessions. s. 9.

Recognizances to be entered into. Ibid.

Decision to be final. Ibid.

By 56 G. 3. c. 129. certain enactments in local poor acts, passed since the commencement of the reign of Geo. 1., repealed.

Whether a poor house purchased under the stat. 9 G. 1. c. 7. by joint parishes, in a third parish, is not, for the purpose of settlement, a part of the purchasing parish. At all events the paupers are not removable. Cald. 215.

By 24 G. 2. c. 40. spirituous liquors are not to be used in workhouses.

By 52 G. 3. c. 160. justices to order parochial relief to debtors in such gaols as are not county gaols.

S. 2. limits the sum.

Legal settlement of debtor to be ascertained. s. 3.

Order of removal to be suspended while debtor is imprisoned. Ibid.

And to be served on the overseers of the poor of his parish. s. 4.

Who shall repay the expence attending the pauper. s. 5.

In case of refusal, the money advanced to be levied by distress. Ibid.

Appeal. Ibid.

Appeal allowed to quarter sessions. s. 6.

In case the pauper has no legal settlement in England or Wales, the allowance shall be paid out of the county rate. s. 7.

## 5. Of the regulation of parish vestries under st. 58 G. 3. c. 69. and 59 G. 3. c. 85.

By 58 G. 3. three days' notice to be given of vestries.

And by publication in the church, and affixing on the church door. Ibid.

Chairman of vestries appointed. s. 2.

Chairman to have the casting vote. Ibid.

Minutes to be entered and signed. Ibid.

Manner of voting in vestries. s. 3.

Inhabitants coming into a parish since the last rate, may vote. s. 4.

Inhabitants refusing payment of rates, to be excluded from vestries. s. 5.

For preservation of parish books and papers. s. 6.

Penalty on retaining or injuring parish books, &c. Ibid.

Recovery and application of penalty. Ibid.

Not to affect other proceedings. Ibid.

Provisions, in relation to parishes, extended to townships, &c. s. 7.

Manner of giving notices of vestries and meetings in special cases. Ibid.

Not to alter the time for holding vestries specially directed. s. 8.

Nor to affect special vestries. Ibid.

Not to extend to London, &c. Ibid.

By 59 G. 3. c. 85. persons rated to the poor, though not parishioners, may vote in vestry, according to the value of the premises rated.

Clerk or agent of corporation, &c. may vote in vestry according to the value of the premises rated. s. 2.

Non-payment of rates to disqualify from being present at or voting in vestry. s. 3.

## 6. Of select vestries under st. 59 G. 3. c. 12.

By s. 1. parishes are empowered to establish select vestries for the concerns of the poor.

Constitution of select vestries. Ibid.

Members elected to be appointed by a justice. Ibid.

Vacancies to be supplied. Ibid.

Continuance of select vestries. Ibid.

Power of renewal. Ibid.

Meetings and duties of select vestries. Ibid.

Overseers (except in cases of emergency) to give no other relief than such as shall be ordered by the select vestry. Ibid.

Justices empowered to order relief in certain cases for a limited time. Ibid.

One justice may order temporary relief in cases of urgent necessity. Ibid.

Minutes to be kept of the proceedings of select vestries. s. 3.

Minutes of select vestries, and reports of their proceedings, to be laid before the inhabitants in general vestry. Ibid.

Notice to be given of vestries for the establishment and election of members, and for receiving reports of select vestries. s. 4.

Justices to act within their respective jurisdictions. s. 35.

Provisions, relating to parishes, applied to townships, &c. Ibid.

Majority to act. Ibid.

Powers given to vestries, applied to meetings of townships, &c. Ibid.

Saving powers of 22 G. 3. c. 83. where the provisions are adopted. s. 36.

Saving powers given by special acts. Ibid.

Select vestries. Ibid.

Act extends to England only. s. 37.

## 7. Maintenance of poor by incorporated societies.

Vide 22 G. 3. c. 83. 38 G. 3. c. 86. 41 G. 3. c. 9. 42 G. 3. c. 74. 43 G. 3. c. 110. 56 G. 3. c. 10. 49 G. 3. c. 124. 52 G. 3. c. 73. 50 G. 3. c. 50. 45 G. 3. c. 54. 55 G. 3. c. 157. 56 G. 3. c. 129. 59 G. 3. c. 12.

Where the guardian and visitor of a parish, which had adopted the provisions of st. 22 G. 3. c. 83. upon application to them for relief by a pauper, for herself and children, directed them to be received into the poor house, held that one justice had not any jurisdiction, upon complaint to him by the pauper, to order relief out of the poor house. 2 M. & S. 324.

Justices empowered to order relief, in certain cases, for a limited time.

Sect. IV. Of the overseer's accounts.—1. Of the accounts, and the justices' power to enforce accounting and payment of the balance.

Vide 4 Chetw. Burn, 179—190.

2. Of appeal against the overseer's accounts.

Vide 4 Chetw. Burn, 190—196.

## Sect. V. Settlement of the poor.

By 54 G. 3. c. 170. all enactments and provisions, in respect of gaining settlement, contained in local acts, repealed.

Persons born in prisons, or houses licensed for the reception of pregnant women, not to gain a settlement thereby. s. 2.

Provision respecting settlements by reason of birth in any poor house or house of industry belonging to united parishes. s. 3.

Prisoners for debt or contempt not to gain settlements while in custody. s. 4.

No gatekeeper or person residing in any toll-house to gain a settlement thereby. s. 5.

No person maintained in any charitable institution to gain any settlement by residence therein. s. 6.

By 59 G. 3. c. 12. s. 11. building hired, &c. taken to be in the parish, &c. hiring, in questions of settlement.

Sect. V. a. Of



Sect. V. a. Of settlement by birth.

The settlement by birth may be proved by the copy of the parish register of christenings, and by identifying the person. B. S. C. 765.

1. Of bastards,

A bastard child is *prima facie* settled where born. Carth. 433.

As to a bastard born in a place by collusion, vide Sett. & Rem. 66. 3 Salk. 66.

As to a bastard born after the order of removal is made out, vide 1 Sess. C. 33. Sett. & Rem. 66.

As to a bastard born where the removal of the mother is suspended, vide 35 G. 3. c. 101. s. 6,

As to a bastard born in removing, vide Sett. & Rem. 66.

As to a bastard born after the removal, which is reversed, and before the appeal, vide Salk. 474.

If a woman pregnant be removed by an order, and she be delivered, and there be an appeal, and the order be reversed, the child must be sent back. Salk. 121. 532.

As to a bastard born in a state of vagrancy, vide st. 17 G. 2. c. 5. s. 25.

As to a bastard born in the house of correction, vide 2 Bulst. 358.

In prison, vide 1 Sess. Ca. 94.

In the house of industry of an incorporated district, vide 20 G. 3. c. 36.

Bastard born under the act for establishing friendly societies, vide 35 G. 3. c. 54., which is not repealed by 35 G. 3. c. 101. 2 B. & A. 149.

As to a bastard born in a lying-in hospital, vide 13 G. 5. c. 82.

2. How bastards are affected by certificates.

Bastard born under the certificate is settled where born. Str. 186.

A bastard does not come within the meaning of the word family in the certificate acts; and therefore if a certificated woman be delivered of a bastard child, it is settled where born, and not in the certifying parish. 2 Sess. Ca. 170. Str. 1168. B. S. C. 187.

And if the certificate undertakes to provide for a woman and her child, she being then pregnant of a bastard, the child is settled in the certificate parish. B. S. C. 264.

Bastard born under a certificate, including the child with which a woman whom they state to be unmarried is at the time pregnant, is settled in the mother's parish. B. S. C. 650.

But such certificate must expressly state the woman to be single (it seems): and quære, if it will extend to a child born long afterwards. 7 T. R. 362.

3. Whether removable from their mother.

Bastard not to be removed whilst a nurse child. Fol. 265. 2 Sess. Ca. 90.

Except when deserted by the mother. 4 Burn. 208.

It shall be maintained whilst a nurse child by its own parish. Dougl. 9. n. Cald. 6.

4. Settlement by birth of legitimate children.

The place of birth of legitimate children is *prima facie* the place of settlement. 6 T. R. 653.

Where the parent is a vagrant, vide Carth. 433.

Where the father and mother are both dead. Dalt. c. 73. p. 168.

And where a child is first known to be, that parish must provide for it till they find another.

Child of Irish parents without settlement. Vide 3 B. & A. 410.

Foundlings maintained in hospitals. Vide 13 G. 2. c. 29.

Sect. VI. Of settlement by parentage; and herein of emancipation.

Settlement of legitimate child is with the parents. Fost. 313. Fol. 269.; though it be an idiot. 2 Bott, 17.

The age at which a child may gain a settlement distinct from the parents, is seven years and forty days. 4 Burn, 213.

How

How far children shall follow the father's settlement; where the father was settled in one place, and the child born in another. Vide 1 Sess. C. 18.

Where the father gained a settlement after the child's birth. Vide 2 Sess. Ca. 102. Str. 580. Ld. Rd. 1332.

A child may be removed with the father to his settlement, though it have never been there before. 2 Sess. C. 150.

If a child be born in a parish in which the father has a settlement, and the father after gain a settlement in another parish, that last parish is the settlement of the child. Salk. 528. 3 Salk. 259.

Removing nurse children to the settlement of their parents; the order is good, though it takes no notice of the death, nor adjudges the place to which they are removed. 1 T. R. 164.

Proof of the father's settlement is sufficient to establish the settlement of the son, if nothing appear to the contrary. 6 T. R. 56.

Father attaint. Vide 6 T. R. 116.

Discharged by order under the sign manual. Vide 15 East, 463.

The child born after the father's death. 19 Vin. 382.

The children shall have the father's settlement derived from their grandmother, in preference to that of their mother. B. S. C. 482.

Father having no known settlement and run away, the child shall be settled with the mother. Fol. 252.

So, where the father was an Irishman, having no settlement. Fol. 251.

So, where the father was a foreigner. 2 Sess. C. 113. B. S. C. 367.

Father dead, and the mother a widow, the children will follow her settlement acquired after his death. Fol. 254. Ld. Rd. 1473. B. S. C. 49. 64.

Intermarrying with a second husband will not change the settlement of the children by the first marriage. Carth. 449. Salk. 482. B. S. C. 2.

A son is emancipated from the father by the father's separating from the son (by removing to another parish), and the son remaining behind and marrying; and the son's settlement will be in the parish where he and his father last lived together, while the father gained a settlement there. Str. 438.

A son at nineteen leaving his father and going into another parish, and marrying, is emancipated, and his children can derive no settlement from their grandfather. 2 Sess. C. 129. Str. 831.

Marriage and separation from the father amounts to emancipation. B. S. C. 270.

Marriage and separation. Vide 5 T. R. 583. 2 Bott, 619.

Marriage and no separation; marriage by the son is of itself an emancipation, although he continue to reside with his father's family. 1 East, 526.

If there be no marriage, the son's carrying on the business for himself will not constitute an emancipation, if he live with his father's widow as part of her family. 2 East, 276.

A son enlisting for a soldier, and being absent for four years, and then returning to his father, is emancipated. B. S. C. 638. 1 Blk. 669.

Where the son enlists as a soldier, and thereby puts himself under the control of others, it is an emancipation. 5 T. R. 670.

The being in the militia and serving in it, is not of itself an emancipation. 8 T. R. 479.

Neither is the being under the control of another person an emancipation. Ibid.

A son, nineteen years of age, treating his father's house as his home, and so considering it, is not emancipated, though he goes about the country working for himself. B. S. C. 806.

Residence of a child, by his father's direction, at a friend's house for support, the child visiting his father's house occasionally as his home, is not an emancipation. Cald. 284. Vide 2 T. R. 114.

Child bound apprentice by a void indenture, and gaining no settlement thereby, is not emancipated. 3 T. R. 553.

A child is not emancipated till he has gained a settlement in his own right, or has contracted a relation incompatible with that of a component part of his father's family, and a person at the age of nineteen, (his father having run away), hiring himself for four years, and not gaining a settlement thereby, is not emancipated. 3 T. R. 355.

Emas-

Emancipation, by a child's gaining a settlement in his own right, in the parish in which he was previously settled. 5 B. & A. 377.

A son leaving his father's family at nineteen, and serving a year, under a hiring for a year, but gaining no settlement thereby, and returning before twenty-one, is not emancipated. 4 T. R. 199.

If a son at sixteen hire himself for a year, and serve that year, he nevertheless cannot be considered as having been emancipated from the very moment of the hiring. 5 T. R. 478.

Where a person, being twenty-one, removes from her father's house, and goes as servant for eight weeks, and then returns to and continues with him, it is an emancipation. 6 T. R. 247.

A widower having a daughter, placed her at eleven years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service for him, but without any contract of hiring to give her a settlement of her own, the father in the mean time having gone out to service. Held, that on coming of age she was emancipated. 10 East, 88.

Son was bound apprentice to a certificated person for four years, and after serving for the time, returned at the age of nineteen to his father. Held not emancipated. 11 East, 578.

The son of a certificated person, who was not named in the certificate, upon the death of his father, was bound apprentice in the certifying parish, where he served under the indentures for some years, and then with his master's consent served the remainder of his time till twenty-one with a person in the certified parish where his mother and family resided under the certificate, and afterwards he hired himself to the same person for a year, and served that and three successive years in the certified parish. Held, that he gained a settlement by such hiring and service. 2 M. & S. 417.

## Sect. VII. Settlement by marriage.

Wife shall follow the husband's settlement, though she never reside with him. 4 Burn, 236.

Wife can gain no settlement separate from her husband. 2 Bott, 75.

Husband dead and his place of settlement not known, the wife's maiden settlement remains. 4 Burn, 236.

Where the woman marries a foreigner. Vide 1 Sess. Ca. 97.

Husband's settlement unknown and he dead. Vide Str. 683. Sett. & Rem. 89. 1 Sess. Ca. 80.

Husband living, but having no known settlement in England. Vide Fol. 249. Sett. & Rem. 97.

The wife may be removed to her maiden settlement if the husband's be not known. Fol. 252.

Husband absent and living. Vide B. S. C. 367.

On removal of a wife it is sufficient, in the first instance, to prove her maiden settlement. Cald. 39. 371. 236. 13 East, 311.

## Sect. VIII. Evidence relating to the two preceding sections.—

### 1. Birth.

The parents may prove the time of birth; and after their death, their declarations made in their lifetime are evidence of that fact. But the register is only evidence of the christenings; and *non constat* thence, when the child was born.

Hearsay declaration of the father as to the place of his son's birth, is not evidence. 4 East, 539.

### 2. Legitimacy.

The parents may be examined as to the legitimacy of their children. 2 Cowp. 591. 6 T. R. 330.

### 3. Bastardy.

Evidence of bastardy after the mother's death by the father, who contradicted his own assertions made during the mother's life that he had been married. B. S. C. 25.

Parents may prove that they were never married. 6 T. R. 330.

Parents being married may prove the time of birth. Cowp. 591.

The wife may prove the fact of connection with the person she charges as the father of the child. 8 East, 193.

But not the non-access of the husband. 11 East, 152.

### 4. Marriage.

## 4. Marriage.

An order of removal removing a woman as the wife of J. S. to the parish of M., and unappealed against, is conclusive of the fact of marriage upon that parish. 7 East, 377.

The statutes relating to this head are, 13 & 14 C. 2. c. 12. 1 J. 2. c. 17. 3 & 4 W. & M. c. 11. 35 G. 3. c. 101. 8 & 9 W. 3. c. 30. 9 & 10 W. 3. c. 11. 12 Ann. st. 1. c. 18. 35 G. 3. c. 54. 52 G. 3. c. 72.

## 1. Who may or may not acquire a settlement by hiring and service.

A widower is within the word unmarried. 2 Bott, 177.

If a married man hire himself, subject to approbation, and his wife die before the agreement is complete, and then the agreement be completed, a settlement will be gained by service under it. B. S. C. 455.

The time to be attended to is the time when the contract is made. Marrying between the hiring and entering into the service will not defeat the settlement, if there be no fraud. 3 T. R. 382. 385.

But a marriage taking place intermediately by fraud defeats the settlement. 5 T. R. 52.

A marriage during the service does not defeat the settlement. Salk. 527.

A settlement cannot be continued hiring, if at the second hiring the servant was married. Cald. 54.

And a service continuing for eighteen months shall be considered as having commenced afresh at the end of the first twelve months. Ibid.

An emancipated child is not within the meaning of child or children in 3 W. c. 11 s. 7. Fol. 131. 10 East, 88.

But a child whose emancipation is only inchoate is within the act. 5 T. R. 478.

A deserter can gain no settlement by hiring and service whilst he is such. 9 East, 204.

A private soldier, with the consent of his officer, entered into a contract of hiring and service conditionally for a year, if so long allowed to be absent, and served the year. Held, not to gain a settlement, as not being *sui juris*. 3 M. & S. 229.

## 2. Of the contract of hiring, as to the parties.

A daughter who is emancipated may be hired as a yearly servant by her father. Fol. 142. 2 T. R. 57.

The master need not have a settlement of his own. Fol. 142.

The master need not live in the parish where the servant serves. 2 Bott, 274.

An infant may hire himself. 2 Bott, 195.

Parish pauper, hired out by parish officers, cannot by such hiring, and service under it, gain a settlement. 7 East, 373.

Compulsory hiring, and service under it, gains no settlement. 9 East, 211.

Poor boy of sixteen hires himself, the overseers of his parish afterwards assist him with clothes. Held that he acted *suo jure*, and gained a settlement. 15 East, 352.

There must be a contract. 2 Bott, 183.

Where it appears that there was no contract, no hiring will be presumed, and no settlement can be gained; but where a contract appears, it will be presumed to have been regular, till the contrary appears. B. S. C. 491. Vide 7 East, 373.

If a person have lived with another as ostler for two years, and have been seen in menial service there, a yearly hiring will be presumed. Cald. 141.

If it be proved that a person was seen and known to be in the service of another, as servant in husbandry, for a year, a yearly hiring will be presumed. 5 T. R. 327.

Also, if a person remain in service after the expiration of the first year, a yearly hiring may be presumed, commencing with the second year. 5 T. R. 668.

Female natural child, hired by the wife of its reputed father. Vide 1 B. & A. 173.

A hiring for a year may be presumed from a service for four years. 15 East, 449.

Hiring by indenture, not executed by the master. Vide 2 B. & A. 375.

If a person be only hired for less than a year, and serve for three years, a contract for a year may be inferred. 5 T. R. 447.

The yearly hiring to be by one entire contract. Salk. 535. Fol. 134.

Though the local custom be otherwise. B. S. C. 674.

Where there is a general hiring, and no time mentioned, it implies hiring for a year. B. S. C. 299.

Telling a person to go into another's place, that other having been a yearly servant, is ground to imply a hiring for a year. B. S. C. 502.

Where

Where no mention is made of wages or of time, and the service is for a year, a hiring is presumed. Bidding one to go into a yard, and look after the horses. *B. S. C.* 759.

Hiring to be a chaise-driver. *Ibid.*

Where one hires himself to another, and there is no stipulation as to time, but only as to meat, &c. and he serves for three years, a hiring for a year will be implied. *B. S. C.* 823.

Where the pauper agrees to go and live with one for a particular purpose, and is to receive clothes, &c., but no time is mentioned, and she remains two years and a half, going away in the middle of a year, yearly hiring is presumed. *5 T. R.* 506.

Hiring, "to come and live and take care of a child." *Ibid.*

Hiring for eleven months, and then on an end, gains a settlement, the latter being an indefinite hiring. *3 T. R.* 76.

Hiring, for fifty-two weeks, not a hiring for a year. *4 Chetw. Burn*, 279.

An indefinite hiring is to be considered as a hiring for a year. *2 Bott*, 202.

If an emancipated person go to her father for a year "to do the offices of a servant," it is a good hiring, although it is agreed that she may earn what she can by her own labour besides. *2 T. R.* 37.

The contract may be, for the servant to work for himself, provided he be bound to do all his master's work. *Ibid.*

If a person go to live with a relation, as such, and not under any hiring, and afterwards to live with him as before, this is no hiring for a year. *6 T. R.* 757.

Assistant to a waiter at an inn, without agreement with the master. *3 T. R.* 449.

A person's agreeing to live with his step-father, to work with him, and to be paid at a certain rate for what he should do, is not a general hiring for a year. *B. S. C.* 513.

Hiring for a year, to spin yarn at so much per stone, will gain a settlement. *Str* 1139.

A hiring "for a year, to make screws at so much per gross, good earn, good hire," will gain a settlement. *Dougl.* 333.

Hiring to make a certain quantity of bricks, no settlement. *1 B. & A.* 325.

If one be elubbed for three years, to be taught a trade, and contract to any work he may set about, it is a good yearly hiring. *5 T. R.* 193.

So, if there be a stipulation in the contract, to deduct wages for illness, &c. and an agreement to do any other work he might be set about. *1 East*, 259.

After hiring himself for a year to a brickmaker, the pauper entered into a written contract, (unstamped and without seals), to serve his master for three years, to learn to make bricks. Held to be a new hiring in the relation of master and servant. *14 East*, 541.

A verbal contract by the father that his son should work with another as a frame knitter for two years, and to have what he earned, and to allow the master 2s. per week for instruction, and the use of a frame and standing; held to be a contract of hiring and service, and not of apprenticeship, and that the son's having served under it is evidence that he had adopted such contract. *1 M. & S.* 370.

Parol contract.—Master to receive money for teaching pauper to make stockings. *1 B. & A.* 115.

Hiring from Whitsuntide to Whitsuntide gains a settlement, though there be less than 365 days in that period. *B. S. C.* 669.

So, although the service be ended before the following Whitsunday, but having continued for more than 365 days. *7 T. R.* 564.

Hiring two days after Michaelmas till the following Michaelmas, gains no settlement. *Str.* 143.

Hiring at a statute fair, if not for less than a year, gains no settlement, although such a hiring be customary. *Dougl.* 439. *Vide* *10 East*, 576.

Hiring the day after Michaelmas-day, to the Michaelmas-day following, gains a settlement. *B. S. C.* 719.

A hiring on October 11th till Michaelmas following, is a hiring for a year. *Cald.* 19.

If one be hired the day after Martinmas-day, till the Martinmas-day following, till is conclusive, and it is a hiring for a year. *1 T. R.* 490.

Hiring three days after Michaelmas till the Michaelmas following, will gain no settlement, although there be a service for 365 days, (being leap year). *5 T. R.* 250.

Hiring three days after Michaelmas, till the Michaelmas following, gains no settlement. *1 T. R.* 694.

Although such contracts are stated to be fraudulent. *Ibid.*

A pauper



A pauper may be hired for less than a year, to prevent his gaining a settlement; for such a hiring is not necessarily fraudulent. *Ibid.*

Hiring for eleven months gains no settlement, although it was so limited for the purpose of avoiding gaining a settlement. *Ibid.*

But a hiring for eleven months, and to give one month over, gains a settlement. *B. S. C. 433.*

Hiring for a year, with liberty to be absent eleven or twelve days sheep-shearing, gains no settlement. *B. S. C. 791.*

Hiring for a year, with liberty to be absent during the harvest month, gains no settlement. *B. S. C. 439.*

But hiring for a year, with liberty to be absent a month in the militia, if requisite, gains a settlement. *B. S. C. 753.*

So, where one hires himself for a year at so much per week, and agrees to serve a month at the end of the year, since he should be absent in the militia for a month of the year, a settlement may be gained. *Dougl. 391.*

A stipulation by an East India pensioner to have two days in each half year to go and receive his pay, defeats his settlement. *1 East, 599.*

Hiring for a year at 15s. 6d. per week, and to be at liberty to be absent during the sheep-shearing season, but to find a fit man at his own expence, to do his work during his absence, but his own wages to go on during the whole time, will not gain a settlement. *1 M. & S. 622.*

Hiring for a year, to go away a month at harvest, and to make up the time after Michaelmas. *2 B. & A. 520. Vide 3 B. & A. 107.*

Where the hiring is to serve three years, to work twelve hours a day, and if more to have a certain sum per hour. *B. S. C. 302.*

Hiring to work for three years, eleven hours a day, the rest of his time, and Sunday to be his own, is not a yearly hiring to give a settlement. *B. S. C. 458.*

A hiring for seven years, to serve from six in the morning to seven in the evening of each day, except on Sundays, will not gain a settlement. *4 T. R. 219.*

Hiring for five years to work twelve hours each day, will not gain a settlement. *5 T. R. 21.*

A hiring to serve five years as a shearmen, and to work shearmen's hours only, will not gain a settlement. *B. S. C. 694.*

Where the exception is part of the contract, no settlement can be gained; it is otherwise where the contract is absolute, and the exceptions only implied. *B. S. C. 671.*

Hiring to work as a bleacher. *10 East, 489.*

Implied exceptions by the custom of the country will not defeat the settlement. *Ibid.*

Merchant's clerk hired for a year, and serving only during the usual hours of business. *1 B. & A. 322.*

Contract for wages at 6s. a week, summer and winter, not a hiring for year, but a weekly hiring. *B. S. C. 653.*

A hiring at so much per week is not a general hiring. *2 T. R. 453. Vide 2 T. R. 622.*

But if there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. *Ibid.*

Where nothing is said as to term of service, but that the servant shall have weekly pay, it is only a weekly hiring. *5 East, 382.*

A hiring at so much a week, for as long time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained. *12 East, 351.*

A servant in husbandry hired to serve for the weekly wages of 4s., board, washing, and lodging, except in the harvest month, when his wages were to be increased to 10s. 6d. per week, and then again reduced to 4s., does not gain a settlement, for that is only a weekly hiring. *3 M. & S. 243.*

Weekly wages, and two guineas for the harvest. *4 M. & S. 315.*

A hiring to work at 3s. 6d. per week, and condition for a week's notice, does not gain a settlement. *2 East, 423.*

A hiring by the month at a month's wages, or a month's warning, will not be a yearly hiring. *B. S. C. 819.*

Hiring at 3s. per week the year round, and liberty to quit on a fortnight's notice, gains a settlement. *4 T. R. 245.*

The power of giving notice makes no difference. *Ibid.*

Hiring at so much per week, and liberty to part on a month's notice, is a general hiring. *5 T. R. 205.*

Weekly

Weekly wages and month's notice. 5 M. & S. 114.

Hiring for a year at 4*l.* wages, payable quarterly, with liberty to part on a month's notice at the end of any quarter, is a yearly hiring. B. S. C. 203.

A hiring at 5*l.* per year wages, with liberty to part at a month's wages or warning is a yearly hiring. B. S. C. 19. Vide 2 Bott, 191.

Hiring conditional as to liking, if the service continue a good hiring for a year, B. S. C. 1.

Hiring for a year, part of which was then past, gains no settlement. B. S. C. 304.

Retrospective hiring not sufficient. 4 T. R. 257.

### 3. Of the performance.

Hiring for a year and service for a year, but not under the same hiring. Fol. 133.

A settlement may be gained by a service under a hiring for half a year, and a second hiring for a whole year. Ld. Rd. 426.

So, where there is a hiring from three weeks after Michaelmas to Michaelmas, and then a hiring for a year, and service for eleven months after second hiring. 1 Sess. Ca. 87.

So, where there is a hiring and service from Christmas to Michaelmas, and then a hiring for a year, and a service till Midsummer under the second hiring. 2 Sess. Ca. 119.

So, where there is a hiring and service from Christmas to Whitsuntide, and then a hiring for a year, and service till the beginning of the March after the Christmas. B. S. C. 545.

So, a hiring and service for less than a year, and then a hiring for a year, but only ten days service will gain a settlement. 5 T. R. 98.

A hiring and service for a year at 18*s.* wages, and then hiring for another year at 25*s.* wages, and service for part of the latter year, is a continuance of the same service at higher wages, and the settlement is in the parish where the service concluded. Dougl. 309.

Hiring for the year with a continued service under a renewed engagement for another year. 15 East, 347.

A weekly hiring may not be connected with a yearly hiring, if the service under the weekly hiring be not similar in kind to that under the yearly hiring. B. S. C. 280.

But if similar in kind, they may be connected. Cald. 179.

But now there is no distinction to be made between services similar and dissimilar. 1 East, 656.

First service under contract entered into while the party under indenture of apprenticeship. 1 B. & A. 280.

A hiring for a year, and a service continued beyond the year for six months, without a new agreement, gains a settlement in the place where the service was performed for the last forty days. Str. 1240.

If the hiring be from November to Michaelmas, and the servant continue in the service till the second day after Michaelmas without any new agreement, and on that day there be a new agreement for a year from that day, the two services may be coupled, or rather the two services may be coupled by the means of the service upon the intervening day. 1 T. R. 778.

If a new contract be entered into on the last day of the first contract, there is no discontinuance, though there be an hour's interval between the termination of the first service and the beginning of the second, and the servant leave the place for that hour. B. S. C. 116.

So also whatever the interval may be, provided it be part of a day only. Cald. 4.

Also a settlement may be gained by a service under two hirings, whereof the yearly hiring preceded that which was for less than a year. And also there may be an interval between the two services, if one end and the other begin on the same day, and the discontinuance will not prevent a settlement, even though the servant quit during that interval. 2 Bott, 264.

A service under a hiring for fifty-one weeks may be coupled with a service under a previous hiring for a year, so as to confer a settlement. 1 B. & A. 319. Vide B. S. C. 461.

Hiring first for a year, and agreeing in the middle of the year to work by the piece. 2 Bott, 222.

Servant marrying during the first service, cannot gain a settlement under a subsequent hiring for a year. Cald. 54.

If there be a service for less than a year, and then the servant marry, and then make a new contract, he cannot gain a settlement by virtue of any service under this last contract;

also if during the service, under a hiring for a year, there be a second agreement for another year, to commence immediately at different wages, and for a different sort of service, it is a dissolution, and not a mere variation of the first contract. 5 T. R. 672.

The service for the last forty days must be performed under a contract of hiring entered into when the pauper was unmarried. Ibid.

If the master let his farm, and the lessee enter, and the servant continue with him for the remainder of his year, it will give him a settlement. 1 Sess. Ca. 121.

So, if the servant continue with an executor for the remainder of a year. B. S. C. 179.

If a servant absent himself beyond his master's leave, and his master receive him again, it is no interruption. Set. & Rem. 129. Str. 423. Vide 2 B. & A. 483.

A servant who absents himself for a reasonable cause at the end of his service, and against his master's leave, may nevertheless gain a settlement. Ibid.

If a servant hired for a year from Michaelmas, do not come into his service till three days after Michaelmas, and is absent at different times without consent, but his master receives him again, it is a dispensation. B. S. C. 522.

If a yearly servant run away from his master, and be absent for thirteen weeks, and then his master apprehend him, and give him leave to come back, deducting a sum for the time of absence, it is a dispensation. 4 T. R. 804.

If a servant at her master's instance, go from his family on account of illness to the hospital, and her mistress give her the remainder of her wages, and she never returns, it is a dispensation. B. S. C. 494.

Absence at the end of the service, on account of illness, is no dissolution, although the master deduct a sum from the wages on that account. B. S. C. 675.

If a person be hired for a year, and be prevented by illness from entering upon his service at the time agreed upon, and upon going to his place, his master refuse to receive him, and then he continue there, agreeing to take what he should be allowed, the service only commences at the second agreement. Cald. 298.

If the master leave his home accidentally before the servant's year is ended, and pay her the whole year's wages and something over, and the servant two days after another service, is still a dispensation. Cald. 48.

If the master become a bankrupt, and the messengers take possession of the house, and the mistress discharge the servant, paying the whole year's wages, it is a dispensation. 2 T. R. 627.

If on account of a difference between a mistress and her servant, the former discharge the latter, and pay her full wages, which she accepts, it is a dispensation. 2 T. R. 624.

If the master quit his house, and tell his servants, he has no longer any occasion for their services, and pay the full year's wages, it is dispensation. 8 T. R. 236.

If a master turn away his servant to prevent his gaining a settlement, it is a fraud, and the settlement will not be defeated. Str. 526.

A quitting the service because the pauper wished to be settled elsewhere, is fraudulent, and amounts only to a dispensation. B. S. C. 565.

If after a person hired for a year, the master tell him he shall go away a fortnight at Michaelmas because of his settlement, and at the year's end pay him a year's wages, it is a dispensation and not a dissolution. 2 T. R. 376.

Where the master died three weeks after hiring the pauper for a year, the latter abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served; and it is no less an abiding in the service for a year, because one of the sons, on a frivolous pretence that the servant threw more sand on the floor than he deemed necessary, turned her out of doors three weeks before the end of the year, she being willing and offering to stay to the end of the year, but carrying away her clothes the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages. 12 East, 51.

If a servant on the last day of his year, desire his master to discharge him that he may go and see his friends, and his master therefore do so, deducting sixpence for that day, it is a dispensation. B. S. C. 690.

Hiring from Saturday, master desired pauper to go into service before Monday. B. S. C. 682.

If the master give the servant leave to go thirteen days before the expiration of his year, and pay him his full wages, it is a dispensation. B. S. C. 740.

If he absent himself with his mistress's leave, for the last five weeks of his service, and at the end thereof, pay her the whole sum earned by him during the time, it is a dispensation. B. S. C. 479.

If a yearly servant, with the consent of his master, procure another person to take his place for a time, paying him himself, and receive from his master his whole year's wages, it is a dispensation. Str. 1232.

Service with other masters by the first master's consent, he taking him again, is service under a dispensation. Str. 1207.

Where a yearly servant, on complaint of master, was committed to the house of correction, and after nine day's confinement was discharged on the master's application, and returned to his service and served out the year. Held that the commitment and imprisonment did not operate a dissolution of the contract. 2 M. & S. 329.

A servant, eleven weeks before the end of his year, in order to procure a discharge from his master, engages another to supply his place, and hires himself to another for the remainder of year, held a dissolution. 12 East, 482.

If a master insist upon turning his servant away, and lay down his wages, which the servant takes up and then goes away, it is a dissolution, though he afterwards return at the request of his master. 1 T. R. 101.

If a servant be turned out of doors by his master, and refuse to go again though requested by his mother, and receive his wages and depart, contrary to the express request of his master, it is a dissolution of the contract. 3 T. R. 754.

If the servant, nine days before the year out, go away on a Sunday morning to get another place, when his year should be up, and do not return till Tuesday morning, when the master tells him he may go and serve the master he has worked for the day before, and pay him his wages to that time, and will not let him stay out the year, it is a dissolution. 4 T. R. 100.

Where upon ill treatment by the master the servant requires to be dismissed, and the master pays her the whole year's wages, and tells her she may serve the remainder of her time, and she refuses, it is a dissolution. 7 T. R. 438. Vide 2 East, 303.

A master refusing to take his servant back, and the servant taking the wages and offering herself to others, it is a dissolution. 4 East, 351.

If upon being taken ill, the servant sends for his clothes and money, which his master sends, deducting for the absence during illness, it is a dissolution. 6 T. R. 464.

Servant entered a new service 12th October, having left her old one the preceding day; wages had been previously agreed upon, but no time mentioned for commencement of the service. She continued in such service till following new Michaelmas day, when she received the wages agreed upon and quitted. 8 T. R. 477.

If after a hiring for a year, a servant be taken ill, and receive voluntarily his whole year's wages, and leave his service, and go to the hospital and never return, it is a dissolution. 4 East, 356.

Terms mentioned, but no absolute agreement till a week after Old Michaelmas, when the servant entered upon the place which she left, after giving warning on the following Old Michaelmas day, held a dissolution before the end of the year. 7 East, 471.

Master consents to servant's leaving his service two days before the end of his year, and pays him his full wages, it is a dissolution. 12 East, 550.

Where, upon the master's insisting upon it, the servant leaves his master's house, and afterwards asks a magistrate's order to be received again, or paid his whole wages, and afterwards enters upon another service, it is a dissolution. 7 East, 539.

If a servant, three weeks before his year is out, go away with his master's consent, and be therefore abated from his wages, it is a dissolution of the contract. Set. & Rem. 84.

Discharge by a justice. Vide 2 Bott, 323. Cald. 566.

If a servant, with his master's leave, go away from his service, and his year expire during his absence, he thereby loses his settlement, though the whole year's wages be paid. Str. 1022. B. S. C. 68.

If a servant part from his master with his own consent, and take the money for the time he served, it is a dissolution. Cald. 247.

If, at the servant's request, his master give him leave to go to another service, though he pay him the full wages, it is nevertheless a dissolution. 6 T. R. 185.

If after six months service the servant, on being paid his wages for the time, go away for a fortnight, held a dissolution, though he afterwards return and stay the remainder of the year without further agreement. B. S. C. 688.

Discharge of a female for bastardy operates as a dissolution. 2 Bott, 299. Vide 2 Bott, 317. 319.

If a servant be apprehended on a charge of bastardy, and be detained for some days from his service, he cannot gain a settlement. Cald. 129.

Where the master of a yearly servant, twenty-eight days before the end of the year; gave up his business, and paid off and discharged the servant, paying him his full wages,

and telling him to go where he liked, and the servant took his wages, left the home, and worked with another person with the master's knowledge, during the twenty-eight days, held that this was a dissolution of the contract. 3 M. & S. 20.

#### 4. Of the residence.

Forty days' residence necessary to a settlement. Sess. Ca. 327.

Not necessary that the forty days be all together. B. S. C. 243.

The residence of forty days must be within the compass of a single year. 1 M. & S. 221.

When the last forty day's service is in different parishes, the settlement is where the servant lodges the last night. B. S. C. 825. Vide Doug. 657.

Service with the same master, but not in the same place where the hiring was, will gain a settlement in the last place. Fol. 188. Vide Cald. 288. 290.

If a yearly servant serve forty days in A., then go with his master's leave to B. his father's parish, and there remain above forty days, then go to another parish to work for his master, and then for the last three days sleep in B., his father's parish, he gains a settlement in B. 5 T. R. 387.

The settlement will be at the place of the last forty days service, though the master have no settlement there. Str. 794.

The service may be in a parish where the master never lives, and so a settlement gained. Str. 528.

A servant will gain a settlement by service to his master, though such master be a visitor only, and a servant may be said to be hired in every parish into which his master may go. Set. & Rem. 139. Str. 524. B. S. C. 422. Fol. 193.

So a person, who is hired as groom to some running horses, and goes from place to place to take care of them, will gain a settlement by residence at the last place, though his master had neither house nor estate there. B. S. C. 722.

Residence of more than forty days at Scarborough, with master, who went there merely for the season, held not to give a settlement. 2 Bott, 280.

A hiring may be in an extraparochial place, and a settlement may be gained by a service under it, in a parish or township, and if the master and servant be at a watering place during the last forty days, a settlement will be gained there. 2 Bott, 289.

Residence of a yearly servant with his master at a sea-bathing place for forty days, will confer a settlement. B. S. C. 774.

The servant need not lodge at his master's house. 2 Sess. Ca. 114.

Where a person during his service marries, and then lodges with his wife for the last forty days in another parish than that where his service is performed, he nevertheless gains a settlement in the parish where he lodges. And this though the master did not know where he lodged. Cald. 51.

Yearly servant held settled in the parish where he had lived with and served his master for ten months, and not in the parish to which he had been sent as a lunatic, and where he had lived for the last two months of his year's contract. 5 T. R. 657.

As to the place of rest. Vide 3 B. & A. 374.

### Sect. IX. Settlement of apprenticeship.

The statutes are the following: 43 Eliz. c. 2. 9 & 10 W. 3. c. 11. 51 G. 3. c. 80. 54 G. 3. c. 107.

The stat. 51 G. 3. c. 80. extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer. 2 B. & A. 200.

#### 1. By what instrument the binding must be.

Binding must formerly have been by indenture, parol binding insufficient.

But by 31 G. 2. c. 11. person bound apprentice by deed, &c. though not indented, being first duly stamped, is entitled to a settlement where apprenticed.

The agreement must be by deed. 4 T. R. 769.

#### 2. Who may be parties.

An infant may bind himself. Fol. 154. Andr. 373.

An infant of eight years may be bound. 1 Bott, 618.

And the master may also be an infant. 4 T. R. 196.

The master's condition is immaterial. B. S. C. 728.

So, the master may have no right to take an apprentice. 4 Burn, 379.

And the apprentice will gain a settlement in the parish where he serves, although the master have no settlement there. 2 Salk. 533.

A person



A person who is bound apprentice by the act of two other parties without his own intervention, can gain no settlement by a service under such a binding. 1 Bott, 587. Salk. 479.

The apprentice must be a party, though an infant. 8 East, 25.

An indenture of apprenticeship is void, if the pauper (though an adult and assenting to the contract) do not become a party to the deed. 9 East, 295.

### 3. Of the execution of the deed of apprenticeship.

If the apprentice be bound, the indenture is good, though the master do not execute it. 2 Bott, 367. 371.

And a parish apprentice's indenture is not void for want of signing by the apprentice. 2 T. R. 726. 1 Bott, 606.

Indenture signed by one churchwarden and one overseer. 12 East, 361.

Indenture reciting certain trustees to be parties, and the consideration to be 20*l*. held good though not executed by the trustees, and though the whole of the consideration was not paid to the master. 2 M. & S. 338.

### 4. Of the time.

Binding for less than seven years does not render an indenture void, but only voidable by the parties. B. S. C. 91.

A binding of a female parish apprentice till twenty-one, does not render the binding void. B. S. C. 248.

So, a binding for six years. Cald. 26. 1 Bott, 600.

Binding for an unlimited time. 1 Bott, 606.

### 5. Of binding parish apprentices, and allowances by the justices.

The justices may sign, and no other mode of allowance is good; and the justices who allow a parish binding must do it in the presence of each other. 1 Bott, 613. 5 T. R. 380.

But one may sign alone, and afterwards be present at the signing by the other. 8 T. R. 455.

The justices refusing their assent to the binding a parish apprentice, he was bound with his own and his mother's consent with the parish money, the binding was found fraudulent by the quarter sessions. Held to be a binding independent of the statute, and a settlement gained. 2 M. & S. 501.

An indenture stated that the overseers and churchwardens of M., in the county of Warwick, with the consent of justices of the said county, bound a pauper apprentice to T. W. of H., in the county of Leicester, and the justices in their written consent in the margin described themselves as justices of the county aforesaid. Held, that it sufficiently appeared that they were justices of the county of Warwick. 1 B. & A. 273.

Where the indenture of apprenticeship had been signed only by one overseer, held, that before parol evidence of there having been only one appointed in that year, could be allowed, all the means of procuring the written appointment must be shewn to have been had recourse to; a notice to the appellants to produce all books, papers, &c. is not sufficient, the officers themselves must also be subpoenaed. 1 B. & A. 173.

### 6. Of the stamp.

The indenture must be stamped. B. S. C. 236.

The stamp must be of the proper kind as well as value. 6 T. R. 317.

Even though the value of the stamp used be higher than that required, and applicable to the same kind of instrument. 1 East, 55.

But if the stamp be applicable to the proper funds, then though of a higher value than is required, the instrument will be valid. 2 East, 414.

### 7. Of the consideration and duty thereon.

Vide 8 Ann. c. 9.

If the duty be not paid, the indenture is void. Str. 903.

No duty payable where the consideration is 6*d*. 1 Wils. 129.

A public annual charitable subscription is within the words "public charity" in the act. B. S. C. 574.

A person bound out for a consideration bequeathed for that purpose by will, is within the meaning of the words "public charity." B. S. C. 697.

Where money is given by the apprentice's grandfather to the master to clothe the boy

boy before he enters upon his apprenticeship, it is not such a consideration as the statute requires to be set out in the indenture. B. S. C. 145.

Money given by parish officers as a consideration for an apprentice, is not liable to the duty imposed by 8 Ann. c. 9. s. 35., even though the binding be voluntary, and though the party receiving the apprentice be not privy to the gift. 4 T. R. 196.

Such money so raised is a public charge. Ibid.

In parish indentures, not necessary to state premium in words at length. 1 B. & A. 477.

The father providing lodging, board, &c. for the apprentice, and the master to pay 4s. per week to the father for the same, no additional stamp is necessary. B. S. C. 831. 1 Bott, 551.

Apprentice covenanting to provide for himself meat, drink, &c., and the master to pay him wages, it must appear that the wages were not an equivalent, if it is intended to invalidate the indenture for want of the proper stamp. 3 T. R. 515.

The friends of the apprentice covenant to maintain him on every Sunday, and to clothe him; this is not such a benefit as is liable to a stamp duty. 4 T. R. 732.

The reservation to the master of part of the apprentice's earnings is not a consideration within the statute. 1 East, 601.

If the stamp duty be paid on the sum contracted for, which sum is inserted in the indenture, but a less sum is actually paid by the apprentice, still the indenture is good, and service under it will gain a settlement. 5 East, 309.

Deed of apprenticeship, containing a covenant by the apprentice to allow the master 2s. a week, and to have wages, and provide for himself during the term, does not require the additional stamp imposed by 44 G. 3. c. 98. 1 M. & S. 151.

### 8. Of the contract.

Where the intention is to create an apprenticeship, and the indenture is void, it shall not enure as a service. 2 Barnard, 39.

Where one is taken as an apprentice, and the indentures not executed, it cannot be converted into an hiring and service. B. S. C. 450. Vide Id. 656.

If A. serve seven years as an apprentice, and there be no indenture, he cannot gain a settlement either as an apprentice or a yearly servant. 5 T. R. 152.

If there be an agreement in writing to teach a trade for certain considerations, and the person is to do no other work, it is not a contract of apprenticeship, but it is a hiring and service. Cald. 367.

Where the intention is to create an apprenticeship, but for fraudulent reasons the indenture is not duly completed, no settlement can be gained by service under it. 2 Bott, 371.

By an agreement to serve to learn a trade at certain wages, and payment of a premium, shall be inferred an intended contract of apprenticeship. 8 T. R. 579.

An intent to constitute an apprenticeship, if agreed that one shall teach and the other be taught a trade. 1 East, 531.

Not necessary to retain one *co nomine* as an apprentice. Ibid.

A person who is verbally bound to another by agreement to serve on condition that he shall be taught a trade, is not a contract of apprenticeship, but service under it will give a settlement as by hiring and service. 2 East, 298.

Where the father agreed with R. that R. should take his son for six years to teach him the trade of a framework-knitter, and he was to allow R. 9s. a week for the first three years for teaching him, and his board and lodging. Held, that this was a defective contract of apprenticeship, and therefore the son did not gain a settlement under it. 8 M. & S. 460.

### 9. Of residence.

Settlement of the apprentice does not depend on that of the master. 2 Salk. 535.

Residence is where the party lodges. Ld. Rd. 1371. Str. 394. 2 Bott, 317. Vide Str. 51.

Serving by day in one parish, and sleeping by night in another. Burr. S. C. 569. 2 Bott, 390.

Residence for forty days will gain a settlement, though no service be performed, and illness be the occasion of the residence in that particular parish, provided the master reside in the parish. Burr. S. C. 706. 2 Bott, 413.

But a residence merely on account of illness, where no service is performed, will not gain a settlement: the residence must be referable in some way to the apprenticeship. 7 East, 581.

Where an apprentice goes into and sleeps in another parish on account of illness, but

but while there is occasionally employed by his master, though not in his trade, a settlement is gained by forty days residence in that parish. 11 East, 176.

A parish apprentice and his master being both on the permanent staff of the local militia, in consequence of that circumstance the apprentice resided together with his master and continued to serve him in the parish of B. for forty days. The court of K. B. held that this residence was sufficient, and that hethereby acquired a settlement in B., notwithstanding they were both under the controul of their superior officers during the whole time. 3 B. & A. 411.

Residence of seafaring persons, see 1 Str. 60. Burr. S. C. 531. 7 East, 466.

Apprentice not being wanted goes back to school; his residence there not a residence under the indenture. 2 B. & A. 382.

Where an apprentice having at his master's desire left the parish in which his master lived, returns and sleeps in that parish without his master's knowledge, it is not a residence under the indentures. 13 East, 452.

Where an apprentice leaves his master's parish and service, without returning, and goes into another parish, where he had been allowed to sleep on the Saturday and Sunday nights, and there sleeps the two following nights. Held, that his settlement was in his master's parish, his service having ended on his quitting on Saturday. 2 M. & S. 135.

Forty days residence successively not necessary. Str. 579.

If an apprentice live with his master forty days in A., then forty days in B., and then one day in A., he is settled in A. 5 T. R. 188.

**10. Service with different masters, by parol consent of the first master, without an actual assignment of the indentures.**

Apprentice bound to one with intent to serve another, is settled in the parish where the service is. Str. 10.

So, where an apprentice by a verbal consent of his original master serves another. Str. 554. 1001. B. S. C. 12.

So, where after serving another, under leave from the first master, the apprentice comes back for the last eight days. B. S. C. 416.

A settlement is gained by a service with a third master, under the express consent of the second, to whom the first had assigned the apprentice. B. S. C. 578.

There must be by the master an express consent to serve a particular person; mere knowledge is not enough. 3 T. R. 605.

A general licence to serve whom the apprentices choose, is not sufficient. Ibid.

Express consent given to the second master, and a general leave to the apprentice is sufficient, and this though the consent were not given till the apprentice had been in his second service for some time. 2 Bott, 422.

The consent of the first master to a subsequent service, is sufficiently expressed by his giving the pauper a character, with a view to induce the second master to take him. Cald. 533.

The consent of the first master may be implied from circumstances. Cald. 461.

A particular consent to a particular service will enable the apprentice serving such service, to gain a settlement by it, though the apprentice agree to give the master a guinea to be let off the remainder of his time, and the master agree to give him clothes when the guinea is paid. 1 East, 73.

**10 a. But the mere knowledge of the master is not sufficient.**

After a parol assignment of a parish apprentice, and part service under that assignment, the apprentice runs away from the second master, then lives with a third person nine months in the original parish, without consent either of the first or second master, and remains afterwards two years in that parish, in good health, and the indentures then expire: no settlement is gained at such original parish.

General consent given to the apprentice to work where he will, not sufficient. B. S. C. 542. 1 Blk. 553.

The master's consent must be express, and for the particular service. 1 East, 59. B. S. C. 629. 1 B. & A. 116.

Whether consent or not, a fact for the sessions to determine. Ibid.

A parish apprentice was, before the passing of this statute 18 G. 3. c. 47., bound till 24, and served till nearly attaining 21, when his master being about to leave the parish, and no longer wanting his service, told him he might leave him and go where he liked, and shift for himself; but if he could not provide for himself, he might return to him; upon which he quitted, and when he was about four months past 21, bound him-

self by indenture as apprentice to another master for three years, and served with him the three years. Held, that he did not acquire a settlement by service under the second indenture. 4 M. & S. 593.

If the master tell the apprentice he may do the best he can for himself, and afterwards the master, upon hearing from the second master that the apprentice had procured a place, express his satisfaction at it; it is not such a consent as will give a settlement where the parties act under the idea that the indentures are at an end; no settlement can be gained as under them. 1 East, 285.

If an apprentice be by parol transferred by the widow of his master (not having taken out letters of administration) service with the second master will be a service under the indenture. B. S. C. 133. 782.

So, he may continue to serve under an indenture by leave of the executor, and will gain a settlement thereby. Dougl. 70. Cald. 60.

### 11. Of service under an actual assignment or transfer of indentures.

If a master assigns over his apprentice, and the apprentice serve in pursuance of that assignment, he thereby gains a settlement; and it differs not whether he serve with one master or another, for he still serves by virtue of the first indenture. 1 Sea. C. 215.

Apprentice assigned by an indorsement on the indenture to a second master, gains a settlement by serving him. B. S. C. 248.

But to enable an apprentice to gain a settlement by serving a second master, the agreement must be proved; and if such proof is by an indorsement on the indenture, or other writing, the same must be stamped, or cannot be received in evidence, nor can parol evidence be received, if the agreement was reduced to writing. 6 T. R. 452.

Hiring not applicable to an apprentice. Ibid.

Apprentice and indenture delivered to a second master, and by him placed with a third master, gains a settlement. B. S. C. 266.

Apprentice assigned to a second master, and hired to a third master, with the second master's consent, gains a settlement by serving the third master. B. S. C. 578. 1 Blk. 635.

A parish apprentice being bound by her original master to another master by a new indenture of apprenticeship, without reference to, or recognition of, the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture, this being only evidence of the first master's consent to the service with the second, under a new contract of apprenticeship. 11 East, 95.

Service under an unstamped assignment by a widow, not stated to be the executrix or administratrix of her husband. 1 M. & S. 577.

### 12. Of service, the indentures being delivered up, or avoided by other acts of the parties.

Indentures being exchanged between the master and apprentice, the apprentice cannot afterwards gain a settlement under them by serving another master, with the knowledge of the first. B. S. C. 274.

Exchanging the indentures is a virtual cancelling. B. S. C. 511.

Bankruptcy of the master does not discharge the apprentice from his indentures. 2 Bott, 395.

Apprentice agreeing with his master for his discharge and quitting his master, but leaving the indentures till the money agreed for is paid, the indentures are not thereby discharged; and service under a second master by the express consent of the first, is service under the indenture. 8 T. R. 108.

Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, and the master having consented to it, and all having agreed to part, the apprentice went away; but the indenture, which was in the hands of a third person, was never applied for nor given up. The court of K. B. held, that the apprenticeship was not put an end to by this agreement, although the master said that he would have given up the indenture if he had had it in his possession at the time, and afterwards refused to take back the apprentice. 3 B. & A. 382.

Apprentice bound by his father may be discharged, although under age, by consent of all the parties to the indentures. B. S. C. 766.

If an apprentice enter into the king's service, it does not avoid the indentures. 6 T. R. 557.

Quære, whether an infant may avoid the indentures at his will. Ibid.

Where

Where an infant bound himself apprentice for seven years by indenture, to which indenture he and his master were the only parties, and after serving some time, in consequence of the master's running away and leaving him, procured the indenture to be given up to him with the master's consent, and afterwards during the seven years hired himself as a yearly servant and served a year. Held, that he acquired a settlement by such hiring and service; for it was for the infant's benefit, under the circumstances, that he and his master should be at liberty to put an end to the indenture. 3 M. & S. 497.

### 12. a. Of parish apprentices.

Indenture being delivered up by the first master to the apprentice's father, and at the same time the master consenting to the apprentice serving a second master as turned over to him, such service gains a settlement. Cald. 126.

The master of a parish apprentice agreeing that the apprentice shall work for his own benefit, doth not imply giving up the indenture. B. S. C. 802.

A parish apprentice when under age cannot consent to his discharge. B. S. C. 441.

Delivering up the indentures to a parish apprentice when he is under age, does not discharge the apprenticeship. 2 Bott, 391.

But when of full age he may consent to his discharge, and his consent then, together with his master's, is a good discharge, though the parish officers do not join. B. S. C. 562.

A parish apprentice when of full age leaving his master, and the indenture being delivered up to him by the master, a subsequent service with another is no service under the indenture, though the term be not expired. B. S. C. 629.

Apprentice when of full age paying money for his discharge, but the indentures not actually delivered up, though offered by the master to the apprentice's father, who did not take them, because he thought it not material to do so, will gain a settlement by hiring and service, as if no indentures existed. 1 T. R. 139.

A boy bound out as a parish apprentice may, after his master's death, hire himself as a servant. B. S. C. 320.

A parish apprentice not living at the time of his mistress's death with her appointee under the provisions of 32 G. 3. c. 57. 15 East, 59.

### 13. Of evidence relating to indentures of apprenticeship.

If an indenture be lost, other evidence may be received of its contents and existence. B. S. C. 151. 7 East, 45.

But such indentures must be most clearly shewn to be lost. B. S. C. 292. 735.

So also of both parts of the indenture. 6 T. R. 256.

As to proof of loss of indenture, see 4 M. & S. 48.

Indenture produced, but no subscribing witnesses thereto: those who call for it from the opposite party need not prove its execution. 2 T. R. 41.

But now it is held that it must be proved by the party calling for it, though it come out of the hands of the adverse party. 8 East, 548. Vide 3 Taunt. 62.

When a copy is evidence. See B. N. P. 254.

Deed thirty years old. Ibid.

Deed blemished. Ibid.

### Sect. X. Of settlements by renting a tenement.

Persons coming to settle in tenement under 10*l.* a year, removeable to place of legal settlement. 13 & 14 Car. 2. c. 12.

Certificated persons to gain settlement only by tenement or annual office. 9 & 10 W. 3. c. 11.

Gatekeeper not renting tolls. 15 G. 3. c. 84.

Prisoners in K. B., not by tenement or payment of rates; nor their servants by residence. 25 G. 3. c. 23.

Residence in forest of Alice Holt not to gain settlement in Binstead. 52 G. 3. c. 72.

Settlement shall not be acquired by renting any tenement, except a house or land in the parish, *bonâ fide* hired at and for 10*l.* a year, &c. 59 G. 3. c. 50.

#### 1. What constitutes such a tenement as will enable a person to gain a settlement by residence thereon.

An incorporeal hereditament is a tenement within the meaning of the statute. 3 T. R. 772. 3 East, 113. 5 East, 239.

Renting



Renting a coney warren will gain a settlement. Str. 678.

So, though the tenant have no right to the soil. 3 T. R. 772.

Renting a fishery will gain a settlement. Q. Whether the kind of fishery be material. 1 T. R. 558.

Liberty (by order of a corporation) to take sand and gravel from a river held a tenement. 5 M. & S. 90.

Renting a cattle-gate gains a settlement. 1 T. R. 137.

Renting a right of common in gross, gains a settlement. 7 T. R. 671.

A settlement may be gained by renting the tolls of a market. 5 East, 239.

The renting of a water-mill gains a settlement. 2 Salk. 536.

So a wind-mill. 1 Sess. Ca. 520. B. S. C. 107.

Taking the pasture of a piece of land gains no settlement. 2 Sess. Ca. 153. 3 Str. 874. B. S. C. 516.

Taking a pasture-ground, quere. Ibid.

Renting hay-grass and after-math gains a settlement. 2 T. R. 451.

Renting fogg or after-grass gains a settlement. 4 T. R. 348.

Taking land for a particular purpose will gain a settlement. Ibid.

But not a crop of growing oats bought at an auction. 4 M. & S. 210.

Renting a dairy will gain a settlement. 3 T. R. 772.

So also will renting a warren to kill rabbits, though the soil be not taken, but merely a right to enter and take the rabbits. Ibid.

Renting 80 cows at 3*l*. 10*s*. a year each, to be fed in certain grounds belonging to the owner, exclusively of any other cattle, is a tenement. 4 T. R. 671.

The land on which the cows are fed must, however, be of the annual value of 10*l*. 2 East, 198.

The value of the cows cannot form any part of the annual value. Ibid.

And it is sufficient though the pauper have not an exclusive right to the pasture where the cows are fed, and the cows be his own. 3 East, 113.

If the contract as to the feeding be not specific, no settlement will be gained. 1 Nol. P. L. 17.

Though the cows be not the pauper's own, and he contract for the privilege of milking them, they being to be fed on a certain farm; yet that will gain a settlement. 10 East, 496.

Contract for a pasture-fed cow for the season, gains a settlement. 14 East, 280.

Where the pauper was hired as a bailiff at weekly wages, and to have the feed of two cows in the pastures of his master; held, that by the feeding of the cows, which was above the yearly value of 10*l*., the pauper acquired a settlement. 3 M. & S. 276.

Where a waiter of an hotel had the tap, or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance, and of which he kept the key, and paid for his situation of waiter, and for the tap and cellar, the yearly sum of 60*l*. Held, that this was not such an occupation of the cellar as to confer a settlement. 2 M. & S. 472.

Occupation of premises by servant, for the better performance of his service, and not in the character of tenant. 5 M. & S. 136. 1 B. & A. 473. 3 B. & A. 171.

Renting pointing places in a mill will not give a settlement; the pointing places not being fixed to the floor of the mill. 8 T. R. 449.

So, runners for scouring needles, though they be screwed to the floor of the mill. 1 East, 528.

So, a standing place for a carding machine. 3 East, 189.

## 2. Of the value of the tenement, under 13 & 14 Car. 2. c. 12. and 9 & 10 W. 3. c. 11.; and how such value is to be ascertained.

The rent is not material, if the tenement be of the value of 10*l*. a year. 1 Sess. Ca. 115. 1 Str. 57.

If a rent of 10*l*. be given in contemplation of improvements by the landlord, who never makes them, and the house is thereby not worth so much rent, a settlement will not be gained by taking or paying that rent. 2 Sess. Ca. 198. 2 Str. 1127.

The quantity of stock on a tenement does not alter the value. 2 Sess. Ca. 41. 2 Str. 1156.

But if land be taken ready sown for crop, its rent may be computed higher on that account. 16 East, 126.

Renting land improved in value from the landlord's having previously dug it for a particular purpose, and on that account let it at a much higher rent, will confer a settlement. 1 M. & S. 381.

Renting

Renting land for planting potatoes, where the pauper agreed to take the land of the landlord ready ploughed and manured, and when he entered upon it, it was quite prepared; was holden to be a renting of land of a yearly value, as it was increased by being ploughed and manured by the landlord, although when the pauper took it, the ploughing and manuring was begun, but not finished. 2 M. & S. 152.

Evidence may be given of a value more than commensurate with the rent paid. 2 Bott, 137.

The special case must describe the nature of the tenement. Cald. 452.

A furnished room, with fire and candle, rented by the week in the gross, is a tenement, and the sessions would find the value of the furniture distinct from that of the tenement. 2 Bott, 96.

If a chattel (as a post wind mill) be placed upon land by the tenant, its value cannot be added to the rent of the land. 6 T. R. 577.

It is not sufficient if the tenement only produce more than 10*l.* per annum, when let by the week. 10 East, 41.

A contract of renting at 10*l.* per annum, the landlord paying parish taxes, is a good taking of a tenement of the proper value within the statute. B. S. C. 748.

### 3. Of divided tenements.

Need not be one entire tenement. Sett. & Rem. 86. 1 Sess. C. 75. B. S. C. 677.

A tenement lying part in one parish and part in another parish, will gain a settlement. Str. 57. 849. 2 Sess. C. 130.

Different tenements, and lying in different parishes, will give a settlement. B. S. C. 44. 588. 2 Bott, 117. 119.

Living upon a tenement of the value of 10*l.* a-year, although a part thereof is given out of charity, and is in another parish, gains a settlement. 1 T. R. 458.

Occupation as tenant in one parish cannot be coupled with an interest as landlord in another, so as to give a settlement. 1 M. & S. 154.

Occupation as tenant cannot be coupled with occupation as landlord. 1 B. & A. 481.

By 59 G. 3. c. 50. no settlement shall be gained, unless the whole of such land (i. e. the land occupied by the person claiming a settlement) shall be situate within the same parish or township as the house wherein the person hiring such land shall dwell or inhabit.

### 4. Of joint occupation.

Renting jointly a tenement, which, when divided as to value between the tenants will not produce 10*l.* a year for each tenant, will give no settlement to either of the parties. B. S. C. 311.

Renting jointly 52*l.* a year gains a settlement; and where one originally takes a farm of that value, and then takes a partner, the latter will also gain a settlement. B. S. C. 598.

Being joint partner with a person of a farm of 176*l.* a-year gains a settlement. 6 T. R. 554.

Renting one entire tenement, and jointly part of another, will, if the whole be of sufficient value, gain a settlement. B. S. C. 499.

Renting a farm of 11*l.* a-year, and afterwards occupying it jointly with another person, does not prevent gaining a settlement by the person originally taking. B. S. C. 756.

Renting 10*l.* a year, although part of it be let off afterwards by the tenant to under-tenants, gains a settlement. B. S. C. 571. 1 Blk. 603.

### 5. Who may gain a settlement by renting a tenement.

It is immaterial whether a surety be taken for the rent. B. S. C. 107.

Same point: and the question is on these cases whether the pauper were tenant or not: and whether he acquired the interest of a tenant to that value. 4 East, 362.

Credit need not be given to the pauper for the rent, if he be the tenant of the whole premises. Ibid.

Tenement taken by the wife of a soldier who had deserted, and who returns and remains concealed in it for seven weeks. 4 M. & S. 357.

An express contract is not necessary; it is sufficient if residence be with the permission of the landlord. 4 T. R. 258.

A toll-keeper may gain a settlement by renting a tenement in the parish which he keeps toll. 5 East, 553.

A person renting the tolls, and residing in the turnpike-house erected by order of the commissioners appointed by stat. 30 G. 3. c. 61. for paving, lighting, and regulating the

the streets of Durham, and for other local objects, cannot gain a settlement in the parish by the general turnpike act, 13 G. 3. c. 84. s. 50. 11 East, 93.

Renting the tolls of a bridge vested by act of parliament in a company of proprietors will confer a settlement, though the tolls are made personal estate, and the renting is not stated to be by deed. 1 M. & S. 514.

The prohibition of the general turnpike act does not extend to the tolls of a bridge which does not appear to be a part of the turnpike road. Ibid.

The occupation of the toll-house and tolls of a bridge demised for a year by five members of a managing committee under their own seals, but not under the corporation seal, held not to confer a settlement, the annual value of the toll-house alone not exceeding 5*l*. 3 M. & S. 247.

A foreigner may gain a settlement by renting a tenement. 4 East, 103.

A soldier, whilst his regiment lay in barracks at B., took a house for himself and family of the yearly value of 10*l*., and resided therein more than forty days. Held, that this was coming to settle in a tenement, and that he thereby gained a settlement. 1 B. & A. 270.

## 6. Residence, as to time and place.

Forty days residence is necessary. B. S. C. 54.

If a person be forcibly removed from his tenement within forty days, it prevents his settlement. 7 T. R. 105.

If a person be arrested and carried to prison in a parish different from that in which his tenement is before he has completed a residence of forty days, he gains no settlement, though his family reside for seven weeks. 7 T. R. 466.

Residence for thirty-three days by a widow on a tenement of 20*l*. a year cannot be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to gain her a settlement. 5 T. R. 664.

Where the tenant is in the rules of the Fleet, and he has in the same parish a tenement he rents, he paying the rent, he gains a settlement. 2 Barnard, 76. 2 Bott, 93.

The residence must be in the parish where the tenement or some part of it lies. Cald. 478. 2 T. R. 48.

A person renting a tenement in one parish, and residing rent free in a tenement in another, gains a settlement where he resides. 7 T. R. 197.

Where a residence is in different parishes, and in one of them for forty days at different intervals, and he sleeps there the last night, the settlement is gained there. 8 T. R. 240. 2 Bott, 148. B. S. C. 825.

By 59 G. 3. c. 50. no settlement shall be gained unless the house or building shall be held, and the land occupied for the term of one whole year, by the person hiring the same.

## 7. Of the time for which the contract is made.

Taking a tenement for eight months will gain a settlement, there being also a forty days residence. B. S. C. 474. 558. 574.

Removal under an order will not put an end to a contract for renting, and a pauper returning after execution of an order of removal to his tenement under such contract, may gain a settlement thereby. 2 T. R. 709.

## 8. Of fraud.

Taking land without stocking it, deemed fraudulent. 1 T. R. 261.

But the court will not presume fraud. 2 T. R. 709.

## Sect. XI. Settlement by a person's own estate.

Purchases under 30*l*. not to entitle to settlements in a parish. 9 G. 1. c. 7.

### 1. Of the value of the estate.

The estate need not be of 10*l*. per ann., if it be for life or of inheritance, and it may be copyhold. Fol. 257.

### 1. a. Of infants, executors, administrators, next of kin, tenants at will, and quarantine.

An infant, eight years of age, residing in the parish in which it has an estate of its own, is irremovable, and may gain a settlement by such residence. 2 Str. 1131.

An executor shall gain a settlement by residence as such upon leasehold. 1 Sess. C. 200. Str. 933.

No right is vested until letters of administration are taken out. Sett. & Rem. 103. Str. 57.

Where there are two next of kin in equal degree, and the father being possessed of the residue of a term dies intestate, and after order of removal made for one, he takes out letters of administration, he cannot have a settlement by virtue thereof. Andr. 4. B. S. C. 109.

Tenant at will gains no settlement as such. Ibid.

Where a wife and two children survive the intestate, the wife cannot gain a settlement by letters of administration taken out after assignment by her of the intestate's terms, lease for lives. Cald. 137.

The husband of an administratrix entitled to the trust of a term, only gains a settlement by residence thereon for forty days. Str. 97.

Coming to a tenement by executorship, although under 10l. a-year, gains a settlement. B. S. C. 538.

The executor to a tenant of an estate under 10l. a-year gains a settlement by forty days residence, although he do not prove the will. 6 T. R. 295.

Sole next of kin taking out of letters of administration after the expiration of the forty days residence. 8 East, 405.

Widow having right of dower, although not set out, gains a settlement by residing upon the estate; but the second husband gains none, though he resides with her. S. C. 783.

#### 1. b. Of joint tenants, trusts, estates vested in the husband by marriage, guardian in socage, &c.

If an estate be devised to a wife during her widowhood, and then to be sold for the benefit of the children; and one of them marry, and then the testator, and after the widow die, and the married child continue to live therein, a settlement is gained. B. S. C. 793.

Where an estate is vested in trustees for the separate use of the wife, the husband may gain a settlement by residence upon it. 3 T. R. 114.

A freehold estate in the parish in which the pauper lived descended to his wife and her sisters as coparceners; in a month after, he and his wife contracted to sell their share, but the conveyance was not executed for more than forty days after their title had accrued. Held, that by residence in the parish (without occupation) he gained a settlement. 1 East, 296.

Residence without right, but without fraud, on a freehold subject to a lease for years, gains a settlement. 2 B. & A. 527.

Estate purchased by the husband for less than 30l., and after marriage settled in trust to wife's use, does not give the husband a settlement. 3 East, 226.

A guardian in socage residing on the ward's estate for forty days gains a settlement in the parish, and cannot be removed from the possession of it at any time. 10 East, 491.

Mother of an infant copyholder held to be legal guardian of the copyhold (there being no custom of the manor for appointing one), and therefore entitled to reside irremovably on the estate. 2 M. & S. 504.

No guardian in socage of an equitable estate. 1 B. & A. 560.

A woman before marriage purchases under 30l.; her husband after marriage resides on the premises, he thereby gains a settlement, and the settlement so gained will be communicated to her. B. S. C. 566.

A leasehold cottage is devised to A. P., with liberty to the paupers to dwell therein during their lives; by residence under the will they gain a settlement. B. S. C. 785.

Schoolmaster in the occupation of a school-house, &c. under trustees created by will, and directed to appoint such master; held to have a life interest therein, and to gain a settlement by forty days residence. 15 East, 356.

#### 1. c. Of estates gained wrongfully, or by imperfect contracts.

Living in a cottage which came to the pauper by descent, gains a settlement, though the pauper's father built the cottage upon a waste without the lord's consent. For a justice of peace cannot determine a man's title. 2 Sess. C. 115. Str. 608.

Living in a cottage built without the consent of the lord of the manor gains a settlement. B. S. C. 631.

Conveyance presumed from peaceable enjoyment less than twenty years. B. S. C. 632.

Grant

Grant of land without conveyance, grantee builds a house, &c. and occupies ten years. 6 T. R. 564.

The son borrowed money of his father to purchase land, on condition by parol to build a house thereon, which the father and mother were to have for their lives. The house was built, and the father lived in it three years rent free, and died. Held, that the father had no legal or equitable estate in the house, and gained no settlement by the occupation, and that the mother was not entitled to reside in it irremovably. 2 M. & S. 461.

Son builds a house on land given him (by parol) by his father, and continues in possession of it for thirty years without paying any rent or acknowledgment, sometimes residing in the house with his family, and at other times letting it, and receiving the rent. Held that the grandson (the pauper), who ceased to be a part of his father's family fifteen years after the building of the house, was entitled to the settlement which the father gained by residing in the house. 3 M. & S. 22.

### 1. d. Of profits partaking of the realty.

Living upon a leasehold estate, out of which and other personal property the person has a rent charge only, gains no settlement. B. S. C. 762.

Right to a stinted common of pasture, to cut peat and get lime-stone during residence, never exercised. Held not to amount to such an estate as will render the party irremovable. 1 M. & S. 473.

### 1. e. Of mortgages.

An estate conveyed to trustees to be sold to pay mortgages and other debts, will not give to the person conveying it a settlement by a subsequent residence, till actually sold. A mortgagor in possession may gain a settlement. Dougl. 630.

So also a mortgagee in possession. Ibid.

Mortgagor living on the premises mortgaged, but not in possession as owner, gains no settlement. 3 T. R. 771.

Equitable title sufficient to give a settlement. Ibid.

If a cottage be leased for years determinable on lives, and be conveyed by a woman and her husband, in trust to raise money by sale or mortgage, with a clause for re-assignment, and the parties continue in possession, and the husband die, and the wife marry a second husband, she retaining possession, he will gain a settlement by forty days residence, though the money do not appear to have been paid. 1 East, 288.

### 2. As to estates by purchase.

By 9 G. 1. c. 7. s. 5. no person or persons shall be deemed, adjudged, or taken, to acquire or gain any settlement in any parish or place for or by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.* *bona fide* paid for any longer or further time than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled, before the said purchase and inhabitancy therein.

Children residing with their father upon a tenement purchased by him for less than 30*l.*, gain no settlement by such residence. B. S. C. 516. 1 Blk. 435.

Father surrenders a copyhold tenement under 30*l.* value to his son, the son gains no settlement by residing thereon. 2 Sess. C. 131. 1 Barnard, 297. Burr. S. C. 56.

But held that a conveyance from a father to his daughter, in consideration of natural love and affection, without any pecuniary consideration being paid, is sufficient to gain her husband a settlement. B. S. C. 386. Vide etiam Id. 560.

A conveyance from father to son, in consideration of natural love and affection, and of 10*l.*, gains a settlement where the real value of the estate is more than 10*l.* 3 T. R. 251.

A grant of waste land by a lord of a manor under 30*l.* value, the fine being 1*s.*, and quit-rent 1*s.*, will not give a settlement. 1 T. R. 241.

Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; and if he does, the grantee acquires thereby no settlement by estate. But a grant of the lord of copyhold land, paying a yearly rent of 2*s.* 6*d.* (which rent in a subsequent part was called a quit-rent), is a purchase within 9 G. c. 7., and being under 30*l.*, confers no settlement. 2 B. & A. 189.

Grant of a licence to inclose waste, and to erect a cottage gains no settlement 4 M. & S. 562.

A person resident on an estate granted him for lives, in consideration of 2*l.* 2*s.* fine, and



and 1s. rent, cannot be removed therefrom though he have applied for relief, and is thereby actually chargeable. But it is an estate within stat. 9 G. 1. under 30*l.* consideration. 5 East, 40.

A purchase of 30*l.*, part of which was paid by the parish officers of another parish, is not taken to be fraudulent, unless so stated. Fol. 238.

Purchase for 39*l.*, though 30*l.* thereof was borrowed on mortgage of the premises, gains a settlement. B. S. C. 57.

Justices are to judge of fraud. Ibid.

Purchase of a cottage for 60*l.*, which was then mortgaged for 50*l.*, and payment afterwards of that 50*l.* by means of borrowing the same, will gain a settlement, though the estate be mortgaged for the 50*l.* the same day. 6 T. R. 755.

Purchase for 39*l.* 17*s.* 6*d.*, the premises being then mortgaged for 52*l.*, which was never paid, is purchase only for 7*l.* 17*s.* 6*d.* *bond fide* paid. 2 T. R. 12.

Where the pauper purchased a messuage for 52*l.*, 40*l.* of which was secured by mortgage of the messuage to the vendor, and the pauper afterwards sold the messuage for 60*l.* to another, who paid the 40*l.* to the original vendor, and 20*l.* to the pauper, and the pauper quitted the messuage within forty days after the payment of the 40*l.* to the original vendor. Held, that he gained no settlement by residence on such estate. 1 M. & S. 387.

Where the purchase-money mentioned in the deeds was 28*l.*, but the sum *bond fide* paid was 30*l.* 3 T. R. 474.

## 2. a. Of residence by a mortgagee.

Mortgagee entering as a principal creditor for above 20*l.* and residing, gains a settlement thereby. Str. 1162.

## 2. b. Money laid out on the premises.

Laying out money afterwards upon a purchase under 50*l.* will not gain a settlement, even though the money be laid out in the erection of a shop. B. S. C. 555.

## 3. That he will not necessarily be settled, though he may not be removable from his own.

A woman cannot be removed from her husband's estate, though he be run away. B. S. C. 412.

Nor from a leasehold tenement of the husband's. B. S. C. 524.

Not even if the pauper be actually chargeable. 5 East, 40.

Father devised a tenement purchased for less than 30*l.* in trust to let to farm during his daughter's life, and to pay her the rents after deducting expences; held that by forty days residence thereon, by permission of the trustee, she gained a settlement. 16 East, 127.

## 4. How far a certificate person will gain a settlement by an estate of his own, notwithstanding the st. 9 & 10 W. 3. c. 11.

A certificate person may gain a settlement by residing on his own estate, where it comes to him by act of law; as in right of wife. Set. & Rem. 121. Str. 163.

So, if he purchase; and his apprentice may derive a settlement from him. Str. 266.

So, where the property purchased is leasehold, and descends to a certificated person. 1 Sess. C. 316. B. S. C. 205.

A settlement may be gained by a certificated person, who has had 20 years possession. B. S. C. 444.

So, where an estate is devised to the wife of a certificate man. B. S. C. 468. Dougl. 767.

## 5. How far residence upon a man's own estate is necessary to gain him a settlement.

Mere property will not do; residence is necessary. Salk. 524. Str. 476. 2 Sess. Ca. 182. B. S. C. 307.

But residence upon the same estate is not necessary, provided it be in the parish. 2 Sess. C. 150.

Residence need not be forty days together. Ibid. B. S. C. 132.

Resi-

Residence in the parish where the estate is, is sufficient, even though the estate be leased, and the owner residing forty days upon it by leave of the lessee, for the purpose of making repairs. 1 East, 247.

## Sect. XII. Of settlement by serving a parish office.—1. What office will confer a settlement.

By 3 & 4 W. & M. c. 11. s. 6. if any person who shall come to inhabit in any town or parish, shall for himself, and on his own account, execute any public annual office or charge in the said town or parish, during one whole year, he shall be adjudged and deemed to have a legal settlement in the same.

By 9 & 10 W. 3. c. 11. no person who shall come into any parish by certificate, shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and *bonâ fide* take a lease of a tenement of the value of 10*l*. or shall execute some annual office in such parish, being legally placed in such office.

Deputy constable gains no settlement. 19 Vin. 579. B. S. C. 520. 634.

But constable serving by deputy gains a settlement. Cald. 252.

Parish clerk is an annual office. Salk. 536. Str. 942.

Curate not a public officer. B. S. C. 746. 2 East, 65.

Sexton is a public officer, and gains a settlement if part of chapel yard is in the parish where he lives, though there be no burials in it during his being in the office. 3 T. R. 118.

Warden for a borough extending to several parishes, gains a settlement in the parish in which he lives. 19 Vin. 379.

Constable of a city which comprehends several parishes, gains a settlement in the parish in which he lives. 1 B. S. C. 27.

Tithingman is an annual office. Str. 544.

Whether entering upon the office immediately, but not being sworn in till after the expiration of a year, be sufficient. Qu. B. S. C. 30.

Borsholder is an annual office. Str. 1199.

So, hog-ringer. 4 T. R. 807.

Notoriety of an employment not sufficient. Ibid.

So, bailiff or ale-taster for a borough. B. S. C. 365.

Schoolmaster not a public officer. Str. 1225.

But collector of duties on births and burials is. Str. 411.

Need not be a parish office. Ibid.

So, collector of the land-tax. 2 Bott, 157.

So, governor of a workhouse. 1 East, 83.

Master of a workhouse not a public officer. 7 East, 167.

## 2. Of the time.

Serving a part of the year only, not sufficient. B. S. C. 238. 8 T. R. 445.

Nor serving for half a year at a time only. B. S. C. 444.

## 3. Of the residence.

It seems that there must be a residence of forty days at least in the parish, in which the office is executed and the settlement claimed. 4 Chetw. Burn, 550.

## Sect. XIII. Of settlement by paying the public taxes or levies of the parish.

By 13 & 14 Car. 2. c. 12. forty days inhabitancy shall gain a settlement.

By 3 W. & M. c. 11. s. 6. if any person who shall come to inhabit in any town or parish, shall be charged with and pay his share towards the public taxes or levies of the said town or parish, he shall be adjudged to have a legal settlement in the same.

But by 35 G. 3. c. 101. s. 4. no person who shall come into any parish, township, or place, shall gain any settlement therein by being charged with and paying his share towards the public taxes or levies of such place, for and on account or in respect of any tenement not being of the yearly value of 10*l*.

In respect to this statute, it is very clear that the legislature meant that no person should gain a settlement after the passing of the act by being rated and paying; the words "who shall come into any parish," mean, who shall inhabit there. It was intended to make an end of this head of settlement law in future. 1 East, 225.

By

By 9 & 10 W. 3. c. 11. persons residing under a certificate shall gain no settlement by being rated to and paying any such levies, taxes, or assessments.

**1. Of inhabitancy.**

Where a person is rated in one parish and resides in another, he does not gain a settlement by paying such rate. 6 F. R. 536.

**2. Of the being charged.**

Though the rate be informal, still payment of the sum assessed is sufficient. 19 Vin. 386.

But not if the name be inserted after the rate is paid. 6 T. R. 540.

**2. a. The tenant must be the person charged.**

The person paying must also be the person rated, and he must be the tenant. Fol. 128. 2 Sess. C. 122.

There must be both a rate made upon and payment by the person claiming a settlement. Fol. 120. B. S. C. 73. 98. 100.

The rate must be on the occupier. Dougl. 564.

But a person may be rated by another description than that of his name, as "occupier" or "tenant." 8 Mod. 38. 2 Burr. 1062. B. S. C. 465.

It is enough if there be a description sufficient to charge the tenant. Cald. 35.

But there must be a charge upon him: and if the rate be made in any other way than by name, it must appear that the tenant was notoriously such. 2 T. R. 628. Dougl. 621.

The rate itself must be produced as evidence of being charged. 2 East, 25.

**2. b. Of refunding to the tenant.**

Landlord refunding to the tenant the amount of the tax paid, does not prevent the gaining a settlement. B. S. C. 522.

Salary of a tide-waiter rated to the land-tax. B. S. C. 5.

Salary of an excise officer rated to the land-tax. 2 East, 68.

Salary of a custom-officer rated to the land-tax. 8 East, 383.

**3. Of the land-tax.**

Land-tax is a tax within the act. B. S. C. 75.

It may be inferred from the form of rating who is the person rated; and in the case of land-tax, the presumption is (between the public and the tenant) that the occupier is the person rated. Cald. 276.

A rate made too narrowly is a good rate for the purposes of a settlement. 9 East, 203.

By 9 G. 1. c. 7. no person who shall be assessed to the scavenger's rate, or to the repairs of the highways, and shall duly pay the same, shall be deemed to be settled thereby.

And paying to the county bridge gains no settlement. Sett. & Rem. 1.

**4. Of stat. 35 G. 3. c. 101.**

The 35 G. 3. c. 101. provides, that no person or persons whatsoever who shall come into any parish, township, or place, shall gain a settlement in such parish, township, or place, by being charged with and paying his, her, or their share towards the public taxes or levies of the said parish, township, or place, for and on account or in respect of any tenement or tenements not being of the yearly value of 10*l*.

The mode of gaining a settlement, therefore, by rating and paying public taxes obtains no longer, for if the tenement be of 10*l*. a settlement arises thereby, so that such is the point to be ascertained; for if it be less, it is immaterial what public impositions are sustained in respect thereof.

By 43 G. 3. c. 161. s. 59. persons assessed to and paying the duties on houses and windows, or any of the assessed taxes, shall not thereby gain a settlement.

**Sect. XIV. Of the acknowledgment of settlement by certificate.**

Although st. 35 G. 3. c. 101., by rendering no one removable till he or she become actually chargeable, has made it no longer necessary to grant certificates, yet as the parish officers retain the power to certify as heretofore that any particular person is a parishioner of their parish, it is necessary to retain this head.

By 8 & 9 W. 3. c. 30. persons coming to inhabit in any parish or place, and bringing with them a certificate under the churchwardens hands, &c. owning them to be inhabitants of such other parish, the said other parish to provide for them whenever they ask relief of the parish to which certificate was given. Explained by 9 & 10 W. 3. c. 11. and 12 Ann. stat. 1. c. 18. s. 2. Such witness to swear to the execution of certificates, &c. by 3 G. 2. c. 29. s. 8., and shall not be removed before.

By 9 & 10 W. 3. c. 11., reciting 8 & 9 W. 3. c. 30. s. 1., and that doubts had arisen by what act persons coming to inhabit or reside within any parish under such certificates might procure a legal settlement, it is enacted, that no person or persons whatsoever who shall come into any parish by any such certificate, shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he or they shall really and *bonâ fide* take a lease of a tenement of the yearly value of 10*l.*, or shall execute some annual office in such parish, being legally placed in such office.

By 12 Ann. st. 1. c. 18. s. 2. any person bound apprentice, or being a hired servant to one who came into a parish by certificate, shall not gain a settlement there by reason of such apprenticeship, &c.

By 3 G. 2. c. 29. witness to certificates of settlements to swear that they saw the churchwardens, &c. sign them.

### 1. Of the form of certificates.

A parish is not compellable to grant a certificate. 2 *Sess. C.* 153.

A mis-direction will not vitiate it, neither will it be bad for non-direction. *Str.* 1165.

*B. S. C.* 171.

Certificate need not be directed to the parish to which it is delivered. 1 *East*, 438.

Nor to any parish in particular. *Ibid.*

But it cannot be transferred from parish to parish. *Ibid.*

And there must be a particular parish in contemplation at the time. 4 *T. R.* 251.

A certificate must be signed by a majority of churchwardens and overseers, or it is void. *B. S. C.* 770. 1 *T. R.* 775.

When signed by one churchwarden and one overseer out of four churchwardens and two overseers, it is void. 2 *East*, 168.

And also by one overseer of a township. *Ibid.*

By 51 G. 3. c. 80. certificates heretofore signed by two persons only acting as churchwardens, &c. valid. *Vide supra.*

Act not to affect any prior decision in any court.

By 54 G. 3. c. 107. certificates of settlement are made valid, although the churchwardens, &c. were not sworn in.

Such certificates to be valid, if executed by the overseers of the poor of any township, &c. *Ibid.*

Not to affect settlements. *Ibid.*

The certificate is to be signed by two justices, but they are not obliged to sign it. *B. S. C.* 581.

The justices who sign may be the witnesses. 2 *Bott*, 561.

A parish certificate of more than thirty years date, acknowledging the pauper's grandfather and father to belong to the appellant parish, produced by a rated inhabitant who was overseer of the respondent parish, was held to be evidence, though it was objected that some account should be given of, and that the witness was not competent to give that account: and it seems that if necessary, he might be examined as to the custody. 2 *M. & S.* 337.

On an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate, given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact, in the hand-writing of a former parish officer. Held that such evidence was inadmissible. 2 *B. & A.* 185.

As to the sealing, see *Phill. Evid.* 510.

### 2. Of the delivery of certificates.

A certificate must be delivered to the parish officers at the time of coming into the parish. 5 *T. R.* 154.

### 3. Of persons who, by certificates, are protected from removal.

*Vide Cald.* 813.

### 4. To

4. To what individuals a certificate extends.

A certificate extends to after-born children, and a second wife. B. S. C. 182.

A parish granting a certificate to a woman, stated to be a spinster and with child, and acknowledging both to be legally settled in the parish so certifying, is bound to receive the child, born a bastard, in the certified parish. B. S. C. 650.

But a certificate, stating the woman to be unmarried, and agreeing to receive her and all the children she might thereafter have, does not extend to a bastard born several years after. 7 T. R. 362.

A certificate does not extend to grandchildren, nor to children (unnamed,) after they become heads of families. 4 T. R. 797.

The family consists of those who live under the same roof with the *pater familias*, who form his fire-side. When they become the heads of new establishments, they cease to be a part of the father's family. Ibid.

But if the children be named in the certificate, it will extend to them after they become heads of families. 5 T. R. 258.

But if a child be intentionally left out of the certificate, it does not extend to that child, although he may not have become the head of a family. 7 T. R. 133.

And the parties themselves may narrow the extent of a certificate. Ibid.

5. Of their effect.

A certificate, acknowledging the persons returned in it to be man and wife, concludes the parish, though it afterwards appear that they were not so; the woman swearing they had never been married. Str. 186.

A certificate, acknowledging R. B., and M. his wife, to be legally settled, &c. is conclusive of the fact of settlement, though they were not married legally, R. B. having a first wife still alive. B. S. C. 255.

Certificate, including by mistake a bastard as a legitimate child, held conclusive. B. S. C. 737. 2 B. & A. 149.

When the second marriage of the wife is not fraudulent or criminal, a certificate, acknowledging the second husband and M. his wife, will be conclusive, though the first husband return after the second marriage. 8 T. R. 465.

A certificate is conclusive, between the parish certifying and the parish to which it is granted, although not delivered till after the removal. Cald. 64.

A certificate is not conclusive, excepting between the two original parishes. 4 T. R. 251.

When a question arises between the originally certifying parish, and a third parish, the certifying parish may inquire into the truth of facts stated in that certificate. 4 T. R. 251.

A certificate is not binding against a subsequent settlement. 3 Salk. 253.

A certificate is not restrictive from gaining a settlement in a third parish, and, therefore, the apprentice to a certificated man being assigned to one in another parish, may gain a settlement in that parish by serving him there. Str. 1147.

A certificated person is at large as to every parish, but the certificated one. B. S. C. 269.

So, also in the case of hiring and service in a third parish. B. S. C. 385.

A certificate extends no further than to the place where first delivered. B. S. C. 381.

6. Of the continuance of certificates.

Where a certificated man takes an apprentice and then goes with him to another parish, and the apprentice resides there forty days as an apprentice, the apprentice gains a settlement there. B. S. C. 527.

A voluntary removal to a third parish is not of itself a desertion of the certificate. Ibid.

A certificate is discharged by gaining a settlement in another parish. B. S. C. 428, 429.

The settlement of a son, coming into a parish with his father under a certificate, as part of the father's family, not having before gained any settlement of his own, shifts with the settlement of the father in the certificated parish, though such son were named in the certificate. 16 East, 118.

Also a certificate is discharged by an estate coming to a man by descent, devise, or purchase, he continuing thereon forty days. 4 Burn. 579.

Also by a removal by order of justices. B. S. C. 373.

And a certificate was discharged, where the object of it returned with his whole family



family to the certifying parish, and died there, without going back to the parish which received him. B. S. C. 402.

A parish certificate, granted to T. C. and J. his wife, engaging to receive them, their child or children, born or to be born, only extends to a son born at the time of granting the certificate, so long as he continues part of his father's family; therefore, where the son married, and resided with his family apart from his father in the certificated parish, held, that his apprentice gained a settlement by serving him in the said parish. 1 M. & S. 669.

If a certificate acknowledge A., and B. his wife, to be legally settled, &c., and A. and B. return to the certifying parish, and there have a son, and the son hire himself to a person in the certificated parish, and there marry and have a family, that family is not within the certificate. Dougl. 418.

If a certificated person go to a third parish, and there be hired to different persons for a year respectively, and serve accordingly, and then return to her brother, who is still residing under the certificate; it is no desertion of the certificate. Cald. 144.

Whenever a certificated person leaves the certificated parish, without any intention of returning, the certificate is at an end. 1 T. R. 554.

A temporary removal is where a person goes from the certificated parish elsewhere, on a visit or on occasional business, leaving his family behind him in that parish as his domicile. 5 T. R. 526.

If the son of a certificated person leave him, and go to the certifying parish, and there hire himself to, and serve several persons, but gain no settlement there, and then return to the certificated person, it is no desertion of the certificate. 8 T. R. 339.

#### 7. Of removing certificated persons.

No more of a certified family can be removed back than those that ask relief B. S. C. 748.

If A. and his family, not residents with his father, ask relief, the latter is not thereby chargeable. 3 T. R. 44.

A pauper may be removed from a parish where he is residing under a certificate, to a parish in which he gained a settlement, before the granting of the certificate, and need not of necessity be removed to the certifying parish. 16 East, 303.

#### 8. Of apprenticeship under certificates.

Apprentice of an uncertified man serving a certificate man, can gain no settlement thereby in the certificated man's parish where the service is performed. B. S. C. 640.

Where a pauper was bound apprentice to a certificated man, and during his apprenticeship, he being of the age of eighteen, his father gained a new settlement, and the pauper did return to his father's till after twenty-one; held, not to be emancipated, but to follow his father's settlement. 2 B. & A. 582.

Apprentice to a certificated man serving an uncertificated person in the same parish. 4 T. R. 371.

A second certificate to a pauper discharges a former one given by the same parish. 1 T. R. 218.

Apprentice bound and serving twenty-two days before the execution of a certificate B. S. C. 470.

Apprentice to a man who had a certificate, but which was not delivered till after the apprenticeship, may gain a settlement by such apprenticeship. 5 T. R. 154.

A certificate extends to the apprentice of the widow. 5 T. R. 266.

So, to certificated man's apprentice, assigned to an uncertificated person. 4 T. R. 371.

Persons who come into a parish under a certificate, must also reside there under it for the purpose of being within the operation of it. 6 East, 397.

Certificate from a friendly society under 33 G. 3. c. 54. without proof of delivery, not available to prevent a settlement. 14 East, 253.

#### Sect. XV. Of acknowledgment of settlement by relief.

The bare fact of receiving relief while in a parish, is no proof of settlement in that parish. 2 East, 27.

Relief given (many times) to a pauper resident in the relieving parish, is no evidence of a settlement therein. 8 East, 498.

But relief given by a parish to a family resident in another parish, is evidence of a settlement in the relieving parish. 5 East, 555.

Evidence of a settlement in A. by certificate granted to pauper's grandfather, is rebutted, by shewing that B. had relieved the pauper and his family while residing in other places. 15 East, 350.

Sect. XVII. Of

**Sect. XVII. Of removals.—1. Who may be removed.**

By 13 & 14 C. 2. c. 12. s. 1. it shall be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of peace, within forty days after any such person or persons coming so to settle (as in the act recited) in any tenement under the yearly value of 10*l.*, for any two justices of the peace, whereof one to be of the quorum, of the division where any person or persons that are likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person or persons to such parish where he or they were last legally settled, either as a native, householder, sojourner, apprentice or servant, for the space of forty days at the least, unless he or they give sufficient security for the discharge of the said parish, to be allowed by the said justices. Altered and explained by 1 J. 2. c. 17. s. 3. 3 W. & M. c. 11. s. 3.

Township in which last legal settlement claimed, ceasing to have overseers, removal cannot be made thither, nor to any other parish. 2 B. & A. 162.

By s. 3. of the above statute, if such person or persons shall refuse to go, or shall not remain in such parish where they ought to be settled as aforesaid, but shall return of his own accord to the parish from whence he was removed, it shall and may be lawful for any justice of the peace of the city, county, or town corporate, where the said offence shall be committed, to send such person or persons offending to the house of correction, there to be punished as a vagabond, or to a public workhouse, in this present act hereafter mentioned, there to be employed in work or labour.

And by st. 17 G. 2. c. 5. s. 1., all persons who shall unlawfully return to such parish or place from whence they have been legally removed by order of two justices, without bringing a certificate from the parish or place whereunto they belong, shall be deemed idle and disorderly persons; and any one justice may commit them (being thereof convicted before him, by his own view or by their own confession, or by the oath of one credible witness) to the house of correction, there to be kept to hard labour, for any time not exceeding one month.

And by st. 13 & 14 Car. 2. c. 12. s. 3., if the churchwardens and overseers of the poor of the parish to which he or they shall be removed, refuse to receive such person or persons, and to provide work for them, as other inhabitants of the parish; any justice of peace of that division may and shall thereupon bind any such officer or officers in whom there shall be default, to the assizes or sessions, there to be indicted for his or their contempt in that behalf.

And by st. 5 W. & M. c. 11. s. 10., churchwarden must receive a person removed by warrant of two justices of peace, under 5*l.* penalty.

And by 35 G. 3. c. 101., no person is to be removed till he become actually chargeable.

But rogues, &c. are to be deemed chargeable. s. 5.

And pregnant single women. s. 6.

A pauper residing upon an estate, which he has acquired by purchase for less than 30*l.*, is irremovable during the time of such residence.

**1. a. Of removal of the wife.**

Whether the wife may be removed without the husband: she cannot. But the appellants must shew that there was a separation in fact. Str. 544. B. S. C. 815.

It must appear (to make such removal invalid) that the husband was resident with the wife at the time of her removal. B. S. C. 153.

If a wife be removed (*eo nomine*) to the place of her legal settlement, it is good. B. S. C. 162.

An order for the removal of a married woman (not stating her to be such) and her children to Y., adjudging that the lawful settlement of her and her children is in Y., was held well, without adjudging that Y. was her husband's settlement; and proof by the mother of the husband that he gained a settlement in Y. by hiring and service, was held sufficient, without calling the husband, although it appeared that he was in this country. 4 M. & S. 52.

The wife and children of a foreigner cannot, when they become chargeable, be removed from him to the wife's parish. B. S. C. 813.

Removal of a woman as the wife of J. G. to C. is good, for it will be presumed that C. is the husband's settlement. Dougl. 46. n. Cald. 42.

If the husband return after the wife has been removed, and that order of removal quashed, they cannot be removed together to the place of the former removal. Dougl. 46. Cald. 59.

The wife may be removed without her husband (he having no settlement) if they consent. 5 East, 113.

A married woman pregnant of a child which when born will be a bastard, is removable if the husband be abroad; and shall be for this purpose as an unmarried woman with child. 9 East, 388.

Otherwise if it appear that she is a woman of substance, and not likely to bring a burthen upon the parish. Ibid.

### 1. b. Of removal of servants.

A maid servant may be discharged by her master for being with child, and may then be removed. Cald. 11.

A single woman serving a master under a contract of hiring and service cannot, though pregnant of a child which will be born a bastard, be removed from her service against her consent and his. 3 East, 565.

### 1. c. Of removals under st. 35 G. 3. c. 101. s. 6.

Order adjudging merely that the woman removed was with child and unmarried, without drawing the conclusion that she was chargeable, is bad. 11 East, 381.

An order of removal founded on the 35 G. 3. c. 101. s. 6., stating that A. E. single woman was by being pregnant deemed to have become chargeable, &c. is good. 9 East, 398.

An unmarried woman being pregnant may be removed though she be residing under a certificate. 8 T. R. 68.

A servant well settled, being with a master removable, cannot be removed with him, but the master may complain upon the retainer. Sett. & Rem. 211.

### 1. d. Of casual poor.

A labourer, who in passing through a parish with a loaded cart, breaks his leg by accident, is to be considered as casual poor, and as such not removable under 13 & 14 C. 2. c. 12. or 35 G. 3. c. 101. 10 East, 25.

Removal of a pauper who had been sent backwards and forwards from one parish to another, and been occasionally relieved by both, held good. 14 East, 251.

### 1. e. Of soldiers, &c.

By 3 G. 3. c. 8. such officers, mariners, soldiers, and marines, who have served since November 1748, and not deserted; and by 42 G. 3. c. 69. the same is further extended to those who have served since 16 July 1784; and by 42 G. 3. c. 69. s. 3. and 42 G. 3. c. 90. s. 75., the same is extended to all militia men, being married men, who have personally served in actual service for five years; and by 56 G. 3. c. 67., to such persons as aforesaid who have been employed since June 22, 1802; and also to fencibles who shall have served five years, and been honourably discharged; and also their wives and children, may set up such trades (as in the act mentioned) without any molestation by reason of the using of such trades; nor shall they, or their wives or children, during the time they shall exercise such trades, be removable to their place of settlement, until they shall become actually chargeable.

Working as a husbandman is not a trade within the act. 3 T. R. 135.

However, st. 35 G. 3. c. 101. seems to render these provisions nugatory, as far as removals are concerned, as that act provides that no person (excepting as therein excepted), shall be removable till actually chargeable.

## 2. Of the order of removal.

Orders must be executed by the officers of the removing parish. Salk. 493.

If a place be extraparochial, and hath no overseers, the justices cannot remove from thence, because there are none either to complain or to convey; but the justices ought first to appoint overseers, and then to remove. Salk. 487.

But it is no longer necessary that the pauper should be conveyed by the overseers, since by st. 54 G. 3. c. 170., paupers ordered to be removed may be conveyed by other persons than churchwardens or overseers.

### 2. a. Of the place from and to which a removal may be.

As the justices cannot send from an extraparochial place, unless they have overseers, so neither can they send to an extraparochial place which hath no overseers, because there are none to receive them. Salk. 486.

Removals

Removals to places which have no overseers. *Vide* Cald. 28.

Order of removal, though to a wrong place, is conclusive, if unappealed against. 18 Vin. 468. B. S. C. 664.

Churchwardens are overseers of a whole parish, though it be divided into townships. *Ibid.*

Removal to a village, a part of a parish, is void. Cald. 248.

Mis-direction of order, see 7 East, 466.

## 2. b. Of the complaint.

The order of removal must set forth a complaint made. Andr. 361.

And made by the proper officers. Salk. 492. Fol. 267.

## 2. c. Of the justices, their style and jurisdiction.

The justices authority must appear. 5 Mod. 322.

The complaint may be to one justice, but two ought to be together at the adjudication and hearing. Sett. & Rem. 107. Str. 73.

Also at the examination. Str. 1092.

And most undoubtedly the justices ought to be both together at the hearing and determining; though the practice in many places is otherwise. 4 Burn, 620.

But it has been determined, that an order of removal, signed by two justices separately, is not absolutely void, but only voidable, if appealed against in a regular way. 4 T. R. 596.

Whether it be necessary that the two justices shall be together at the time, depends upon the circumstance whether the act to be done be judicial, or merely ministerial. 2 Bott, 375.

The order must state that the justices were justices of the peace. Set. & Rem. 27.

And for the county, &c. Salk. 474. Cald. 575.

It need not appear that they are justices of the division. Salk. 473.

One county mentioned in margin, and two in body of order. See 2 East, 66.

An order of magistrates was directed to the parish of W. in the county of Rutland, and also to the parish of M. in the county of Leicester, and the words "county of Rutland" were then written in the margin, and the magistrates were in a subsequent part of the order described as justices of the peace for the county aforesaid. Held, that it thereby sufficiently appeared that they were justices for the county of Rutland. 1 B. & A. 327.

By 26 G. 2. c. 27. no order shall be set aside for not setting forth that one of the justices was of the quorum.

The sessions may examine into the jurisdiction of the removing justices. Str. 300.

By 7 G. 3. c. 21. if in any city, borough, town corporate, franchise, or liberty, they have one, and no more than one justice actually of the quorum, all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments, done or executed by two or more justices, qualified to act within such city or other place, shall be valid, although neither of the justices shall be of the quorum.

## 2. d. Of the county.

The county in the margin is not sufficient, but it must appear in the body of the order that the place is in such county, either expressly or by some words of reference, as 'in the said county,' or 'in the county aforesaid.' Set. & Rem. 151. 2 Sess. Ca. 181. 1 Barnard, 177. 196. 2 Burr. S. C. 198.

But where two counties are mentioned before, 'the county aforesaid' is bad for uncertainty. B. S. C. 23.

## 2. e. Of the description of the paupers.

Pauper to be named if known; or if unknown, he should be stated to be so. Set. & Rem. 45. 57.

Children to be described by their name and age. Salk. 485. Str. 114. 1 Sess. Ca. 11. Set. & Rem. 41. Str. 527.

Adjudication as to place of settlement, see Fol. 271.

Ages of children must be stated in the order. 2 Sess. Ca. 74. B. S. C. 177

Must have come to inhabit. Set. & Rem. 16.

And not gained a settlement. Salk. 492. 3 Salk. 255.

## 2. f. Of the being actually chargeable.

Chargeable to the parish removed from. Vide Set. & Rem. 40. Str. 142, 593, 691. 2 Sess. Ca. 75. B. S. C. 39. 138, 139.

## 2. g. Of the examination.

What shall be deemed due proof. 2 Sess. Ca. 40. 45.

One justice may order a pauper to be brought to be examined, but two must be present at the examination. Salk. 488. Str. 1092.

Examination taken, and order signed by two justices separately, is not void, but only voidable, if appealed against in due time. 4 T. R. 596.

To be examined by the same justices who remove. Andr. 258.

Removal by two justices of one county, on examination taken by justices of another. B. S. C. 156.

The pauper having become insane, quere whether either his examination previously taken by justices of the same county, or hearsay testimony of his former declarations, be admissible in evidence? 5 T. R. 707.

An examination of a pauper for the purpose of removal is not evidence upon an appeal against that order of removal, though the pauper cannot be found. 1 East, 575.

Neither of the hearsay of a pauper, who is dead, nor his *ex-parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. 2 East, 54, 63.

Clause in the mutiny act relating to soldiers' settlements for their wives and children when quartered in England. 1 G. 4. c. 19.

No other attested copy of the examination, under the mutiny act, than that given to the soldier, is legal evidence. 5 T. R. 704.

The original examination, taking under the mutiny act, is admissible evidence, as well as the attested copy. 6 T. R. 534.

Verification of such examination necessary. 1 East, 15.

The examination of a soldier, taken under the mutiny act, is to be received as evidence as to his settlement, even though he be dead, or absent from the kingdom, at the time when the appeal is tried. 3 B. & A. 181.

The pauper himself ought to be summoned and heard. Andr. 258.

But held that it is not necessary in all cases that the pauper himself should be examined. Cald. 179.

A pauper refusing to be examined may be committed. 1 T. R. 653.

By 59 G. 3. c. 12. examination of prisoners to their settlements is made evidence.

## 2. h. Of the adjudication.

The justices must make an adjudication. Salk. 491. Str. 75. 2 Sess. Ca. 93. 1 Sess. Ca. 131. Set. & Rem. 38. Salk. 479. 1 Sess. Ca. 45. 2 Sess. Ca. 92. Salk. 473. Set. & Rem. 32.

## 2. i. Of suspending orders of removal.

By 49 G. 3. c. 124. any magistrate may take the examination of an infirm pauper as to his settlement, and report to petty sessions.

By 35 G. 3. c. 101. justices empowered to suspend orders of removal of sick or infirm persons.

And charges incurred by such suspension to be paid by the officers of the parish to which they are ordered to be removed, which may be levied with costs.

And if costs exceed 20<sup>l</sup>., appeal may be made to the quarter sessions.

And this act not to alter the power of justices to pass or punish vagrants by 17 G. 2. c. 5. except as to suspension.

An order of removal, made by two justices upon the examination of the pauper, taken by one of them pursuant to st. 49 G. 3. c. 124, s. 4. need not state the special circumstances of taking the examination, &c. 4 M. & S. 354.

The justice cannot refuse indorsing the warrant for distress. 1 East, 117.

Of appeal against an order of justices for payment of the charges above 20<sup>l</sup>. of an order of suspension. 9 East, 97.

Appeal, in case of pauper's death before actual removal, against order for costs under 20<sup>l</sup>. 15 East, 51.

If at the time of making an order of removal, the pauper be too ill to be removed, and an order of suspension be made, his presence is not necessary if he be ill, and unfit to move. 9 East, 101.



By 49 G. 3. c. 124. reciting 55 G. 3. c. 101. it is enacted, that in all cases when any order of removal or vagrant-pass shall be suspended, any other justice of the county or place where such removal or pass shall be made, may order the same to be executed, &c.

How the time of appealing shall be computed. s. 2.

Order of removal suspended in case of sickness may also extend to other persons named in the order, to prevent the separation of a family. s. 3.

Order of removal, suspended on account of the husband's sickness, who afterwards dies, and the wife and children removed without taking off the suspension. 13 East, 317.

Of filing orders of removal at the sessions; and making a record of the whole proceedings. Vide 4 Chetw., Burn, 645.

Penalty on refusing to receive persons removed from one county, riding, city, town corporate, or liberty, to another. St. 3 W. & M. c. 5. s. 11.

Where the removal from parish to parish, a refusal to receive is an indictable offence. Say, 163.

### 3. Of persons removed returning after removal.

Persons removed returning to the place removed from, must be charged therewith on oath. C. T. H. 124.

The warrant of commitment must be for a time definite. 1 Burr. 595.

The commitment must state to what place the pauper returned. 2 Bott, 683.

Returning and residing in a tenement of 10*l.* a year value. 2 T. R. 709. Vide 3 B. & A. 105.

### 4. Removal of a certificate person, and reimbursement of overseers.

By 5 G. 2. c. 29. overseers to be reimbursed on reconveying certificate persons.

### 5. Appeal against the order of removal.—5. a. Who may appeal, &c.

Power of appealing is given by 13 & 14 Car. 2. c. 12. s. 2. and 3 W. & M. c. 11. s. 10.

And appeal from justice of peace to quarter sessions, whose order shall be final. 3 W. & M. c. 11. s. 9.

And appeal against an order for removal of poor person to be determined at the quarter sessions. 8 & 9 W. 3. c. 30. s. 6.

On an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes, have not a right to vote. 4 T. R. 71.

The pauper himself may appeal. Carth. 222. Str. 96.

Appeal must be to the sessions of the county, and not of a corporation. Salk. 490. Set. & Rem. 10.

Or borough. B. S. C. 592.

### 5. b. To what sessions the appeal shall be, as to time; and what are the next sessions.

To be the next sessions after the removal. Str. 831.

Time limited for appeal, how far affected by referring the matter to arbitration. Cald. 32.

By next sessions is meant the next possible sessions. Dougl. 192.

Where two days intervene between the removal and the next sessions, the appeal ought to be entered at that sessions. 3 T. R. 504.

An order of removal was made and executed the day before the Epiphany sessions, and an appeal entered and notice given for the Easter sessions; on the sessions refusing to receive the appeal at the Easter sessions, a mandamus was granted. 1 M. & S. 479. Vide 4 M. & S. 327.

The next sessions means the next practicable sessions. 1 B. & A. 210.

### 5. c. Of adjournment.

Adjourning an appeal for further consideration. Vide 2 Salk. 605. Comb. 565.

Where justices are divided. 2 Bott, 753.

Style of the sessions where they are adjourned. 19 Vin. 356. B. S. C. 88. Str. 1263.

There

There must be an adjournment from place to place, where the sessions are held at different places. B. S. C. 295.

Order confirmed at the sessions without hearing the appellants, quashed by court of K. B. Str. 1168.

#### 5. d. Of notice of appeal.

By 9 G. 1. c. 7. s. 8. reasonable notice is to be given of appeals.

But sessions are bound to receive an appeal, although no notice has been given. Cald. 283. Dougl. 191.

Unless they think the appellants had sufficient time to have given notice and had neglected. 3 T. R. 150. Vide 3 East, 343.

It is imperative upon the sessions to enter and adjourn the appeal, where no notice has been given to the respondents. 7 East, 549.

The sessions have power to judge of the reasonableness of the notice, and if they be wrong, the court of K. B. will interfere. 10 East, 404.

#### 6. Of the effect of an order of removal, unappealed against.—6. a. How far an order of removal is final.

Order not appealed against is final, and there can be no second order reversing the first excepting by appeal. Fol. 273. Salk. 488.

The original order is, when unappealed from, conclusive. B. S. C. 276.

Except where the removal is to a place that does not maintain its own poor separately. Cald. 248.

Or where the justices making the order want jurisdiction. 8 T. R. 178.

An order may be deserted and given up by consent, without appealing. B. S. C. 658.

Removing parish may, by consent, abandon the order. A subsequent order to another parish held good. 12 East, 359.

#### 6. b. Of what facts it is conclusive when unappealed against.

An order of removal unappealed against, is conclusive of the facts stated in it. 1 Sess. Ca. 154.

If two be removed as man and wife, it is conclusive of the fact upon the parish removed to, if the order be not appealed against, and after-born children claiming settlement from the father and mother, are also concluded as to the fact of marriage. Str. 1172. Burr. S. C. 191. 551.

So also it is conclusive on all derivative settlements. 6 T. R. 615.

Order unappealed against, is only conclusive as to those who are mentioned in it, and removed. 1 T. R. 353.

Where the pauper is removed by the name of E. S. widow. Vide 8 T. R. 620.

Order of removal of a woman as a wife unappealed against, conclusive of the question of marriage. 7 East, 377.

An order of removal, unappealed against, is conclusive of the place of settlement, up to that time. 2 T. R. 598.

Even when a question of settlement is raised between two other parishes. 11 East, 388.

#### 7. Of the effect of confirming or quashing orders of removal appealed against.—7. a. Upon the merits.

Order confirmed upon the appeal, is final; but an order discharged, binds only the parties. Salk. 527. Str. 232.

An order of removal confirmed, is conclusive of the then place of settlement. Salk. 524. 3 Salk. 261.

Order quashed, conclusive only between the parties. Salk. 486. Str. 567.

Order of removal is, when quashed, conclusive between the two parishes, and upon a second removal between the same parishes, there must appear a new settlement. B. S. C. 394.

But special matter may be set forth by the sessions, upon the second appeal, which may prevent the first order from being final. Str. 1256.

Order confirmed on appeal conclusive on all the world; but if quashed, is conclusive only between the parties. B. S. C. 17.

A discharged order of removal to A. does not prevent a third parish from shewing a settlement in A. gained subsequently to the order in question. B. S. C. 425.

7 b. Of

7. b. Of quashing for want of form.

Order quashed for form not conclusive. Fol. 276. 6 T.R. 613.

By 5 G. 2. c. 19. s. 1. defects of form are to be amended.

There must be a complaint, and adjudication of chargeability. 2 Sess. Ca. 142. Str. 1158. B. S. C. 163.

Where the justices making the order want jurisdiction, it is a matter of substance and not of form, and such an order, although not appealed against, is totally void, and cannot be amended. 8 T.R. 178. Vide 2 East, 66.

8. Of the power of the sessions in orders of removal.

The sessions cannot make an original order of removal. 2 Show. 503.

Must either quash or affirm. Salk. 472. 2 Bott, 712.

The sessions may alter an order made at same sessions. 2 Salk. 494.

Where justices are divided. Vide 2 Sess. Ca. 193.

Judgment was entered by mistake on a miscalculation of votes. Mandamus to rehear refused. 1 M. & S. 442. Vide Bott, 114.]

Justices in sessions may alter their judgment during the continuance of the sessions. Ibid. 2 Bott, 712.

But one sessions cannot quash the order of a former sessions. 2 Bott, 711.

8. b. Of stating a special case.

The justices not bound to express the reason of their judgment. Salk. 607.

Sessions are not compellable to state cases. B. S. C. 64.

A bill of exception does not lie to the justices at their sessions. B. S. C. 77.

Where a case is insufficiently stated, it may be sent back to the sessions. B. S. C. 682.

What is to be done with the pauper when the order of removal is quashed. Vide Comb. 401.

A certiorari to remove an order of sessions confirming an order of removal must be moved for within six calendar months after such order of sessions made, and six days notice of such motion must be given to the justices pursuant to stat. 13 G. 2. c. 18. s. 5. notwithstanding the order of sessions was made subject to the opinion of this court on a case to be stated. 1 M. & S. 631.

8. c. Of costs and maintenance.

By 8 & 9 W. 3. c. 30. justices on appeal to them concerning the settlement of any poor person to award costs.

Person ordered to pay costs living out of the jurisdiction, justice of the county, &c. where such person inhabits, may cause the money to be levied; if no distress, offender to be committed to gaol. Ibid.

The sessions are judges whether costs shall or shall not be given. 1 Sess. Ca. 422.

They cannot give costs on a mere adjournment. B. S. C. 205.

By 9 G. 1. c. 7. maintenance is to be reimbursed. Vide 2 Sess. Ca. 67.

Sessions must either give or refuse costs of maintenance at the time of making their order. B. S. C. 194.

(B 76.) Vagabonds, &c.—Who are. Vide the stat. 12 An. 23.

By the st. 39 El. 4. (whereby all former statutes for punishment of rogues, &c. are repealed): (1.) all persons calling themselves scholars, going about begging; (2.) all seafaring men pretending losses at sea; (3.) all idle persons, begging, using unlawful games or plays, or pretending palmetry, fortune-telling; (4.) all proctors, procurers, patent-gatherers, or collectors for gaols or hospitals; (5.) all fencers, bear-wards, players of interludes wandering, unless authorised by a peer; (6.) all jugglers, tinkers, pedlars, and petty chapmen wandering; (7.) all wanderers able to work and refusing work, at the wages usual in those parts, and not having to maintain themselves; (8.) all out of gaol begging for fees, or otherwise; (9.) all wandering and begging,  
pre-

pretending losses by fire, or otherwise ; (10.) all wandering (not felons), pretending to be Egyptians, or in their habit or attire, shall be deemed rogues, vagabonds, and sturdy beggars, and punished as such.

By the st. 5 El. 4. a servant taken with a counterfeit testimonial shall be whipt as a vagabond.

So, by the st. 43 El. 3. a soldier or mariner begging, or counterfeiting a certificate.

By the st. 1 Jac. 7. all glassmen wandering (though by the st. 39 El. 4. if licensed by three justices, and not begging, they were excused), shall be deemed rogues : and no authority from a peer shall excuse any person from the punishment of rogues.

By the st. 7 Jac. 4. persons able to work, who run away and leave their families to the parish, shall be deemed and punished as incorrigible rogues : and if any such threaten to run away, on proof by two witnesses on oath before two justices of the division, unless he or she find surety to discharge the parish, shall be sent to the house of correction, and dealt with as a rogue, and not delivered till the next meeting of the justices, or the quarter sessions.

By the st. 13 & 14 Car. 2. 12. a person sent by two justices of peace to his place of settlement, and returning of his own accord, any justice of peace may send him to the house of correction to be punished as a vagabond.

A person who travels within his own county, to sell wares in private houses out of fairs and markets, is a vagrant pedlar within the st. 39 El. R. 2 Cro. 577. 2 Rol. 172.

If he wander, though he be not taken wandering. 2 Rol. 172.

[By st. 17 G. 2. c. 5. idle and disorderly persons are thus described.]

[Persons threatening to run away.]

[Returning to the parish removed from.]

[As to the form of commitment thereon, see 1 Burr. 596.]

[And quære, whether a wife removed with her husband, and returning with her husband to the parish whence removed, can be committed with her husband. 1 Burr. 595.]

[Refusing to work.]

[Begging.]

[And one justice may on conviction commit to hard labour for not exceeding one month.]

[Which commitment must be for a limited time. 2 Blk. Com. 141. 6 T. R. 225. 3 Burr. 1636. 1 Burr. 596.]

[And the warrant must shew the justice's authority. 5 Burr. 2684.]

[The commitment is necessarily in execution. 4 T. R. 220. 6 T. R. 509.]

[A reward for apprehending, and authority is given by the statute.]

[And by 32 G. 3. c. 45., persons neglecting to provide for their families, are to be deemed idle and disorderly.]

[A person must be idle, as well as disorderly, to be committed for a vagrant. Str. 1103.]

[The same statute of 17 G. 2. c. 5. has declared that the following persons shall be deemed rogues and vagabonds.]

[Persons gathering alms under pretence of losses.]

[Collectors for prisons.]

[Fencers.]

[Fencers.]

[Bearwards.]

[Common players.]

[Minstrels.]

[Jugglers.]

[Gypsies.]

[Fortune-tellers.]

[Using subtil craft.]

[Playing or betting.]

[Running away.]

[But a soldier who leaves his wife and children chargeable, and is himself billeted in another parish, is not a rogue and vagabond. 1 Wils. 331.]

[Pedlars unlicensed.]

[Persons not giving a good account of themselves.]

[Beggars pretending to be soldiers, seamen, &c.]

[And though this was not to extend to soldiers wanting subsistence, having lawful certificates from their officers or the secretary at war; nor to mariners or seafaring men licensed by some testimonial or writing under the hand and seal of some justice of the peace.]

[Yet by 32 G. 3. c. 45. s. 7. the above is repealed; and all such soldiers and mariners wandering abroad and begging shall be deemed rogues and vagabonds within the meaning of the said act, notwithstanding such certificate or testimonial aforesaid.]

[However, by 43 G. 3. c. 61., soldiers, sailors, marines, and the wives of soldiers therein mentioned, are relieved against the penalties of the vagrant acts.]

[By 52 G. 3. c. 31., st. 39 Eliz. c. 17. against wandering persons pretending to be soldiers or mariners is repealed.]

[So by 17 G. 2. c. 5. pretending to go to work in harvest.]

[And all other persons wandering abroad and begging, shall be deemed rogues and vagabonds.]

[But this shall not extend to any person going abroad to work at any lawful work in the time of harvest, so as he carry with him a certificate signed by the minister and one of the churchwardens or overseers where he shall inhabit, that he hath a dwelling-house or place there.]

[So by 23 G. 3. c. 88. persons having a pick-lock key, &c.]

[And a commitment under this statute must state that the party had the implements upon him when apprehended. 8 T. R. 26.]

[So, by 39 & 40 G. 3. c. 87. s. 12. suspected persons frequenting the Thames.]

[By 54 G. 3. c. 37. (repealing 51 G. 3. c. 119.) constables may apprehend suspected persons frequenting places of public resort.]

[By 17 G. 2. c. 5. incorrigible rogues are thus described:]

[End gatherers offending against 13 G. 1. c. 23.]

[Rogues and vagabonds escaping from persons apprehending them.]

[Or from houses of correction.]

[Second offence as rogues and vagabonds.]

[To which may be added any person convicted of a third offence against 6 G. 3. c. 48., and against 15 Car. 2. c. 2., or of a fourth offence against 45 G. 3. c. 66.]

[With



[With respect to apprehending and detecting offenders.]

[By 17 G. 2. c. 5. s. 5., if any person shall be found offending against this act, any person may apprehend him, and convey or cause him to be conveyed to a justice of peace.]

[By the same act, general privy searches shall be made four times a year.]

[And by 25 G. 2. c. 36. justices may examine on oath rogues, vagabonds, and other disorderly persons brought before them.]

[Which examination shall be signed and transmitted to the quarter sessions.]

[And person not giving a satisfactory account of himself, shall be committed.]

[And an advertisement shall be published describing his person and the things found upon him.]

[As to examination.—By 17 G. 2. c. 5. s. 7. where any rogues or vagabonds apprehended by any constable or such other officer or person as aforesaid, shall be brought before a justice, he shall inform himself by the examination upon oath of the person apprehended, or of any other person, of the condition and circumstances of the person so apprehended, and of the parish or place where he was last legally settled; the substance of which shall be put into writing and be subscribed or signed by the person or persons so examined; and the justice shall likewise sign the same, and transmit it to the next sessions, there to be and kept filed on record.]

#### (B 77.) Who not.

But by the st. 5 El. 4. persons having no harvest in their own town or county, may repair, having a testimonial from a justice of peace of the same place, to another town or county, only for hay or harvest work.

By the st. 39 El. 4. person travelling, without begging, by licence of two justices of peace of the county where he dwells, and provision sufficient for the time limited by such licence for his travel, stay, and return, may go to the Bath, or to Buxton.

And seafaring men, suffering shipwreck and wanting relief, and having a testimonial of a justice of peace, shewing the place and time of his landing, the place of his birth or dwelling, and the time for his passage thither, may within that time beg in his direct way home.

And children under seven [fourteen by 12 Ann. c. 23. Fort. 323. Str. 631.] years old shall not be adjudged vagabonds.

By the st. 39 El. 17. a soldier or mariner, having licence from a justice of peace, may ask relief in his direct way home, during the time of his licence.

#### (B 78.) Punishment of a rogue.

By the st. 39 El. 4. a rogue taken shall by a justice of peace or constable's appointment (or by the headborough with advice of the minister and one other of the parish), be stripped to the middle, and openly whipped till bloody; and then with a testimonial under hand and seal of the justice of peace, constable, headborough, and minister, or two of them, of the day and place when punished, whither sent, and in what time (which the minister shall register on pain of 5s.) shall be conveyed from

from parish to parish, by the officer of the same, the next way to the parish where born, or if not known, to the parish where he last dwelt for a year, or if neither known, where he last past without punishment, thence to be sent to the house of correction or gaol, there to be set on work till he get a yearly service, or if unable to work, till put into an alms-house.

And if the rogue prove dangerous, or will not be reformed, two justices (one quorum) may commit him to the house of correction or gaol till the next quarter sessions, and then, if not thought fit to be delivered, the court may banish him, to be conveyed at the charge of the county to a place, which six of the privy council (whereof the lord chancellor, keeper, or treasurer to be one) shall appoint, or may adjudge him perpetually to the gallies; and if being banished he return, he shall be a felon.

But by the st. 1 Jac. 7. the quarter sessions shall brand him with R. on the left shoulder, and send him to the place of his dwelling, or if not known, to the place where he last dwelt for a year, or if neither known, to the place of his birth, to be set to work; and if after he offend, he shall be adjudged a felon.

[By 17 G. 2. c. 5. s. 7. the justice shall order the party apprehended to be publicly whipped; or to be sent to (the common gaol by 27 G. 3. c. 11. or) house of correction, till the next general or quarter sessions, or for any less time, as such justice shall think proper.]

[Under which statute a commitment as a rogue and vagabond can only be in execution, and must therefore be preceded by a conviction. 4 T. R. 220. 6 T. R. 509.]

[By 32 G. 3. c. 45. rogues or vagabonds ordered to be conveyed by passes agreeable to the 17 G. 2. c. 5. shall be publicly whipped, or confined in a house of correction.]

[But by s. 3. no female shall be whipped.]

[And by 57 G. 3. c. 75. the whipping of female offenders is abolished in all cases.]

[By 17 G. 2. c. 5. s. 9. where any offender against this act shall be committed to the house of correction till the next sessions, the sessions, if they adjudge him to be a rogue or vagabond, or an incorrigible rogue, may punish him by imprisonment and whipping, or by sending him into his majesty's sea or land service.]

[And the conviction must specify whether the service is by sea or land. 5 East, 339. 1 Smith, 547.]

[A party convicted under 23 G. 3. c. 88. as a rogue and vagabond, and offending again, may be indicted on st. 17 G. 2. c. 5.]

By the st. 39 El. 4. justices of peace for a county shall not meddle in a borough, &c. but the justices of peace, mayor, &c. of such town, shall execute this statute against vagabonds and rogues. [Vide etiam 17 G. 2. c. 5. s. 27.]

And a rogue come from Scotland, Ireland, or the Isle of Man, after punishment ut supra, shall be conveyed to the port or parish where he first came, and then, at the charge of the county, be transported to the place whence he came.

[As to Scotch and Irish vagrants see 17 G. 2. c. 5. 59 G. 3. c. 12.]

[As to lunatic vagrants, see 17 G. 2. c. 5.]

By

By the st. 7 Jac. 4. justices of peace shall meet twice a year at least, and four or five days before, issue warrants to the constables to make a general privy search in one night, in their several towns, for rogues, &c. and to bring them to such meeting to be examined and punished.

By the st. 13 & 14 Car. 2. 12. justices of peace at the quarter sessions may cause rogues adjudged incorrigible, to be transported to the English plantations beyond sea.

By the st. 11 & 12 W. 3. 18. (continued by the st. 1 Ann. 13. and 5 Ann. 32.) if a vagabond, &c. be brought to a constable with a pass, &c. he shall be conveyed to the next justice of peace, who, if he deserve punishment, shall send him to the house of correction; if not, shall order him to be conveyed to such town of the next county, through which he is to pass, as he thinks proper: and the justice of peace shall give the constable a certificate of whom he is to convey, and in what manner, and indorse what he shall have for his expence and trouble, which the high constable shall pay, and discount with the treasurer of the county.

[As to conveying by pass, see 17 G. 2. c. 5. 26 G. 2. c. 34. 32 G. 3. c. 45. 35 G. 3. c. 101. 49 G. 3. c. 124.]

[And though one justice may make a pass to pass an offender as a vagrant. *Ld. Rd.* 1360.]

[Yet not an order to remove a vagrant to his settlement. *Ibid.*]

[No appeal lies against a vagrant pass. *B. S. C.* 840.]

[As to the charges of maintaining and conveying vagrants, see 17 G. 2. c. 5. 12 G. 2. c. 29.]

[And note, that the sessions may examine into constables' accounts and make deductions. 2 Burr. 1197.]

A rogue shall be whipt, and sent to the place where he affirms his birth or settlement; but was not to be sent to the house of correction till the st. 11 & 12 W. 3. 18. 2 Bul. 358. *R. Lamb.* 205. l. 2. c. 7. sect. 1, 2.

But if he names his birth, or settlement to be where it was not, he shall be sent as an incorrigible rogue to the house of correction. *R. Lamb.* 205, 206. l. 2. c. 7. sect. 1, 2.

[As to the case where no settlement can be found, vide 17 G. 2. c. 5. s. 28.]

Children under seven years of age go with the parent vagrant to the place of his birth, or settlement, or where he passed without punishment. *R. Lamb.* 206, 207. l. 2. c. 7. sect. 4. 6.

[Vide 17 G. 2. c. 5. s. 24.—As to children born in vagrancy. *Id.* s. 25.]

And at the place, where he passed without punishment, the children shall be relieved with the labour of the parent in the house of correction: but the children shall not be sent thither. *R. Lamb.* 206, 207. l. 2. c. 7. sect. 6.

[As to what shall be done with the offender at the place to which he is sent, vide 17 G. 2. c. 5.]

If the parent dies where the children attain the age of seven years, they shall not be afterwards removed. *R. Lamb.* 206. l. 2. c. 7. sect. 4.

But if a man has a dwelling, he shall be sent thither. *R. Lamb.* 206. l. 2. c. 7. sect. 3.

And

And a wife and children being vagrants shall be sent to the father, though he be only a servant. R. Lamb. 206. l. 2. c. 7. sect. 4, 5.

[As to the discharge of offenders, vide 17 G. 2. c. 5. s. 32.]

[Penalty of lodging vagrants, vide 17 G. 2. c. 5.]

[General penalty for hindering the execution of the vagrant act. Ibid.]

[Persons aggrieved may appeal to the next general or quarter sessions. Ibid.]

[And persons sued for any thing done in the execution of this act may plead the general issue; and if they recover, shall have treble costs. Ibid.]

**(B 79.) Neglect to apprehend, in a constable, &c.**

By the st. 39 El. 4. a constable, &c. not doing his best endeavour, for the apprehension of rogues, &c. in his parish, and for punishment and conveyance of them, forfeits 10s. (and by the st. 1 Jac. 7. 20s.) upon conviction by confession or two witnesses, before two justices of peace, to be levied by distress and sale to the use of the poor, or of the house of correction, at the discretion of the justices of peace.

By the st. 7 Jac. 4. constables shall give account on oath in writing, under the hand of the minister, to the justices of peace at their two meetings, of what rogues they have taken on their privy search, or otherwise, and how many they have punished, or sent to the house of correction; and for neglect, or for not safely conveying those sent by the justices of peace's warrant to the house of correction, shall forfeit what the justices of peace think meet, not exceeding 40s. for every offence.

By the st. 11 & 12 W. 3. 18. a constable neglecting to apprehend a rogue, or being negligent in his duty, forfeits 20s., a fourth part to the informer, three parts to the poor, to be levied on oath of one witness, on warrant of a justice of peace, by distress and sale.

If an officer refuse a rogue sent to the parish, he shall forfeit 5*l.* R. Lamb. 208, 209. l. 2. c. 7. sect. 12. 14.

So, if he be sent by a general pass, and not from parish to parish. R. Lamb. 208. l. 2. c. 7. sect. 13.

[See farther as to neglect to apprehend in constables or others, 17 G. 2. c. 5.]

**(B 80.) In others.**

By the st. 39 El. 4. any letting or disturbing the punishment or conveying of a vagabond, or relief or settling of impotent poor, or making rescous against the officer, on conviction by confession or two witnesses, before two justices of peace, shall be bound to good-behaviour, and forfeit 5*l.*, to be levied and employed as the forfeiture of a constable, *supra*.

And any wittingly bringing into this realm, any like to be a vagabond, &c. from Ireland, Scotland, or the Isle of Man, forfeits 20s. to the poor of the parish for every rogue set on shore.

By the st. 1 Jac. 7. every one shall cause a begging rogue, resorting with his knowledge to his house to beg, to be apprehended and carried to the next constable, on pain of 10s., to be levied by distress and sale *ut supra*, on conviction *ut supra*.

## (B 81.) Reward for apprehending.

By the st. 13 & 14 Car. 2. 12. justices of peace to whom a vagabond is brought may reward the apprehender, by giving him an order under hand and seal to the constable of the town where he past unapprehended to pay 2s., and if he refuse may levy the penalty of the st. 1 Jac. 7., and out of it allow to the apprehender 2s. and for the loss of his time.

And if apprehended on the confines of a county, on certificate of a justice of peace of the county where apprehended, a justice of peace of the other county shall give a warrant to the constable of the parish where he past unapprehended, to pay 2s. to the apprehender, and if the constable refuse they may levy 10s. according to the st. 39 El. 4. or so much thereof for his expences and loss of time, as the justice of peace shall think fit.

[See farther as to rewards for apprehension, 17 G. 2. c. 5.]

[And by 32 G. 3. c. 45. no reward is to be paid for apprehending rogues or vagabonds, until they shall have been punished.]

## (B 82.) House of correction.—By whom erected.

By the st. 39 El. 5. (made perpetual by the st. 21 Jac. 1.) any person of age, discreet, and of sane memory, seised in fee, may by deed enrolled in Chancery, erect an house of correction, hospital, &c. to have continuance for ever; and place there such head and members as he thinks fit; which house, &c. shall be incorporate, have perpetual succession, common seal, may purchase goods and lands, not above 200*l.* per ann. (nor shall have less than 10*l.* per ann.) freehold, and not holden *in capite*, or by knight's service, may sue and be sued, and governed by the rules of the founder not contrary to law, may lease for twenty-one years in possession at the ancient rent, but cannot alien in perpetuity.

By the st. 39 El. 4. justices of peace in a county or corporation, at the quarter sessions, may erect an house of correction, and provide a stock, and take care for the governing, and for the correction of offenders committed, and make rates, &c. for those purposes.

By the st. 7 Jac. 4. in every county there shall be erected an house of correction with convenient backsides, impléments, &c. which shall be conveyed to such persons as the justices of peace at the quarter sessions think fit, for correction and setting to work of vagabonds, rogues, sturdy beggars, and other idle and disorderly persons. And justices of peace at quarter sessions may elect a governor or master, to punish and set to work persons sent thither, who shall be no charge to the county, but maintained by their own labour; and may allow such master a yearly salary for his pains, and relieving the sick, to be paid quarterly before hand by the treasurer, and in default of payment to be levied by such master, in such manner as the treasurer by the st. 43 El. 2. may levy it; and such governor not giving account to the justices at quarter-sessions of all sent to him, or letting any go abroad, or escape, may be fined by the quarter sessions, which fine shall be paid to the treasurer.

By the st. 13 & 14 Car. 2. 12. work-houses may be erected within the



the weekly bills of mortality, which shall be incorporate and have several powers there allowed, &c.

By the st. 39 El. 5. a body politic which may alien, as mayor and commonalty, &c. may erect an house of correction. 2 Inst. 722.

And every other who has ability by law to grant. Ibid.

The endowment by this statute must be of freehold land of an estate in fee simple. Ibid.

Of land above the value of 10*l.* per annum, and not above 200*l.* per annum. Ibid.

But if it does not exceed that value at the time of the endowment, it is sufficient, though it be afterwards improved to a greater value. Ibid.

And if the first endowment be not of so great a value, they may afterwards purchase other land to the value of 200*l.* per annum in the whole. Ibid.

And they may take goods without limitation. Ibid.

And chattels real. 2 Inst. 723. in marg.

But the endowment must be made by deed inrolled in chancery, and not by other conveyance. 2 Inst. 722.

But the deed need not be indented, or inrolled within six months. 2 Inst. 723.

They must be erected to have perpetuity, and not for life, or years. Ibid.

Justices of peace may erect an house of correction at any time by the st. 39 El. 4. though the st. 7 Jac. 4. limits a time for the doing it. 2 Inst. 729.

And such house of correction erected, may be so ordered that it be incorporated within the st. 39 El. 5. 2 Inst. 730.

If an old house be converted to this purpose, it shall be said to be erected, though it be not built *de novo*. Ibid.

So, if an house were antiently erected, the justices of peace may erect a new house of correction, by the st. 39 El. 4. which continues in force. R. 1 Sal. 362.

But that ought to be at the charge of the county, and not of a particular precinct. Ibid.

So, it ought to be directed by the justices at the quarter sessions; for they cannot delegate their authority to other justices to do it. R. 1 Sal. 362, 3.

[By 12 Geo. 2. c. 29. s. 13. no part of a county-rate may be applied to repair houses of correction or prisons, but on presentment of the grand jury.]

[By stat. 14 Geo. 2. c. 33. s. 2. quarter sessions, where there are no assizes, may, on presentment of grand jury, repair, enlarge, or purchase house or land to build on for houses of correction.]

[By stat. 15 Geo. 2. c. 24. justices of liberties and corporations may commit offenders to the houses of correction of counties, to which such liberty contributes.]

[By stat. 17 Geo. 2. c. 5. s. 30. quarter sessions, on presentment of grand jury, may erect or purchase, or enlarge house of correction, and raise money for that purpose.]

[By s. 31. houses of correction are to be under the direction of quarter sessions, who may also fine or remove the master.]

[By s. 33. the expences relating to vagrants, to houses of correction, and persons there sent, to be raised by quarter sessions, according to the manner directed in st. 12 Geo. 2. c. 29.]

[Vide 22 G. 3. c. 64. 24 G. 3. st. 2. c. 55. 31 G. 3. c. 46.]

[A building given about seventy years ago by a corporation for the purpose of a house of correction, and maintained by them to the present time, is not a house of correction within the exception of this statute, s. 31. liable to be maintained by the corporation; but the public may be called upon to support it by a county rate. 6 T. R. 228.]

### (B 83.) Who may be committed to it.

By the st. 39 El. 4. houses of correction are ordered for offenders committed to them. Vide the st. 12 Ann. 23.

But by the st. 7 Jac. 4. those general words are explained to intend vagabonds, rogues, sturdy beggars, and other idle and disorderly persons. 2 Inst. 730.

And therefore, all adjudged rogues, or vagabonds, may be committed to the house of correction. Ibid.

So, an able man, who refuses labour, though he be not a vagrant, may be committed to the house of correction, if he has no means of living. R. 2 Inst. 730.

So, though he has means of living, if he be an idle or disorderly person. 2 Inst. 730.

[Justices may commit to hard labour till next quarter session, a woman taken on a general privy search, and charged on oath with being a loose, idle, and disorderly person. Str. 882.]

[By stat. 17 Geo. 2. c. 5. s. 32. when a justice has power to commit to house of correction, and the time and punishment not directed, he may commit to hard labour till next quarter session.]

[The house of correction for the county of Middlesex adapted to the separate reception of felons pursuant to the stat. 22 Geo. 3. c. 64. and other acts, is a legal prison for the safe custody of persons under a charge of high treason. 8 T. R. 172.]

### (B 84.) Cottages.

By the stat. 31 El. 7. none shall erect or convert any building to a cottage for habitation, unless he lay to it four acres of ground of his own freehold and inheritance, near to such cottage, to be continually occupied therewith, on pain of 10*l.* to the queen for every offence.

And none shall continue a cottage, without four acres of ground, on pain of 40*s.* per month.

Of which offences, justices of assise, justices of peace at the sessions, and lords of leets may inquire, &c. by indictment, or presentment, and award execution, by *feri facias, elegit, capias*, &c.

Provided this statute extends not to cottages in a city, borough, or market-town, or within a mile of any mines, quarries, brick-kilns, lime-pits, &c. for the only dwelling of labourers in the said works: or within a mile of the sea, or a navigable river, for the only dwelling of sailors, or any whose occupation is the making, furnishing, or victualling of a ship or other vessel; nor to a cottage in a forest, chace, warren, or park, for the under-keeper or warrener nor to a cottage for a com-  
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mon herdsman, or shepherd, or for a poor impotent person, or allowed by justices of assise, or of the peace, by order entered in open assises, or quarter sessions. Vide Leet, (L 14.)

This act is a statute, and not an ordinance. R. 1 Sal. 195.

By the st. 43 El. 2. churchwardens and overseers, by agreement with the lord of the wast, or by order of the quarter sessions, with the like agreement, may erect cottages on the wast, at the charge of the parish, for the only habitation of the impotent poor of such parish.

A body politic, as well as natural, is prohibited the erecting or continuing of cottages. 2 Inst. 736.

And it is not sufficient, if the cottage has four acres of lands holden by copy; for it must be freehold. 2 Inst. 737.

Or, of land, holden for life, or years; for it must be an inheritance in fee, or tail. Ibid.

Or, if the acres are not accounted according to the st. 35 Ed. 1. *de adm. terris*, viz. sixteen feet and an half to the pole. Ibid.

If a lord of a manor permit a cottage to be erected, or continued upon his wast, and take rent for it, he shall be fined within the statute. R. Jon. 272.

If a parish erect a cottage, without the particular direction of the st. 31 El. 7. Vide 1 Sid. 359.

A common herdsman, or shepherd, cannot inhabit in a cottage, not having four acres of land annexed, unless it was erected before the st. 31 El. 7. for the exception, as to them, is only to a cottage heretofore made. 2 Inst. 737.

So, neither can a poor impotent person, unless in a cottage erected according to the st. 43 El. 2. 2 Inst. 737.

An information lay in B. R. for the erecting of a cottage, as well as before justices of assise, or peace. 1 Sid. 359.

But this is now restrained by the st. 21 Jac. 4. (Vide 1 Sid. 359.)

An indictment, or presentment for a cottage, is bad, unless it be said to be for habitation. R. 1 Sand. 135. 1 Mod. 295.

And it shall conclude, *contra formam statuti*. R. 1 Sand. 135. D. Skin. 565.

And if the presentment be in a leet, they shall not make an amercia-ment under 10*l*. 1 Sand. 135.

Yet it is not necessary to say, that any one inhabits there, if the indictment says, it was erected for habitation. R. 2 Bul. 264. R. Skin. 564.

But it is not within the st. 31 El. 7. if a man erect a cottage for his own habitation, though he does not lay four acres of land to it; for the statute extends only to cottages erected for the habitation of others, 1 Bul. 52.

So, if a copyholder erect an house upon his copyhold, and does not lay four acres of land to it, it is not within the statute. R. 1 Bul. 52.

So, if a cottage was erected upon the manor of A. before his purchase, and he does not take rent for it; A. shall not be punished. R. Jon. 273.

If the indictment does not shew by whom the cottage was erected, it shall be quashed. R. Jon. 273.

So, if an indictment be, for erection and continuance, without saying, to both, *contra formam statuti*. Comb. 307.

[By st. 15 Geo. 3. c. 32. the st. 31 Eliz. is repealed.]

(B 85.) Inmates.

By the st. 31 El. 7. no inmate, or more families than one, shall dwell in any cottage, on pain that the owner of such cottage, placing or suffering such inmate, &c. shall forfeit to the lord of the leet 10s. per mensem; whereof the justices of peace at the sessions may inquire by indictment. &c. and award execution for the forfeiture by *feri facias*, *elegit*, *capias*, &c. Vide Leet, (L 14.)

But by the st. 43 El. 2. churchwardens and overseers of the poor may place inmates, or more families than one, of impotent poor of their parish, in one cottage or house.

Before this statute there was no remedy against inmates, but by by-laws in the leet. Kit. 45. a.

A man is accounted an inmate, who not having sufficient to live of himself by his land, art, or trade, dwells in part of another's house. Kit. 45. b.

As, if common breakers of hedges, or other idle or suspicious persons dwell in an house with another. Ibid.

Or, if a poor labourer dwells with another, and both go by the same door into the high street. Ibid.

Or, if a man, not of ability, take certain rooms in an house. Ibid.

But if a man demise parcel of the house where he dwells, and severs it from the other part, and makes separate doors to the high street, the lessee is not an inmate; for they are two houses. Ibid.

Or, if a man take another *ad mensam*, or to sojourn with him, and he has certain rooms: he is not an inmate. Ibid.

Or, if a man take his married daughter with her husband, according to agreement, and suffer them to have certain rooms in his house. Kit. 45. b.

Or, if he suffer a gentleman to have certain rooms in his house, who does not table with him, but goes to a victualler's for his sustenance. Kit. 45. b.

[Defendant having houses in Saint Catherine's, leased the rooms to several families. The Ch. J. (Pratt) ruled, that it was not within the statute; for a house is not a cottage. Str. 405.]

Pratt, Ch. J. held, that inmates in cottages in market-towns are exempt, and that where the houses are contiguous, they are part of the town. Str. 405.

This statute extends to a cottage, that has inmates, within a city, borough, or town, as well as elsewhere. 2 Inst. 738.

And to an inmate in a cottage that has above four acres of land annexed to it, as well as in cottage that has no land. Ibid.

But one indictment against several for having inmates shall be quashed. 2 Rol. 164.

(B 86.) Wood-stealers, &c.

By the st. 43 El. 7. any convict, by confession or one witness, before a justice of peace, mayor, &c. that he cut or took away any corn grow-  
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ing, or robbed any garden or orchard, or for breaking or cutting a hedge, pales, rails, or fence, or pulling up fruit trees, with intent to carry away, or cutting or spoiling wood, underwood, poles, or trees, not being felony, or for procuring, or knowingly receiving such offender, shall pay to the party such recompence as the justice of the peace shall direct; or, if unable, shall be delivered to the constable to be whipped; and for the second offence shall be whipped: and the constable, refusing to whip, shall be committed to gaol, without bail, till he procure such whipping. Provided a justice of peace shall not act in his own case, unless assisted by some other justice.

By the st. 15 Car. 2. 2. a constable, or any person, may in his parish, &c. apprehend whom he suspects of having or carrying any wood, &c. or any bark, gates, stiles, posts, rails, pales, broom, or furze, (and the constable by warrant of a justice of peace may search the house and yards of any suspected, &c. and finding, may apprehend) and carry before a justice of peace of the county or town; and if he cannot give a satisfactory account how he came by such wood, with the owner's consent, or by a day set, produce the seller, or a witness to prove the sale, he shall for the first offence pay such satisfaction to the owner, and in such time as the justices shall appoint, and likewise a sum not above 10s. to the poor, and on non-payment shall be whipped by the constable or sent to the house of correction, as the justice thinks best, for not more than a month; for the second offence he shall be sent to the house of correction for a month, and kept to hard labour; for the third offence shall be deemed an incorrigible rogue.

And if any buys stolen wood, &c. of any, whom he might justly suspect to come unlawfully by it, a justice of peace having examined, and found the matter on oath, shall order the buyer to pay treble value to him from whom the wood, &c. was stolen, and if not paid, shall levy it by distress and sale, and for want of distress, commit the offender to gaol for a month, without bail.

But none shall be prosecuted on this statute, but within six weeks after the offence.

The statutes 43 El. 7. and 15 Car. 2. 2. extend to gentlemen as well as others; for the court cannot make a distinction between the quality of persons. Per Cur. B. R. Trin. 2 Ann. upon conviction of one Burnaby. 1 Sal. 181.

But justices of peace cannot make a conviction upon these statutes, if a property be claimed in the wood; and if they do, a prohibition lies, or an action against him who levied the damages awarded by the conviction. Per Cur. in Burnaby's Case, 1 Sal. 182.

And after a conviction removed by certiorari, the defendant may suggest his property by way of plea. Per Holt; but the others cont. in Burnaby's case, 1 Sal. 182.

And if the conviction does not specify the certain number of trees, or quantity of wood cut, it is bad. R. Trin. 2 Ann. B. R. in Burnaby's case, 1 Sal. 181.

[Vide 1 G. 1. st. 2. c. 48. 6 G. 1. c. 16. 9 G. 1. c. 22.]

[By st. 23 Geo. 2. c. 26. person convicted by one justice of stealing or maliciously destroying turnips, shall make satisfaction to the owner, and pay not exceeding 10s. to the poor, or in default be committed not



exceeding a month, or whipt for first offence; and for the second committed for three months.]

[Vide 29 G. 2. c. 36. 31 G. 2. c. 35. 4 G. 3. c. 41.]

[By st. 6 Geo. 3. c. 36. persons in the night-time destroying or taking timber-tree, or tree likely to become timber, or in an inclosed ground, any roots, shrubs, or plants of 5s. value, and all aiding and receiving, are guilty of felony, and may be transported for seven years.]

[By st. 6 Geo. 3. c. 48. person damaging or carrying away timber-tree, or tree likely to become timber, or any part, or the lop or top, convicted before one justice, shall forfeit not exceeding 20*l.* and charges, or be committed from twelve to six months for first offence, 30*l.* or from eighteen to twelve months for second offence, and felony and transportation for seven years for third offence.]

[Oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore and birch, are timber; and by st. 13 Geo. 3. c. 33. poplar, alder, larch, maple and hornbean, are so also. N. B. Pine is omitted in both acts, probably through inattention.]

[Destroying or carrying away root, shrub, or plant, out of field or cultivated land, convicted before one justice, forfeits not exceeding 40*s.* and charges for first offence, 5*l.* for second offence, and felony and transportation for seven years third offence.]

[Destroying or carrying away from woods, underwoods, or wood-grounds, any wood, underwood, or sticks, or having the same in their custody, and not giving good account thereof, convicted before one justice, forfeits not exceeding 40*s.* and charges for first offence, 5*l.* for second offence, and deemed incorrigible rogue for third offence.]

[By st. 9 Geo. 3. c. 41. this clause is extended to the king's forests, &c. and to hollies, thorns, and quicksets there, or any other wood-grounds.]

[On non-payment, commitment to hard labour for one month, and once whipt, for first offence; and for three months, and thrice whipt for second offence.]

[Person attempting to hinder seizing offenders, forfeits 10*l.* or hard labour not exceeding six months.]

[By st. 13 Geo. 3. c. 32. persons stealing or maliciously destroying turnips, potatoes, cabbages, parsnips, pease, or carrots, on conviction before one justice, forfeit 10*s.* above the value, to be given to the owner and poor. The owner may be evidence, and then all the forfeiture goes to the poor.]

[Vide 41 G. 3. c. 109. 45 G. 3. c. 66. 52 G. 3. c. 71, 72.]

### (B 87.) Victuallers.

By the st. 23 Ed. 3. 6. mayors, bailiffs, &c. shall inquire and punish victuallers who sell at excessive prices; and if convict of neglect in inquiring, shall pay treble price.

By the st. 12 R. 2. 3. Rast. (which confirms the statute of victuals) it is enacted, that victuallers be justified by justices of peace at the suit of the king or of the party.

By the st. 12 Ed. 4. 8. mayors, bailiffs, &c. and those who have charter, shall have the sole surveying of a victualler; and all patents to others for that purpose are void.

Justices

Justices of peace may inquire of victuals and victuallers who do not observe the assise. Semb. Cro. Car. 113.

By the st. 12 Ed. 2. 6. an officer in a city or borough, who hath an assise, shall not merchandize for wine or victual, on pain of forfeiting it, either in gross or by retail.

By the st. 6 R. 2. 9. a victualler shall not execute a judicial office in a city, or borough, if sufficient beside.

But by the st. 3 H. 8. 8. if a victualler be chosen officer, two others not victuallers, chosen by the commonalty, shall be sworn with him to set prices, &c. And then such officer may sell victual in gross, or by retail.

By the st. 6 R. 2. 10. *aliens amyes* may bring fish, or other victual, to cities, boroughs, &c. and there sell them by retail, or in gross. Confirmed by the st. 1 H. 4. 17.

And by the st. 14 H. 6. 6. a disturber of such foreigner forfeits ten pounds.

By the st. 4 H. 7. 3. in London, or any walled town, (except Berwick and Carlisle,) or in Cambridge, no butcher shall kill within the walls, on pain of 12*d.* for every ox, and 8*d.* for every other beast.

#### (B 88.) Corrupt victual.

By the st. 51 H. 3. of Pillory and Tumbrel, a jury shall enquire of a butcher, who sells contagious flesh, or dead of the murrain, of a cook who seeths unwholsome fish or flesh, and of such who buy flesh of Jews and sell it to Christians. Vide Leet, (L 10.)

By a st. *incerti temporis* (H. 3 Ed. 1. or Ed. 2.) a butcher who sells swine's flesh meazled, flesh dead of the murrain, or bought of Jews, for the first offence shall be amerced; for the second pilloried; for the third put to fine and imprisonment; for the fourth shall abjure the town. Vide Keble's Statutes, fo. 86. 17 Ed. 2. 7.

#### (B 89.) Price.

By the st. 23 Ed. 3. 6. butchers, fishmongers, regraters, hostlers, brewers, bakers, poulterers, and all other sellers of victuals, shall sell at reasonable prices, having regard to the price in places adjoining. Vide Leet, (L 9. 14.)

By the st. 13 R. 2. 8, victuallers shall have no more gains than is limited by the justices of peace, on pain to be punished at their discretion, where no punishment is expressly given.

By the st. 25 H. 8. 2., on complaint of enhancing the prices of victuals, the lords of the privy council, and justices of either bench, chamberlains, chancellor, and barons of the exchequer, or seven of them, (whereof the lord chancellor, treasurer, lord president, or privy seal to be one,) may set the prices at which all shall sell after proclamation made; but mayors, bailiffs, &c. of towns corporate, may set the prices, as before this act.

By the st. 2 & 3 Ed. 6. 15. a butcher, brewer, baker, poulterer, cook or fruiterer, conspiring to sell at certain prices, forfeits 10*l.* for the first offence, or twenty days imprisonment with bread and water only, on nonpayment in six days; 20*l.* for the second offence, or pillory; 40*l.* for

for the third offence, or pillory and one ear, and be infamous. Vide Leet, (L 14.)

If a corporation of any of these victuallers conspire, they shall be dissolved.

Vide Leet, (L 9.)

(B 90.) **Weights and measures.**—What weights are allowed.  
Troy.

By the st. 11 H. 7. 4. two justices of peace (1 qu.) by examination or inquiry, may hear and determine offences in mayors, &c. for not making, signing, and viewing weights and measures, or in buyers and sellers by defective weights and measures; and may set a fine and amerciamment on the offenders, and destroy such defective weights and measures.

[By st. 10 Geo. 3. c. 44. trader subject to excise, using false scales or weights, to defraud the king of duties, forfeits 100*l*.]

[As to proper persons to be appointed to examine weights and balances, see 35 G. 3. c. 102. 37 G. 3. c. 143. 55 G. 3. c. 43.]

As to Troy weight, vide Leet, (L 6.)—Vide 4 Inst. 273.

#### Averdupois.

As to Averdupois, vide Leet, (L 7.)

Averdupois is so called, because it gives full weight. 4 Inst. 273.

By averdupois weight are weighed all physical drugs, wax, pitch, tar, iron, steel, lead, hemp, flax, flesh, butter, cheese, and all commodities subject to waste. 4 Inst. 273.

By the st. Comp. Pond. 25*s*. weight makes a pound of lead, 12 pounds a stone, 6 stone wanting 2 pounds a formel, 30 formel a load.

By the st. Comp. Pond. the st. 25 Ed. 3. 9. and 31 Ed. 3. 8. 14 pounds of wool make a stone, 26 stone and no more a sack, and 12 sacks a last.—So, the st. 11 H. 7. 4. Dav. 8. b.

(B 91.) **What measures are allowed.**

By the st. M. Ch. 9 H. 3. 25. *sit una mensura vini per totum regnum et una mensura cervisie, et una mensura bladi, scilicet, quarterium Lond.*

So, by the st. 25 Ed. 3. 10.; 13 R. 2. 9.; 27 Ed. 3. 10.; and 16 Car. 1. 19.

By the st. Comp. Mens. 31 Ed. 1. by consent of the whole realm the king's measure was made; viz. 32 grains of wheat, in the midst of the ear dry, make a penny sterling; (or 24 grains of barley, 4 Inst. 273, 4.) 20*d*. make an ounce; 12 ounces make a pound; 8 pounds make a gallon of wine; 8 gallons make a bushel; 8 bushels make a quarter. Confirmed by the st. 12 H. 7. 5.

A pound weight is a pint in measure; 2 pints make a quart; 2 quarts make a pottle; 2 pottles make a gallon; 2 gallons make a peck; 4 pecks make a bushel; 4 bushels make a comb; 2 combs make a quarter; 6 quarters make a wey; 10 quarters make a last. 4 Inst. 274.

By the st. 25 Ed. 3. 10. confirmed by the st. 15 R. 2. 4., 1 H. 5. 10., and by the st. 11 H. 7. 4., the quarter shall contain eight bushels, and no more.

By

By a *st. incerti temporis* (H. 3 Ed. 1. or Ed. 2.), 4. *de pist.* toll shall be taken by the king's measure. Vide Keble's Stats. fo. 85.

*De mensurâ vini et cervisiæ*, vide post, (B 94. 98.)

(B 92.) Measure of length, &c.

By the *st. comp. ulnar.* three grains of barley, dry and round, make an inch; twelve inches make a foot; three feet a yard; five yards and a half a perch; forty perches and four in breadth make an acre. Vide *st. de mens. terris*, 33 Ed. 1. 4 Inst. 275.

[For the measure of corn and salt, see the stat. 22 Car. 2. c. 8. and stat. 22 & 23 Car. 2. c. 12.]

[Under these statutes it is illegal to sell corn by any other measure than the Winchester measure. 4 T. R. 750.]

[The buyer of corn by any other than the Winchester measure forfeits, by stat. 22 & 23 Car. 2. c. 12., the penalty of 40s., besides the value of the corn. 5 T. R. 353.]

[If the *reddendum* in an hospital renewed lease be "so many quarters of corn," it will be understood to mean legal quarters, reckoning the bushel at eight gallons, although the old leases before the st. 22 & 23 Car. 2. c. 12. contained the same *reddendum*, and although till lately the lessees had paid by composition, reckoning the bushel at nine gallons. 6 T. R. 338.]

By the stat. 27 H. 8. 6. four inches make an hand.

A yard and quarter make an ell; five yards and an half make a pole or perch; forty poles make a furlong; eight furlongs make an English mile. 4 Inst. 274.

Seven feet make a fathom. Dalt. 121. (Edition of 1727. 370.)

(B 93.) Manner of measuring.

By a *st. incerti temporis* (H. 3 Ed. 1. or Ed. 2.), 9. *de pist.* no corn shall be sold by the heap, except oats, malt, and meal. Vide Keble's Statutes, 86.

By the same stat. 4. no toll shall be taken by the heap, but by strick.

And by the same stat. 8. any convicted of double measure, a greater to buy by, and a less to sell by, shall be imprisoned. Vide Keble's Statutes, 85, 86. 17 Ed. 2.

(B 94.) Assises, and assay of ale.

Assise is sometimes taken for an ordinance, for putting things into a certain rule and disposition. Lit. s. 234.

*Cervisia* in the antient statutes includes beer. 4 Inst. 262. in marg. Bier is a Saxon word. 4 Inst. 262. in marg.

By the st. M. Ch. 9 Hen. 3. 25. *per totum regnum sit una mensura cervisiæ.*

By the st. mens. 31 Ed. 1. a penny sterling shall weigh thirty-two grains of wheat dry in the midst of the ear; twenty pence make an ounce; twelve ounces a pound; and eight pounds a gallon of wine.

By the st. 23 H. 8. 4. every barrel of beer shall contain thirty-six gallons, a kilderkin eighteen gallons, a firkin nine gallons, of the king's standard gallon; and a barrel of ale thirty-two gallons, a kilderkin sixteen, and a firkin eight gallons of the same standard.

By

By the st. 12 Car. 2. 23. a barrel of beer shall be thirty-six, of ale thirty-two gallons, according to the standard of the ale quart, four of which make a gallon; and of other liquors, according to the wine gallon.

By the st. 1 W. & M. 1 sess. 24. a barrel of beer and ale shall be thirty-four gallons, by the ale quart. [Except in London and Westminster, and the bills of mortality, where it shall be according to former acts.]

[By the same stat. s. 13. justices are empowered, upon complaint made to them by any brewer, within their jurisdiction, of any overcharge returned upon him by any of the gaugers, to hear and determine the same, and on due proof to discharge or acquit such brewer of so much of his charge as shall be made out.]

[After the duties of excise are charged on wash made for extracting spirits by stat. 26 G. 3. c. 73. if any part of the wash be lost, the manufacturer cannot be relieved by the justices from the respective proportion of the duty, as for an overcharge. 7 T. R. 56.]

By the stat. 11 & 12 W. 3. 15. a retailer of ale, or beer, shall sell only by the standard ale quart, or pint, duly marked, on pain of a sum, not above 40s., nor under 10s., a moiety to the poor, a moiety to the informer, to be levied by justices on goods of the offender, on oath of one witness in thirty days.

And the officer of excise shall gratis bring the standard quart and pint to every borough and town, by 24 June 1700, if no brass standard quart and pint already there, on pain of 5*l*.

And the mayor, &c. shall see every quart and pint measured by it, and marked with W. R. and a crown, on request, or forfeit 5*l*. and treble damages and costs to the party.

By the st. 2 & 3 Ed. 6. 10. in June, July, and August, malt shall be seventeen days in the fatt, floor, steeping, and drying, and at other times three weeks, on pain of 2s. per quarter, otherwise it cannot be wholesome; he that mingles ill made malt, or of mow-burnt or spired barley with good, forfeits 2s. per quarter, and he that sells it not well trodden, rubbed, or fanned, forfeits 20*d*. per quarter; a moiety to the king, a moiety to the informer.

By the st. 1 Jac. 18. an importer of corrupt or unclean hops forfeits them, and the brewer, who uses them, forfeits the value.

[By st. 2 G. 3. c. 14. if brewer or retailer mixes strong beer or strong worts after gauging, with small beer or wort, or water, he forfeits 50*l*.]

#### (B 95.) Price.

By the st. Ass. Pan. and Cerv. 51 H. 3., when wheat is sold at 3*s*. or 3*s*. 4*d*. per quarter, barley at 20*d*. or 2*s*., oats at 16*d*., brewers in cities shall sell two gallons of beer or ale for a penny, and out of cities three or four gallons; and when in cities, brewers sell three, out of towns they ought and may sell four gallons for a penny.

By the st. 23 H. 8. 4. none shall sell a barrel, kilderkin, or firkin of beer or ale, but at the prices set by the mayor, &c. in towns corporate, and by justices of peace out of towns, on pain of 6*s*. for a barrel, 3*s*. 4*d*. per kilderkin, 2*s*. per firkin, 10*s*. for a greater, and 12*d*. for a less vessel.

By the st. 1 Jac. 9. an inn-keeper, alehouse-keeper, or victualler, who



who sells less than a full quart of the best beer or ale, or two quarts of small for a penny, forfeits 20s. to the use of the poor, to be levied by distress and sale, after six days, or else by imprisonment.

By the st. 12 Car. 2. 24. no brewer, or retailer of beer or ale, shall take more than the excise above the usual prices, but as much as the excise is above the usual prices he may take.

By the st. 1 W. & M. 1 ss. 24. no retailer of beer or ale shall during that act be impleaded, for selling above the prices before appointed.

[By the st. 2 Geo. 3. c. 14. no brewer or retailer shall be sued for advancing the price of strong beer in a reasonable degree.]

### (B. 96.) Of bread.

By the st. 51 H. 3. Ass. Pan. and Cerv. when a quarter of wheat was 12*d.* wastel bread of a farthing shall weigh 6*l.* 16*s.*; cocket bread of the same corn, more than wastel by 2*s.*; of worse corn, more by 5*s.*; simnell bread less than wastel by 2*s.*; bread of the whole wheat shall weigh a cocket of 5*s.* more than wastel, and an half; bread of treet shall weigh two wastels; bread of common wheat shall weigh two great cockets, &c. *sic pro rata*.

According to this proportion, the assise of bread at this day, when wheat is sold at

|  |   | l. oz. dwt. | Wheaten.<br>l. oz. dwt. | Household.<br>l. oz. dwt. |
|--|---|-------------|-------------------------|---------------------------|
| 20 <i>s.</i> per quarter, penny white<br>should weigh  | } | 1 4 18      | 2 1 6                   | 2 9 16 Troy.              |
|  |   |             |                         |                           |
| 24 } A penny white loaf will<br>28 } then weigh.<br>32 } <i>Et sic pro rata</i> , the penny<br>36 } weight being now 3 <i>d.</i> which<br>40 } was then a penny sterling,<br>44 } and a pound of silver being<br>48 } but 20 <i>s.</i> till raised by H. 6.<br>52 } to 30 <i>s.</i> by Ed. 4. to 40 <i>s.</i><br>56 } by H. 8. to 45 <i>s.</i> and since<br>60 } to 60 <i>s.</i> | } | Wheaten.    | }                       | Household.                |
|  |   |             |                         |                           |
|  |   | 1 2 2       | 1 9 2                   | 2 4 4                     |
|  |   | 1 0 1       | 1 6 0                   | 2 0 2                     |
|  |   | 0 10 11     | 1 3 16                  | 1 9 2                     |
|  |   | 0 9 8       | 1 2 1                   | 1 6 16                    |
|  |   | 0 8 9       | 1 0 12                  | 1 4 18                    |
|  |   | 0 7 13      | 0 11 10                 | 1 3 6                     |
|  |   | 0 7 1       | 0 10 10                 | 1 2 1                     |
|  |   | 0 6 10      | 0 9 14                  | 1 1 0                     |
|  |   | 0 6 0       | 0 9 0                   | 1 0 0                     |
|  |   | 0 5 11      | 0 8 8                   | 0 11 2                    |

Wingate's Abridgment, Weights, 3.

At the time of the st. 51 H. 3. according to this assise by the computation of the king's baker, a baker in every quarter of wheat gained 4*d.* and the bran and two loaves, three halfpence for three servants, an halfpenny for two lads, an halfpenny for salt, an halfpenny for yeast, a farthing for candle, 2*d.* for wood, and an halfpenny for his boutel. Rast. Weights, 2. Vide the st. 51 H. 3. Ass. Pan. & Cerv.

But by the book of assise now in use published by proclamation of Eliz. bakers are allowed for their charge in baking, in every quarter of wheat of a middle price, 4*s.* and bakers in a town corporate, who pay scot and lot, 6*s.* Wing. Abr. Weights, 4.

By the st. 51 H. 3. Ass. Pan. & Cerv. and the st. *de pist. incerti temporis* (H. 3 Ed. 1. or Ed. 2.) the assise shall be set according to the middle price of wheat, and not changed but on the increase or decrease of 6*d.* in the sale of one quarter. Vide Keble's Statutes, 85.

[By 10 Geo. 3. c. 39. Michaelmas quarter-session shall appoint persons in (from two to six) market-town, to make weekly returns of the prices of corn to a person at the treasury, to be appointed by the treasury,

sury, and to send duplicates four times a year to the clerk of the peace; the returns to be published weekly in the gazette.]

[The commissioners of customs are to transmit annually to treasury an account of corn exported and imported, and bounties and duties paid and received.]

[The weight, &c. of bread is now regulated by 59 G. 3. c. 36.]

(B 97.) The duty of a baker.

By the st. *de pist. incerti temporis*, (H. 3 Ed. 1. or Ed. 2.) every baker shall have his own mark for his bread. Vide Keble's Statutes, 85.

By the st. 51 H. 3. twelve men sworn shall inquire of the price of wheat, and if bakers keep the assise; and the bailiff shall bring in all the bakers with their measures.

By the same statute, if a baker be convicted that he hath not kept the assise, for the first, second, and third offence, he shall be amerced, if he exceed not above 2s. And by the st. *de pist. incerti temporis* (H. 3 Ed. 1. or Ed. 2. not above 2s. 6d.) weight in a farthing loaf; but if he want more weight than that, or if he offend often, though he want less, he shall be set in the pillory without redemption. Vide Keble's Statutes, 85.

(B. 98.) Of wine.

The st. M. Ch. 9 H. 3. 25. provides, *quod sit una mensura vini per totum regnum*.

By the st. 2 H. 6. 11. none shall import or make a ton of wine, unless it contain 252 gallons, a pipe 126 gallons, and the tertian and hogshead after the same rate, on pain to forfeit the said wine to the lord of the town, one fourth to the informer; and justices of peace, and mayors and bailiffs who have power of the peace, may inquire of this statute.

And by the st. 18 H. 6. 17. it is said, that by the antient assise, every ton ought to contain 252 gallons, every pipe 126 gallons, a tertian 84, an hogshead 63 gallons. [So, by the st. 2 H. 6. 11.]

By the st. 1 R. 3. 13. the butt shall contain 126 gallons, the barrel thirty-one gallons and a half, rundlet eighteen gallons and a half.

Twelve ounces make a pound, eight pounds a gallon of wine. 4 Inst. 274.

By the st. 27 Ed. 3. 8. all wine imported for sale shall be duly gauged by the king's gauger, or his deputy; and the refuser forfeits his wine, and shall suffer imprisonment and ransom; and if the ton wants of the assise, he shall abate in his price.

By the st. 31 Ed. 3. 5. a seller of a ton or pipe of wine ungauged, shall forfeit it or the value to the king.

By the st. 18 H. 6. 17. a seller of a ton, pipe, tertian, or hogshead of wine, not gauged, forfeits it, or the value, a moiety to the informer; and if it want of the assise, he shall abate in the price *pro rata* on pain of forfeiture.

By the st. 1 R. 3. 13. it is also enacted in like manner.

By the st. 28 H. 8. 14. (which confirms the 1 R. 3. 13.) the gauger shall mark the contents of the ton, &c. on the head of such vessel.

By the st. 1 W. & M. sess. 1. 34. no retailer of wine shall sell but in pewter sealed, on pain of 5*l.* to the informer.

By the st. 2 W. & M. sess. 2. 14. any convict by confession, or two witnesses, in thirty days, before a justice of peace, forfeits 50*s.*

The

The king cannot licence to break the assises of wine by a *non obstante* of the st. *de pistoriis*. Vau. 343.

By the st. 4 Ed. 3. 12. assay shall be made of wines at Easter or Michaelmas, or oftener, by lords or mayors and bailiffs of towns, and all found corrupt shall be poured out, and the vessels broken; and the chancellor and treasurer, justices of either bench, and of assise, shall have power to inquire of mayors and ministers of towns, if they do according to the statute.

By the st. 12 Car. 2. 25. no merchant, vintner, seller, or retailer of wine shall mingle or utter the same mixt with other sorts of wine, cyder, perry, stum, honey, sugar, vitriol, molasses, or any syrup, isinglass, brimstone, lime, raisins, water, other liquors or ingredients, clary or other herb, or any flesh, on pain of 100*l.* to the seller in gross, and 40*l.* to the retailer, a moiety to the king, and a moiety to the informer.

By the st. 1 W. & M. 1 sess. 34. if any sell by gross, or retail, any wine corrupt or adulterated, or adulterate any wine, he forfeits 300*l.* a moiety to the king, and a moiety to the informer.

The king cannot dispense with the statutes against corrupting of wine. Vau. 344.

### (B. 99.) Price.

By the st. *de pist. incerti temporis* (H. 3 Ed. 1. or Ed. 2.) a gallon of wine shall be at 12*d.* and if taverners exceed, their doors shall be shut up by the mayor and bailiffs. [Repealed by the st. 21 Jac. 28.] Vide Keble's Statutes, 85.

By the st. 4 Ed. 3. 12. wines shall be sold at reasonable prices.

By the st. 28 H. 8. 14. no wine French shall be sold above 8*d.* the gallon, 4*d.* the pottle, 2*d.* the quart, 1*d.* the pint; nor sack or sweet wines above 12*d.* the gallon, 6*d.* the pottle, 3*d.* the quart, and 1½*d.* the pint. And the lord chancellor, treasurer, president of council, privy seal, two chief justices, or three of them, might set prices of wine sold in gross by the ton, &c. And after proclamation none shall sell above, on pain of 40*s.* for every vessel, a moiety to the king, and a moiety to the corporation, if in a town corporate, else to the informer.

By the st. 7 Ed. 5. 6. no Gascoigne or French wine shall be sold above 8*d.* the gallon, nor Rochelle wine above 4*d.* per gallon, nor other wine above 12*d.* per gallon, on pain of 5*l.*

But by the st. 5 El. 5. a retailer might sell at prices, allowed by proclamation issued with the assent of such lords, as by the st. 28 H. 8. 14. were to set prices on wines in gross.

By the st. 12 Car. 2. 25. no retailer shall sell Canary, Spanish, or sweet wines above 18*d.* per quart, nor French wine above 8*d.* per quart, nor Rhenish above 12*d.* per quart, on 5*l.* penalty. Provided the lord chancellor, &c. between the twentieth of November and the last of December, may yearly set and alter the prices of wines; and then, not above those prices.

By the st. 1 W. & M. 1 sess. 34. after 10th September, 1690, none shall sell French wine above 6*d.* per quart, on pain of 5*l.* for the first, and 10*l.* per quart for every other offence.

By the st. 24 H. 8. 6. if any refuse to sell wine at the prices set for ready money, he shall forfeit the value of the wine, unless he make oath  
he

have not the same for sale in gross; and justices, mayors, &c. may not request enter and sell the same. The king cannot dispense with the statutes which limit the price of wine. Vau. 343, 4.

(B 100.) Wine licence.

At the common law every one might sell wine without restraint. R. 1 Sid. 6. Hard. 344.

But by the st. 7 Ed. 6. 5. none shall retail wine, but in cities, boroughs corporate, port or market towns, on pain of 10*l*. per offence, in cities or towns corporate, unless appointed by the head officer, and three parts of the common council, aldermen, burgesses, or community there, by writing under the common seal; nor in a market town, unless licensed by the justices of peace at the general sessions, by writing under the seals of the majority, on pain of 5*l*. who shall not licence above two in any city, town, &c. except those mentioned in the statute.

Yet the king might dispense with any person to retail wine, notwithstanding that statute. Vau. 344. 346. R. 1 Sid. 6. Semb. Dy. 270. a.

And king James the first granted to the vintners of London, that every one free of their company, might sell wine by retail or in gross, within the city and suburbs, and three miles of the walls of the city, all sea-ports, and in cities and port-towns between London and Dover, and London and Berwick, notwithstanding the 7 Ed. 6., which grant is good. R. Vau. 330. 348, &c. 359.

By the st. 12 Car. 2. c. 25. the king may commission two or more, who may grant wine licences to whom they think fit, for a term not above twenty-one years, at certain rent, without fine, which shall not be assignable; but they must use the selling of wine, or be owner of the house.

Not to prejudice the universities, or company of vintners.

By the st. 15 Car. 2. 2. 14. the duke of York and his heirs male had sole power of wine licences, exclusive of the king: saving the privilege of the universities, and company of vintners.

And by the proviso in the statutes of 12 Car. 2. and 15 Car. 2. the company of vintners have power to sell wine by retail, &c. without licence, as they might by the charter 9 Jac. R. Vau. 332.

So, they may sell by retail without licence of the mayor, &c. in a corporation; or of justices of peace in a market town; for the clause in the st. 7 Ed. 6. extend only to private persons, not to taverners. Dub. Hard. 344.

So, by the st. 7 Ed. 6. 5. that act is not to prejudice either of the universities, so as there be not more taverns kept there than are provided for in the statute, viz. Oxford, 3. Cambridge, 4.

So, by the same stat. persons, who by licence may have a tavern, may sell wine by retail in their houses, without other licence. Per Hale & Atkins, two Barons cont. Hard. 345. Dub. Hard. 344.

But a licence to retail wine does not import a licence to have a tavern. R. Hard. 348.

If a wine merchant sells a gallon of wine in his own house, which is drunk in another in the same town, he is a retailer within 12 Car. 2. c. 25. Str. 718. Ld. Raym. 1421.]

[If a merchant sells one dozen quart bottles, unmeasured, it is retailing. And. 392. Str. 1124. Reversed by the lords, because one dozen quart bottles was not found to be a retail measure; *venire de nous awarded*. Str. 1124.]

Vide Leet, (L 14.)

(B 101.) Default of officers.

So, justices of peace by their commission may inquire of sheriffs, stewards, bailiffs, constables, gaolers, and other officers who are remiss in their duty.

By the st. 23 H. 6. 10. justices of peace may inquire, &c. if the sheriff let to farm his county, or any of his hundreds or bailiwicks; or return bailiffs or their servants or any pannel; or if he, his undersheriff, &c. refuse to bail those bailable, (vide Bail, (F 5.) or take more fees than allowed, (vide Extortion,) for which they shall forfeit treble damages to the party and 40*l.*, a moiety to the king, a moiety to the prosecutor.

By the st. 11 H. 7. 15. justices of peace, or any of them, may inquire if the sheriff, shire clerk, &c. enter a plaint in the name of a plaintiff not present in person, or by attorney; or enter more plaints than one for the same cause; or more than there is cause of action for; and if he be convicted on examination, he shall forfeit 40*s.* for every default, which the justices of peace, on pain of 40*s.* shall certify into the exchequer.

And such justices of peace, or any of them, (to be appointed for these purposes at Michaelmas sessions by the *custos rotulorum*, or senior justice of the (quorum) may inquire of defaults in bailiffs not warning defendants to appear in the county court, or not doing their office, who convicted, &c. forfeits 40*s.* for every default.

And the sheriff, &c. shall make no estreats to levy amerciaments, till two justices of peace (1 quorum) have viewed their books, and till an indenture be made of such estreats, under the seals of the sheriff and the said justices; and that the justices of peace swear bailiffs not to levy more than contained in such indenture, on pain of 40*s.* for every default, &c.

By the st. 42 Ed. 3. 9. justices of peace may hold suit, if the sheriff, &c. levy the king's debts, and do not shew the estreats under the exchequer seal to the party, and cause what is paid to be totted; who shall for default pay treble damages to the party, and a fine to the king.

And by the st. 7 H. 4. 3. the justices, before whom issues or amerciaments are forfeit, shall charge the clerk of the estreats on oath, to express in the roll of estreats the cause, the term, the nature of the writ, and parties between whom such estreats and amerciaments were lost.

By the st. 27 El. 7. justices of peace may inquire, &c. of sheriffs, &c. who return jurors without proper addition, or levy issues of any not in right chargeable with them, who shall forfeit five marks to the queen, and five marks to the party grieved.

By the st. 27 El. 12. an undersheriff, bailiff of franchise, their deputy or clerk, or any who meddles with the return of a jury, or execution of process, shall before justices of assise, *custos rotulorum*, or two justices of peace (1 quorum) take the oath of supremacy, and an oath



not to use the office corruptly, nor take more than due fees on return of an inquest, &c. before he executes his office, on pain of 40*l.*, a moiety to the queen, a moiety to the prosecutor; and offences contrary to the act, or oath, justices of peace may hear and determine, and award process, by *fieri facias*, attachment, *capias*, or exigent.

(B 102.) Perjury; what shall be, and what not.—By the common law.

So, by the st. 5 El. 9. justices of peace may inquire of perjury and subornation, contrary to that statute.

Perjury was an offence, punished upon indictment, or information, by the common law. 3 Inst. 163, 164. R. 12 Co. 102. 2 Cro. 8. 5 Mod. 342. Vide ante, (B 1.)

And therefore, if a man committed perjury, he might be punished by information in the star chamber. 12 Co. 101. Dub. Dy. 242. b.

As, if he take an oath before him who has lawful authority to administer, and swear positively and falsely in a material point. 3 Inst. 164. Vide Serement.

[The requisites essential to the crime of perjury are, 1. The oath must be taken in a judicial proceeding, before a competent jurisdiction: 2. It must be material to the question depending. 1 T.R. 63. and wilful. Lofft. 771.]

And perjury shall be punished, though it be committed by a witness for the king, in an information against others. 12 Co. 101. 3 Inst. 164. R. per two J. 2 Cro. 212.

So, perjury in an answer in chancery or exchequer, shall be punished by the common law. 5 Mod. 348. 3 Inst. 166.

Or, in answer to interrogatories. 5 Mod. 348.

Or, in an affidavit in B. R., C. B., or chancery, &c. 5 Mod. 348. Sho. 335. 397. Per Coke, 1 Rol. 79.

An affidavit, if false, incurs the crime of perjury (all other essentials existing) at what time soever it may be sworn. 4 M. & S. 332.

Or, upon a wager of law. Noy, 128.

Or, upon a commission for examination of witnesses.

Though the examination was after the commission determined by the death of the king, if his death was not known. R. Cro. Car. 99.

So, perjury in a court not of record; as, in a court-baron. 5 Mod. 348. Per Twisd. 1 Mod. 55.

Or, an ecclesiastical court. 5 Mod. 348.

In an affidavit made for obtaining a licence of marriage. 1 Vent. 370.

So, it will be perjury by the common law to swear a thing not known by him, though it be not false. R. Pal. 294. 3 Inst. 166.

As, that A. in his presence revoked his will, though he did it in his absence. R. Het. 97.

But it will not be perjury if a man take a false oath before him who has no lawful authority to administer it. 3 Inst. 165, 166.

Or, before him who has no jurisdiction of the cause. 3 Inst. 166. R. Yel. 111.

So, it will not be perjury, if the oath be not direct and positive; as, if he say, *ut meminit*, &c. 3 Inst. 166.

If an answer in chancery be false in a thing, which is not said to be of his knowledge, but of his belief. R. 1 Sid. 419.

So, it will not be perjury, unless it be in a point material to the issue. 3 Inst. 167.

As, if it be asked, whether payment was made for such goods at one time, and he says, it was, it will not be perjury, if payment was made, though not all at the same time. R. 2 Rol. 41, 42.

If he swear that he beat and wounded A. with his sword, it is not perjury if it was with a stick; for all that is material is the battery and wounding. R. Hel. 97.

But it is sufficient, if it be in any degree material; as, if he be perjured directly in his answer in chancery, though it be in a matter not charged by the bill. 5 Mod. 348. Semb. 1 Sid. 274. 106.

If he be perjured in his testimony as to the credit of a witness. R. Sal. 514.

But a man shall not be indicted for perjury, for breach of an oath of his office; as, a judge, sheriff, bailiff, or other officer.

So, he shall not be indicted for perjury, if the matter be explained by another part of the answer, affidavit, &c.

Or, by a subsequent answer. 1 Sid. 419.

(B 103.) By the st. 5 El. 9.

So, by the st. 5 El. 9. a person who procures any witness to commit wilful and corrupt perjury, in any cause depending by writ, action, bill, plaint, or information in chancery, star-chamber, or any court of record, leet, frankpledge, ancient demesne, hundred, court-baron, or court of stannaries, or a witness *in perpetuam rei memoriam*, shall forfeit 40*l.* or suffer imprisonment for half a year, and stand in the pillory an hour in full market, and be disabled to be a witness, &c.

And a person, who, by subornation, or his own act, commits wilful perjury, &c. shall forfeit 20*l.* and be imprisoned for six months, and be disabled to be a witness; and if he have not 20*l.*, to be set on the pillory in a market-place, &c. and have his ears nailed, and be disabled to be a witness; a moiety of the forfeitures to the queen, a moiety to the party grieved, &c.

And upon this statute the party grieved shall have his action. 3 Bul. 147.

Persons grieved ought not to join in the action another who does not appear to be aggrieved. Per two J. 2 Leo. 12.

So, the declaration is not good, unless it describes the lands in regard of which the perjury was committed. 2 Leo. 12.

The plaintiff may sue for a manifest perjury, as the party grieved, though the verdict be for him. Ley, 66, 7.

So, an action for perjury lies against a Jew, though sworn upon the Pentateuch only. 2 Keb. 314.

Or, a witness sworn upon the book of common prayer, having the gospels and epistles. 2 Keb. 314. [Cont. per Windham of a psalm book only.]

A person will be perjured within the st. 5 El. 9. if he swears falsely and positively in any trial, to the proof of the point in issue.

Or, to a circumstance which conduces to the proof of the issue, though it never was material whether such circumstance were true; as, that the

beasts of B. were in such a close, because they have such a mark, when B. never used such mark. Per two J. Dod. cont. Pal. 585. 2 Rol. 268.

But a man is not punishable by this statute, if he perjure himself in an answer in chancery, or the exchequer, for it extends only to witnesses, 3 Inst. 166.

In an answer by a defendant to interrogatories in the star chamber. R. Yel. 120. Cro. El. 148.

Or in a deposition for one, who is a party to the cause, *inter alia*, where a man comes in upon *aide prier*. Dub. Yel. 1228.

Or, is added as a party by order in chancery, upon a bill between other persons, R. Yel. 22.

So, if the perjury be in the spiritual court, for it is excepted by the st. 5 El. 9.

(B 104.) How it shall be punished. By indictment.

Perjury was indictable by the common law. Vide Action by the party grieved, ante, (B 103.)

And an indictment lies for it in B. R. though the perjury was in another court. R. Pal. 294. 2 Rol. 244.

So, an indictment, &c. lies against a witness for perjury, though the party be convicted upon his evidence. Ley, 69.

But an indictment does not lie, upon the st. 5 El. 9. for perjury by a witness, who deposes for the king, in an information by the attorney-general in the exchequer, R. 2 Cro. 120. Adm. 2 Cro. 212.

Or, upon an indictment. R. 5 Co. 99. a.

So, an indictment does not lie upon the statute, for perjury in his own cause; as, upon a wager of law. R. Noy, 128.

So, it does not lie, where the perjury was not as a witness, or *in perpetuam rei memoriam*; as, if perjury be committed in an answer and upon an examination to interrogatories in the star chamber. R. Cro. El. 148. Yel. 120. Vide ante, (B 103.)

If the perjury be in a court of Westminster, and the party confess it; his confession being recorded, he may be set in the pillory, without indictment. 2 Mod. Ca. 179.

Though the perjury was in C. B. &c. 2 Mod. Ca. 179.

An indictment for perjury ought to shew that it was done *voluntarie*. R. Sho. 190. 3 Inst. 167.

It ought to shew the exact breach; and therefore, an indictment for swearing, that A. acknowledged that he was treated at N., *ubi repertum* A. did not acknowledge that he was treated at the city of N., is not a good breach. R. Sho. 335.

That A. suborned B. to take an oath that such a one was present at a conventicle; without saying that B. swore so. Semb. 3 Mod. 122.

If the perjury be at a trial, it must shew, what was the issue, and how the evidence tended to the issue. R. Cro. El. 148. 2 Rol. 429.

If the perjury was before a commissioner of the chancery, it must shew the commission under the great seal, so that there was a power to take the oath. R. 2 Rol. 429.

So, there ought to be the same certainty in an information at common law, as upon the statute. Sal. 514.

The

The indictment ought to shew, whether he committed the perjury by subornation, or on his own accord. 3 Inst. 167.

And shall say, *falso voluntarie & corrupte dixit*; for a conclusion, *et sic commisit voluntarium & corruptum perjurium*, is not sufficient. 3 Inst. 167.

[On perjury in an answer in chancery, it is not necessary to prove the identity of the person who swore it, nor that any person swore it; it is sufficient if his hand-writing is proved, and that the master proves that the jurat was subscribed by him (the master) as being sworn before him. 2 BSM. 1189.]

[By stat. 22 Geo. 2. c. 118. In information or indictment, it is sufficient to set forth the substance of the offence, and before what court or person, with averment of the authority to administer oath, and averment to falsify the matter wherein perjury is assigned, without setting forth the proceedings or the authority.]

[So, for subornation.]

[Justices of assise may order a witness to be prosecuted, and assign counsel; and the prosecution shall be without tax, duty, or fee.]

[Perjury being committed in the booth-hall, within the limits of the county of a city, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by juries of the county at large. Doug. 791.]

[Perjury committed at the Old Bailey, on a trial before a Middlesex jury, is laid in, and tried by a jury of the city of London. Doug. 794.]

As to action upon the statute, vide ante, (B 133.)

[In alleging perjury to have been committed in an affidavit in any court, &c. it is sufficient to state, that the defendant came before the court, and exhibited the affidavit, or paper writing, that court having competent authority, &c. and that he swore falsely such and such things; without adding that any use was afterwards made of the affidavit, or referring to the fines of the court. For the guilt of the defendant cannot depend upon the subsequent use made of the affidavit. 7 T. R. 315.]

[An indictment for perjury, under the statute of Eliz., by which an action is given to the party injured by the false oath, must aver that the affidavit was produced and used against the party. 7 T. R. 315.]

[An indictment for perjury stated the court to have been holden "before A. B. & C., and others their fellows, under a commission of oyer and terminer to the said A. B. & C. and others, and any two of them, of whom the said A. B. & C. should always be one." Held, that the commission, though inaccurately expressed, meant that one of the quorum should be present. 5 T. R. 311.]

[There is an application to the court of K. B. and rule thereon, that an attorney may answer the matters of an affidavit. In an indictment for perjury in his answer, it was held unnecessary to allege where the court was holden when the application and rule were made. 7 T. R. 315.]

In an indictment for perjury, the averment that the question was material is essential, and its omission is not cured by verdict. 5 T. R. 316.

[In an indictment for perjury it was not necessary, even at common law, to shew by detail how the question upon which, &c. was material, but merely to aver that it was so. Still less since the stat. 23 Geo. 2. c. 11. 5 T. R. 311.]

[An indictment for perjury at a trial, it is not necessary to state that issue was joined, or any thing more than that there was a certain cause, &c., and that it came on to be tried in due form of law. 5 T. R. 311.]

[In an indictment for perjury on a trial, the event of the cause need not be stated, since the crime is not affected by it. 5 T. R. 311.]

[An indictment for perjury, drawn as at common law, if defective as such, is not aided as an indictment under st. 23 Geo. 2. c. 11. 5 T. R. 311.]

[A plea of *autre fois acquit*, may be pleaded to an indictment for perjury in an affidavit, where the only distinction between the two indictments, which were both in Middlesex, is, that the former averred that the affidavit was sworn in Middlesex, as appears by the record there; whereas the latter omitted the *prout patet*, and set forth the jurat of the affidavit, which expressed that it had been shewn in London. 9 East, 437.]

[In indicting for perjury upon an answer in chancery, there is no need to prove the identity of the person, or the actual swearing. 2 Barr. 1189.]

[On an indictment for perjury at an election, in polling in the name of A. on a certain day, evidence that the defendant, not being a freeholder and entitled to vote, polled and was sworn, though it does not appear by what name, is evidence to be left to the jury that he polled in the name of A., and in that name took a false oath. 2 Smith, 525. 6 East, 323.]

#### (B 105.) Indictment for subornation.

So, an indictment lies for subornation. Vide ante, (B 104.)

So, for giving 350*l.* to A. to prove a writing given in evidence for another, to be forged; for it tends to subornation. R. 2 Sbo. 1.

#### (B 106.) What judgment for perjury.

For the judgment upon an indictment or information for perjury at the common law, vide 8 Inst. 163.

By consequence of the judgment upon an indictment or information for perjury at the common law, the party shall be disabled from being a witness, till he be pardoned. Sal. 514. Vide Testmoigne, (A 4.)

In an indictment, or information for perjury, upon the statute, the judgment shall be to forfeit 20*l.* and be imprisoned for six months without bail or mainprize, and his oath from thenceforth not to be received in any court of record, until the judgment shall be reversed. And if the offender have not goods or chattels to the value of 20*l.*, then to be set on the pillory in a market-place, within the shire, &c. and to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any court of record, until the judgment be reversed. Vide the st. 5 Ed. 9.

And the disability of being a witness, being part of the judgment, cannot be pardoned; nor shall the party be restored, but by reversal of the judgment. Sal. 514.

But



But judgment shall not be given, unless the party be present in court. Skin. 684.

Though he be outlawed for it; for a *capias* ought to issue, upon which he shall be brought into court. Skin. 684.

(B 107.) Conspiracy.

Justices of oyer and terminer have authority to inquire of confederacies. 1 Sal. 174.

And therefore an indictment lies for a conspiracy of indicting for any offence temporal or ecclesiastical falsely, though nothing be done in execution of the conspiracy. R. 1 Sal. 174.

As, for conspiring to charge a man with being father of a bastard. R. 1 Sal. 174.

Though it does not aver that he is innocent; for it shall be intended, where he charges falsely. 1 Sal. 174.

[One conspirator may be convicted after the other is dead, or before he has pleaded. Str. 1227.]

[If several persons, in order to get the rewards for apprehending highwaymen, agree that one of them shall procure a man to rob another of them, which is done, they may be indicted, and on conviction sentenced to stand in the pillory twice, to be imprisoned seven years, and till they find sureties, for three years more. Foster, 121.]

[Indictment for a conspiracy falsely to accuse a man of taking hair out of a bag, the goods of A., and exacting money and notes from him, as a composition for not prosecuting, lies before quarter-sessions; for a conspiracy is a trespass, and tends to the breach of the peace. 3 B. M. 1320.]

[Such indictment is good, though it does not say, taking unlawfully or feloniously. Ibid.]

[A conspiracy to pervert the cause of justice, by certifying a fact, is criminal, whether or not the parties knew at the time that it was false; therefore, on indicting them, it need not be averred that the falsehood was known to them. 6 T. R. 619.]

[It is criminal to conspire to charge a man with acts that may affect his reputation only. 1 Blk. 368.]

[The conspiring to raise the price of the public funds, by illegal means, for instance false rumours, on a given day, and with a criminal view, for instance with the intent to injure those who may purchase on that day, is an indictable offence. The end contemplated may be prejudicial to a class of the community, and therefore the act, coupled with this and the intention, is criminal. 3 M. & S. 67.]

[A conspiracy to commit a civil trespass by night, and to go armed to resist obstruction, is not an indictable offence. 13 East, 228.]

[Where several must join when acting in their official capacity, they are not so far considered one person in law; that if they conspire to pervert the course of justice by such act, they may not be indicted for conspiracy. 6 T. R. 619.]

[The survivor of two conspirators may be indicted. 13 East, 412.]

[An indictment for conspiring to raise the price of the public funds by illegal means, not naming the individual purchasers who were to be or who were actually defrauded; charging the intent to have been to have

raised the public funds and government securities of this kingdom (that is the united kingdom of Great Britain and Ireland) is sufficient. It need not specify the purchasers, because it was not essential to the crime that the design should have been to defraud any one in particular, nor that any person should be defrauded, since the conspiracy alone, without its consequences, made the offence. And the appellation, the "public funds of this kingdom," is unobjectionable; since, though part of the funds is applicable to Great Britain, part to Ireland separately, yet collectively they answer to the name given. 3 M. & S. 67.

[On the trial of an indictment for conspiracy, the fact of conspiracy may be inferred from circumstances. 1 Blk. 392.]

[Where several conspire for an illegal purpose, the act of one done in furtherance of that purpose, is evidence against all. 6 T. R. 527.]

[After the conviction of several on an indictment for conspiracy, a new trial cannot be moved for on the behalves of some, unless all are present. The reason of the rule is, to prevent the most guilty from keeping out of the way, and putting forward the least guilty, in order to try the result of a motion for a new trial. 3 M. & S. 2, 10.]

[(B 108.) In what cases justices of peace have no authority.]

[Vide ante, (B 1. 3.)]

### (C) Conviction by justices of peace.

#### (C 1.) In what cases necessary.

If a statute inflicts a penalty, for an offence to be determined by one or more justices of peace out of sessions, there must be a conviction for the offence before the penalty levied. Vide 1 Str. 127.

And such conviction ought to be made in due form.

[Quære. Whether a person can be convicted of two distinct penalties in the same information? 1 T. R. 249.]

[Only one penalty can be incurred on the same day on the st. 5 Ann. c. 14. for the better preservation of the game. (Com. 274.) 10 Mod. 26.]

[Nor, on the st. 29 Car. 2. c. 7. "for the better observation of the lord's day." Cowp. 640.]

[Two penalties may be incurred on the same day on the st. 12 G. 2. c. 36.]

(C 2.) In what manner.—There must be a summons to the defendant.

A conviction ought to be made in the manner the law requires. Vide ante, (B. 47.)

And therefore the defendant must be summoned before he be punished.

[But defect in the summons is cured by the defendant's appearance. Sta 261.]

If the conviction does not shew the defendant to be summoned, it shall be quashed. 6 Mod. 41.

So,

So, if it does not shew a summons at a possible day; as, if he says, whereas A. was summoned to appear, and did appear on Tuesday, 17th April, where the 17th April was Friday. R. 1 Sal. 791. 1163. Ca. 41.

And where the day mentioned for appearance is impossible, the appearance upon another day shall not be intended. 1 Sal. 181. 1163. Ca. 41.

[If the summons, appearance and conviction, be had to be on a day prior to the information and examination of the witness, it is bad. 1163. Raym. 1546.]

[In convictions the evidence must be set out. Str. 919. D. per Hardwicke C. J. It is fully settled. Str. 998. Andr. 81. 1163. Doug. 486. 1 T. R. 188. 6 T. R. 75. 8 T. R. 920.]

[So, it is not sufficient to say, the charge as set forth being proved on oath of A. and B. 4 B. M. 2063. In orders it is not necessary.]

[Omission of proof to shew the offence within a statute shall not be helpt, by the conclusion of the conviction, *contra formam statuti*. Dug. Skm. 562.]

[If the defendant is convicted on the evidence of the informer who is entitled to part of the penalty, it is bad. Str. 316. Andr. 18, 240.]

[If the statute requires that the conviction be by justices of the county where the offence was committed, it must appear on the conviction, or it will be quashed. Ibid. Str. 261.]

[If it appears on the conviction, that the witness swore generally that the defendant was guilty of the premises, it is bad; for he took on himself to swear the law. Str. 316.]

[A conviction shall be presumed to be right, if it does not appear to be wrong; as, if one is convicted for obstructing an excise-officer, the court will presume it was in the day-time. 2 Ld. Raym. 1375. Str. 608.]

[Proceedings upon convictions must be in the present tense. Str. 608.]

[In convictions for non-payment of money, (as collector of a turnpike,) the sum, and times when received, must be mentioned. Str. 900.]

[An excuse in a proviso need not be taken notice of in a conviction; but if it is in an enacting clause, it must. Str. 1401. Andr. 289.]

[Feme-covert may be convicted for a crime which can be committed by her alone; as, for selling gin contrary to 9 Geo. 2. c. 28. Str. 1120.]

[If an order is good in substance, it is sufficient, and it need not be literally so strict as an indictment; thus, an alternative charge, as aiding in removing or concealing goods, (on st. 11 Geo. 2. c. 29.) is good. 1 B. M. 399.]

[An order against a man for aiding in removing or concealing goods, is good, though it doth not state that the tenant removed them. Ibid.]

[If the defendant appears, any irregularity in the summons, or even the want of a summons, 3 Burr. 1785, altogether becomes immaterial; at least, if it be also stated that he did not require further to make his defence.]

defence. 1 East, 649. Except it be in a case where a special form of summons is required by the act, which has not been complied with. Comp. 30.]

[In convictions the evidence should be given in the defendant's presence, (2 Burr. 1163.) that he may cross-examine the witness. To read to him a deposition, taken in his absence, and which the witness, without being re-sworn, affirms to be true, is not sufficient. 1 T. R. 125.]

[In convictions the evidence should be given in the defendant's presence. If however, having been given in his absence, it be read over to him, and he confess the charge, such confession is a waiver of the irregularity, and shews that there has been no injustice. 1 T. R. 820.]

[In convictions, if some evidence is offered tending to prove the offence, the convicting magistrate is exclusively the judge, whether or not it be sufficient. 6 T. R. 177. 376.]

[Though the general rule be, that no material omission in the evidence as to the description, in those particulars which are necessary to constitute the offence, can be supplied by intendment; yet how far that rule may be qualified in favour of what is necessary and plainly to be collected from the facts stated, though it be not expressly averred, may be judged from. 7 East, 989. 3 Smith, 377.]

[The evidence must go to establish the identical offence, which forms the subject of the information. 8 T. R. 588. Lofft. 183.]

[Semble, that the circumstance of the articles being found concealed in defendant's garden, with the appearance of being just worked off, is evidence to warrant the inference that they were in his custody and possession. 14 East, 267.]

[The old rule, that the court will be acute in discovering defects in convictions, is exploded; since the court has to question the policy of supporting summary jurisdiction established by the legislature. 2 T. R. 23.]

[The court cannot intend nothing in favour of convictions, and will intend nothing against them. 13 East, 139.]

[If the charge falls short of the necessary legal description of the offence, the omission is not cured by any allegations of its being done unlawfully or fraudulently, or the like; or by stating that it was against the statute. 8 T. R. 542.]

[No presumption from the manner of describing the fact can supply the omission of a direct averment of its being within the requisite jurisdiction. 1 East, 278.]

[If knowledge of the party be an essential of the offence, nothing short of a direct averment to that effect is sufficient. 8 T. R. 536.]

[Wherever a statute makes a guilty knowledge part of the definition of an offence, the knowledge is a material fact, which in a conviction or indictment for the offence, must be expressly averred; and the omission is not aided by a proviso, that no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alleged were proved. 8 T. R. 536.]

[The validity of a conviction must be determined by what appears upon the face of it, not by reference to matter dehors; thus matter contained in the certiorari removing it. 8 T. R. 553.]

[Con-

[Convictions must be precise, that the court may see that they fall within the jurisdiction of the justices. 2 T. R. 24.]

[The reason for requiring greater certainty in convictions than in indictments is, because the defendant has no opportunity of pleading. 8 T. R. 542.]

[Where a blank is left for inserting the offence, the same accuracy is required in the description of it as in other cases. 18 East, 139.]

[A conviction for buying a certain quantity of wheat, to wit, fifteen bushels of wheat (contrary to 22 & 23 Car. 2. c. 12.) is sufficiently certain. 5 T. R. 358.]

[Every thing requisite to support a conviction, should appear on the conviction itself. 6 T. R. 538.]

[Although an act directs, "that no conviction under that act should be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alleged be proved," yet, notwithstanding those or the like words, every material fact must be alleged. 8 T. R. 536.]

[If a statute direct that a conviction shall be, "in the form following," which it gives, the form must be strictly pursued, without variation or addition; but if it adds, "or to the effect following," an addition to a form substantially pursuing that prescribed, will not vitiate, being surplusage. 4 T. R. 767.]

[A conviction must be good in all its parts; the information must be supported by the evidence and the judgment by both. 1 T. R. 249.]

[If in a conviction, the prosecutor negatives some only of the exceptions, which he is not bound to negative at all, the negation may be rejected as surplusage. 1 T. R. 320.]

[If in a conviction it appears that the information and judgment were on different days, the information may be recited in the past tense, since a conviction speaks as to the time of the adjudication. 1 T. R. 320.]

[An information appearing to be exhibited on 29th of May 1805, charging the fact within three months, to wit, on 12th May now last past; held, that these words, "now last past," might by reason of the accompanying words, "within three months," refer to the day and not the month, so as to obviate the objection of the information being out of time by supposing it to refer to May 1804. 7 East, 389. 3 Smith, 377.]

[Semble, that if the place of appearance be not mentioned, it will be intended to have been at the place where the information appears to be laid; and this, though the examination of witnesses and the judgment are stated at a different place from the former. 8 T. R. 284.]

[It is necessary that the evidence should be set out in a conviction, that the court may judge whether it was admissible. 4 Burr. 2063. Doug. 486. 7 T. R. 153.]

[No precise form of words is necessary in stating the proofs of the offence. It is sufficient if the deposition be in terms ordinarily intelligible, having regard to the usual import of technical modes of speech adapted to the subject. 7 East, 393. 3 Smith, 377.]

[The evidence, as well for as against the defendant, may very properly be set forth in conviction. 8 T. R. 220.]

[It is sufficient if the evidence be stated to be upon oath, without adding



adding that the magistrate was legally authorized to administer it. 2 East, 195.]

[A conviction must shew that the evidence was given in the presence of the defendant. 6 T. R. 75.]

[In a conviction it is sufficient, if enough appears to shew that the evidence was given in the presence of defendant, without stating that he was present. Cowp. 241.]

[If it appear on a conviction that the evidence was given on the same day that the defendant appeared and pleaded, the court will presume, that it was given in his presence, provided there be nothing in the statement to contradict that supposition. 3 Burr. 1785. 2 T. R. 18. 7 T. R. 152.]

[If the evidence be stated as having been given the same day the appearance and plea are recorded, it will be intended to have been given in his presence, even though the examination of witnesses and appearance are stated as at different places. 8 T. R. 284.]

[The defendant was stated to be summoned, and to have appeared on 4th of June, and the conviction was signed and sealed on the same 4th of June. Upon this statement it was agreed, that the proceedings were to be taken as one continued act from the appearance to the conviction; therefore, that the evidence was to be presumed to have been given in the defendant's presence, since his departure, during the continuance of the transaction, would not be intended. 7 East, 389. 3 Smith, 377.]

[The confession only admits the charge, but not the legal effect of it. 3 Burr. 1475.]

[A conviction in which the persons charged were described as Messrs. Harrison & Company, is a nullity even against the party named. 8 T. R. 508.]

[An impossible or incongruous date, if the conviction be complete without it, may be rejected as surplusage. 2 East, 196.]

[If a certain time be limited, within which the conviction must take place, a conviction after that period cannot be supported, though it appears upon the face of it to be upon an information commenced in time, and adjourned to a future day. 3 East, 467.]

[On a conviction before a magistrate, it must appear expressly upon the statement of the evidence that the offence was committed within the time limited for the conviction. 3 Smith, 286. 7 East, 146.]

[In fixing the offence to a certain date it is sufficient to refer to a date already mentioned and ascertained. 7 East, 389. 3 Smith, 377.]

[In convictions it must appear from the evidence, that the offence was committed within the jurisdiction of the convicting magistrate. 1 T. R. 241.]

[A conviction on 41 Geo. 3. c. 38. against a manufacturer for combining to refuse work, stated that the defendant on a certain day, (he being then employed by G. S. &c. of W. in the county aforesaid, in the trade of, &c. carried on at W., and whilst he was such workman, and so employed as aforesaid,) refused to work with one S. B., then also employed by G. S. &c. in the said manufacture carried on by them at W. aforesaid. Quashed, because it was not expressly averred where the refusal was given, so that it did not appear to be within the jurisdiction of the magistrate. 13 East, 139.]

[Con-

[Conviction by the justices of Middlesex, for having in the defendant's custody and possession a private still, contrary to 19 Geo. 3. c. 50. The deposition was, that the witness went to the house of the defendant at E. in the county of Middlesex, and that he found the said house a private still, just worked off. Q did not appear that the garden was in Middlesex.]

[A conviction on 39 & 40 Geo. 3. c. 106. for enticement to controul a master manufacturer, held bad, stated the words and terms of the agreement, nor the words of the act. 2 Smith, 418. 6 East, 417.]

[Every exception contained in the clause creating the offence must be negated. 8 T. R. 542.]

[As to exceptions coming by way of proviso in a separate clause or act, and without reference in the enacting clause, incorporating them therewith, the defendant must bring himself by proof within the proviso. 1 East, 647.]

[It is unnecessary to negative a claim by the owner within ten days after seizure, where the information appears to have been laid more than ten days after the offence charged, and proved to have been committed. 14 East, 267.]

[The want of the necessary negative averments is not merely a formal substantial defect, and therefore is not aided by a provision in the statute that the conviction shall not be vacated for want of form. 8 T. R. 542.]

[The conclusion is form only. Therefore a statute which provides that no conviction under it shall be objectionable for want of form, aids an error in that averment. 1 T. R. 320.]

[An adjudication that the defendant is "thereupon convicted," not adding "of the premises," or the like, is sufficient, since the necessary inference is, that it is for the offence before mentioned. 2 T. R. 18.]

[The words "the offence aforesaid," in the adjudication, refer to the offence described in the information, so as to render another particular description unnecessary. 4 T. R. 767.]

[The judgment must contain, in form, an adjudication of forfeiture as well as of conviction, let the punishment be fixed or not. 7 T. R. 298.]

[Where a discretion is given to the magistrates in awarding a corporal punishment, that which is discretionary must be distinctly ascertained by the conviction. 5 East, 399. 1 Smith, 547.]

[Where the amount of the penalty is described, and the persons entitled to the same, or even where both the amount and the persons are described, but the individuals answering in each of these cases the magistrate in particulars at the time of the adjudication, by name, of the party entitled to the same, so as to leave no part of the judgment uncertain. 2 T. R. 96.]

[A conviction "for the said offence," where two offences are charged by the information and evidence, is bad, from the uncertainty to which offence it refers. 1 T. R. 249.]

[A conviction on stat. 19 Geo. 3. c. 50. set out an information of the discovery, in defendant's possession, of certain private stills, &c. (each of which subjects the party to a penalty of 200*l*.) and alleged that defendant, for said private still, forfeited one penalty. The evidence corresponded with the information, and the adjudication was of a forfeiture of 200*l*. for his said offence. Held good. 14 East, 267.]

[A magistrate empowered by statute to award the reasonable charges of a distress on conviction, must ascertain the amount in the conviction. 1 East, 189.]

[The adjudication of a penalty, in a conviction, to the overseers of the poor of the township of X., where the statute has directed payment to the overseers of the poor of the parish where the offence is committed, is bad. Nor can it be intended, according to the fact, that the township of X. maintains its own poor separately, even supposing they would then be exclusively entitled to it. 6 T. R. 538.]

[The judgment, in a conviction, being an entire act, cannot be severed, and therefore if it be bad as to part, the whole is thereby vacated, although the several parts may be in their nature distinct. 5 East, 344. 1 Smith, 547. 2 Str. 900.]

[One convicted of playing at bowls, under 33 Hen. 8. c. 9. s. 16. is not punishable as a disorderly person, within 17 Geo. 2. c. 5. Cowp. 35.]

[There seems to be no objection to including, in one conviction, several distinct offences and penalties of the same kind. 8 T. R. 284.]

[The formal conviction may be drawn up at any time, before the return to the certiorari or sessions, though after a commitment, 12 East, 82.; or after the penalty has been levied by distress. 1 East, 188.]

[Even after the magistrate has delivered to the defendant a copy of a conviction, as that upon which the subsequent proceedings have been founded, he is not thereby precluded from drawing up and returning a conviction in a more formal shape, which is to be taken as the only authentic record of the proceedings. 1 East, 188. 12 East, 67. 15 East, 41.]

[A magistrate should, in all cases, return a conviction to the sessions, whether the party convicted appeals or not, or whether an appeal is or is not given, in order that the crown may not be deprived of its share of the forfeiture. 2 T. R. 285.]

[A conviction on 5 Geo. 3. c. 14. for preservation of fish, was quashed, because it did not appear thereon, that the fishing was without the consent of the owner. 4 Burr. 2279.]

[A conviction, under st. 5 Geo. 3. c. 14. for fishing without the leave of the owner, alleging the offence to have been committed "in part of a certain stream which runneth between B., in the parish of A., in the county of W. & C. in the same county, was quashed, because it did not show that the intermediate course of the stream, between the two termini, was in W. 1 East, 278.]

[A joint action of debt may be brought against several persons to recover one penalty upon the game laws; thus the penalty of 5*l*. under st. 5 Ann. c. 14. s. 4. for keeping a lurcher to kill and destroy the game. 2 East, 578. n.]

[In an action of debt against several, for a penalty under the game laws, some may be found guilty, the others acquitted. 2 East, 578. n.]

[A charge

[A charge that the defendant on such a day did keep and use a dog, and also a gun, to kill and destroy game, is of a single offence only; therefore a conviction "for the said offence," is good. 7 T. R. 152.]

[An information on the game laws need not be *qui tam*, as well for the parish as for the informer. 7 T. R. 152.]

[A description of the dog, as a dog called a lurcher, is sufficient. 15 East, 456.]

[A conviction for using a gun, being an engine for the destruction of game, is void, unless it add that the party used it for the destruction of game. Dougl. 683. n.]

[Declaration that the defendant used a gun, being an engine to kill and destroy the game. Held well, being after verdict. Cowp. 825.]

[The information, in a conviction on the game laws, must negative the qualifications enumerated in st. 22 23 Car. 2. c. 25. 1 East, 643. n. Dougl. 345.]

[Negating that the defendant had not any estate, &c. nor was in any other manner qualified, does not sufficiently negative that he had not an estate in right of his wife. 15 East, 456.]

[The rule, with one exception only, is, that the evidence must be set out in a conviction particularly. The exception is a conviction upon the game act, 5 Ann. c. 14. 9 East, 358.]

[In convictions the general rule is, that the particular facts to which the witness deposes, must be stated, and not the conclusion from those facts, in order that the court may see whether the magistrate has convicted properly; an exception to this rule occurs in convictions under the game laws, where a statement that the defendant kept a gun to destroy game has been held sufficient; but upon this ground only, that such has been the long established form, which it would be dangerous to overturn. 2 T. R. 18.]

[In convictions upon the statute 5 Ann. c. 14. for killing game, &c. the evidence may state generally that the defendant is not qualified, without specifically negating each particular qualification. 1 T. R. 125.]

[Declaration in debt that the defendant kept a snare for killing hares, *contra formam statuti*, whereby, and by force of the statute, an action hath accrued to demand 5*l.*, held good, the offence being created by one statute, and the action for the whole penalty to the informer being given by several subsequent statutes, incorporated in the st. 2 Geo. 3. c. 19. 3 Smith, 506. 7 East, 516.]

[A penal action is not an appropriate form of proceeding to determine a question of right. If, therefore, a defendant in an action on the game laws, can shew a colourable right, either in himself or another (of which a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim, or the single act with which he is charged, is not evidence) he will succeed; even though the parties have agreed to determine the right in this form. 4 T. R. 681. Id. n. (a.) 682. n. 5 T. R. 19.]

[In actions on the game laws, though it is necessary to allege that the defendant is not qualified, yet the plaintiff need only prove the offence. 1 T. R. 144. 648. 1 B. & P. 468. 3 B. & P. 307. 1 East, 650.]

[Held that justices before whom an information was exhibited on the game laws, were justified in founding the want of the defendant's qualification, upon the fact of his having sworn before them, acting in another

ther capacity, as commissioners of the income tax, to an estate under 100*l.* a year. 8 T. R. 220.]

[A snare can only be kept for the purpose of killing game. But the act of keeping a gun is ambiguous. 2 T. R. 19.]

[It cannot be inferred from the bare act of keeping a sporting dog, that it was kept to destroy game. 15 East, 271. Loffe 179. accord. 2 T. R. 19. contra.]

[Under the st. 25 Geo. 3. c. 50. these defendants only are entitled to treble costs, who are acquitted upon prosecutions for selling guns; not those, therefore, who are sued for penalties under the act. 1 T. R. 308.]

[An order of the justices to keep in confinement, for three days during the sessions, is not a commitment in execution under 13 Geo. 2. c. 30. which must be for three months, if at all. 3 Anst. 898.]

[On an appeal from a conviction for killing game on 13 Geo. 2. c. 80. the quarter sessions may either order payment of the penalty or imprisonment; therefore a recognizance of a surety, taken for trying the appeal, and paying the penalty with costs, in case of affirmance, is bad. 3 Anst. 898.]

[The killing of several hares in the same day, incurs only one forfeiture. 8 T. R. 284.]

[Where several persons join in an offence against the game law, only one penalty can be recovered. 2 T. R. 713. Hence, two cannot be convicted in separate penalties under 5 Ann. c. 14., for using, or for keeping a greyhound to destroy game. 4 T. R. 809.]

[An action brought by the loser to recover back money lost at play, is remedial and not penal, and a new trial may be had therein. 2 Blk. 1226.]

[Where several win money at play, they are only liable to the loser jointly, under the st. 9 Ann. c. 14., his claim being founded in contract. 7 T. R. 257.]

[Money fairly lost at play, can only be recovered back under the st. 9 Ann. c. 14. s. 2. and only then on a count referring to the statute. 1 M. & S. 500.]

[Under 9 Ann. c. 14. s. 2. the loser must sue for the thing lost, within the three months, since the contract is not made void. 2 N. R. 413.]

[A bill against the winner of more than 10*l.* at play, must state the plaintiff to be the loser, or three months have elapsed since the offence. 2 Anst. 504.]

[As to what evidence is sufficient to convict under st. 12 Geo. 2. c. 28. see 5 T. R. 338.]

[Semble, that in an action for the penalties given by 9 Ann. c. 14. s. 2. a bill of discovery, filed against the defendant, for the purpose of a former action on the former part of the second sect., for the money lost, may be given in evidence. 1 Mars. 497. 6 Taunt. 141.]

[The st. 32 Geo. 3. c. 53. s. 5. enacts, that penalties levied under that act, except the informer's share, shall be paid to the receiver appointed by the act. It seems that this does not alter the form of adjunction in a conviction. 5 T. R. 341.]

### (C 3.) Remedy upon an undue conviction.

A justice of peace is a judge of record; and if he acts within his jurisdiction pursuant to a statute, his judgment on conviction shall not be avoided by B. R., nor the party in execution upon it set at large. 100. 171.

But



But if a justice of peace does not pursue the statute, his proceeding is void, and *coram non iudice*; and there shall be redress by B. R. upon removal of the conviction or order before them by certiorari. *Ibid.*

[An appeal from a conviction is in the nature of a writ of error. 1 T. R. 417.]

Where a statute gives an appeal from a conviction upon certain conditions, with which, as well as the right to appeal, the justices convicting are required to make the party acquainted, he does not lose his right to appeal by non-compliance with those conditions, through neglect of the justices to inform him of them. 4 T. R. 585.]

[If an order of commitment be excepted out of the appeal clause, and conviction and commitment comprized in one instrument cannot be made the subject of appeal. 12 East, 572.]

[If an appeal is given to the quarter sessions, from a conviction or otherwise, and the party make an informal appeal, which is on that account dismissed, he is concluded from prosecuting a second appeal, though within the time limited, since the meaning of the privilege given is, that he shall appeal once, but no more. 3 T. R. 776.]

[In appeals limited to the next sessions, where the appellant relies on an objection independent of the merits, and procures an order of the sessions quashing the conviction on that ground, which order is afterwards set aside by the court of K. B.; the appellant cannot afterwards go to the sessions again to hear the appeal discussed upon the merits, by entering continuances from the first appeal. 15 East, 333.]

[If no limits are fixed by the act for the time within which an appeal must be brought, it is nevertheless understood that it must be within a reasonable time. 1 M. & S. 448.]

[The st. 24 Geo. 3. c. 81. s. 19. provides "that if any person shall find himself aggrieved by the judgment of any such justice, &c. he may appeal to the next general quarter sessions." The word judgment refers to the conviction, not the subsequent execution, so that the defendant must appeal, if at all, to the sessions next after the conviction. 1 T. R. 414.]

[No appeal lies to the sessions from a conviction by two justices, under statute 25 Geo. 3. c. 72. s. 9. 2 T. R. 504.]

[The stat. 17 Geo. 3. c. 56. gives "an appeal against the convictions founded upon that act, and requires the convicting magistrates to make known to the person convicted his right to appeal," which virtually implies, that they must also inform him of the necessary steps to be taken in order to appeal. 4 T. R. 584, 585. After a conviction under that act, the justices inform the defendant that he has a right to appeal, who thereupon answers, that he thinks he had better pay the penalty. Held, that by such avowed relinquishment of his right to appeal, he discharged the justices from the duty of stating to him the steps, &c. 8 M. & S. 493.]

[It is discretionary with the court whether to grant or refuse a certiorari to remove a conviction.]

[If there is a probable ground that injustice has been done below, it will be granted; otherwise not, as where the defendant's guilt is a fair inference from the premises. 5 T. R. 251.]

[Even where a statute, in express terms, declares that the proceedings shall not be removed by certiorari, this does not prevent its issuing at the suit of the prosecutor. 15 East, 333.]

[The court will not grant a certiorari to remove a conviction, unless the party applying for it enters into a recognizance to pay costs. 1 T. R. 82.]

[The enactments of st. 5 Geo. 2. c. 19. s. 2. & 5. are imperative. Therefore, a certiorari to remove a conviction was quashed, because, 1. The party did not join with his sureties in the recognizance; 2. Because he did not apply for the certiorari within six months from the date of the conviction. 4 T. R. 281.]

[Where a general form of conviction is given and pursued, no benefit can be derived from removing it by certiorari, because the proceedings or examinations need not be returned, but only the conviction, which, being general, does not exhibit the error. 2 T. R. 285.]

[A conviction was affirmed on appeal, and afterwards on removal by certiorari into K. B. was quashed for a defect in the information. The court refused to compel the magistrates to return the original information, which was perfect, or to proceed thereon. 8 T. R. 625.]

[A certiorari will not lie to remove a conviction, by commissioners of excise, for the double duties on beer. Dougl. 549.]

A certiorari will lie to remove a conviction on st. 11 Geo. 1. c. 30. s. 16. for harbouring tea and spirits, either by justice of peace, or commissioners of excise. Dougl. 553.]

[The result of the several provisions in st. 16 Geo. 3. c. 30. passed to prevent deer-stealing, is, that the defendant has an option, either to remove the conviction by certiorari, or appeal to the sessions. By adopting one, he renounces the other. 2 T. R. 89.]

[The provision in st. 36 Geo. 3. c. 60. s. 9. giving an appeal to the sessions from the convictions of justices, under that act, declares that the determination of the justices shall be final. Yet held, not to prevent the defendant, after an appeal tried and determined at the sessions, from suing forth a certiorari to remove the proceeding. 8 T. R. 542.]

[The conviction, returned to the sessions or the court of K. B., is the only one of which those courts respectively can take notice. 1 East, 188. 12 East, 67. 15 East, 41.]

[After a conviction has been returned to the sessions, a return of that fact, by the convicting magistrate, to a certiorari sued to remove it, annexing to the return a copy of the writ, is sufficient. 2 T. R. 285.]

[A special case may be returned to the K. B. with the conviction. 15 East, 333. Lofft. 348.]

[In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to shew that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was a want of probable cause. 1 Mars. 220. 5 Taunt. 580.]

[On an appeal from a conviction for killing game, on 13 G. 3. c. 80., the quarter sessions may either order payment of the penalty, or imprisonment, therefore a recognizance of a surety, taken for trying the appeal, and paying the penalty, with costs, in case of affirmance, is bad. 3 Anst. 898.]

[As to the right to remove a conviction, vide 5 G. 2. c. 19. 13 G. 2. c. 18.

[In actions against justices on account of convictions, second damages only are recoverable (besides the penalty) if any levied, unless malice be alleged. 43 G. 3. c. 141.]

(D 1.) Sessions

## (D 1.) Sessions of justices of peace.

Justices of peace may hold their sessions for the administration of justice within their precincts. Vide Dalt. 650. c. 185.]

And their sessions are petit, general, or quarter sessions.

An assembly of two justices, or more, (*quorum unus*,) not only for inquiry, but also to hear and determine, makes a session. Lamb. 373, 374. l. 4. c. 1.

Though the quarter-session is a general session, yet there may be a general session of the peace at a different time. Lut. 911.

The whole session is but one day in law. Sal. 607.

And if it be said to be held the 20th and 27th of October, it will be bad. R. Sal. 605.

Persons *eundo & redeundo* to and from sessions have the privilege of not being arrested. Semb: 1 Lev. 159.

And if such person be arrested *in facie curiæ*, the court will discharge him. R. 1 Brownl. 15.

But if the arrest be not *in facie curiæ*, the court cannot discharge him. 1 Brownl. 15. Semb. where the writ of privilege of a *custos rotulorum* was pleaded to an action for an escape, and held a bad plea. Ray. 100.

## (D 2.) At what time held.

By the stat. 12 R. 2. 10. justices of peace shall keep their sessions in every quarter of the year at least, and for three days, if need be.

And therefore, by the stat. 2 H. 5. 4. in the first week after the feast of St. Michael, the first week after the Epiphany, the first week after the clause of Easter, and the first week after the translation of St. Thomas the martyr, and oftener, if need be.

But by the st. 14 H. 6. 4. the justices in Middlesex need hold their sessions but twice a year.

## (D 3.) How summoned.

If a sufficient number of justices of peace and others assemble, they may hold a session, though not summoned by precept. Lam. 375, 376. l. 4. c. 2.

But the regular course is, that it be summoned by a precept of two justices. Lamb. 375. l. 4. c. 2.

Otherwise, none ought to be punished for default of appearance. Lamb. 376. l. 4. c. 2.

And a precept by one justice is not sufficient, though it be by the *custos rotulorum*; for he has no other authority for this purpose than as a justice of peace. Lamb. 377. l. 4. c. 3.

And a precept by two justices cannot be superseded by other justices of peace. Lamb. 378. l. 4. c. 2.

Yet, if two justices make a precept for a session, two others may make a precept for a session at another place. Lamb. 379. l. 4. c. 2.

And the proceedings at both places are good, for they are of equal authority. Ibid.

The king may make a *supersedeas* to a precept of two justices of peace. Crom. J. 107. b. (Vide Lamb. 378. l. 4. c. 2.)

And it may be directed to the justices, or to the sheriff. *Crom. l. 107. b.*

[If the sessions is once dropt and not adjourned, it cannot be resumed. *B. S. C. No. 105. Str. 1263.*]

(D 4.) Who ought to attend.—*Custos rotulorum.*

By the commission in a county, the *custos rotulorum* ought to attend at the sessions with records, &c.

By the st. 37 H. 8. 1. reciting, that the lord chancellor by reason of his office had the appointment of the *custos rotulorum* in every shire, &c. no person shall be appointed, but such as hath a bill signed by the king, to whom the chancellor shall make a commission to be *custos rotulorum*, till the king assign another by bill, &c. to hold by himself or sufficient deputy learned in the law.

But by the stat. 3 & 4 Ed. 6. 1. the lord chancellor, &c. may appoint the *custos rotulorum* to exercise by himself or deputy, as before 37 H. 8. without bill signed by the king.

Provided the archbishop of York, bishops of Durham, Ely, chancellor of the duchy of Lancaster, or any corporation or other who have authority by patent, or otherwise, to constitute a *custos rotulorum* for any place, may still do so.

— And there was the same proviso in the stat. 37 H. 8. 1.

And now, by the stat. 1 W. & M. 21. s. 4. the *custos rotulorum* shall be appointed as directed by the st. 37 H. 8. 1.

After justices of peace were made judges of record by the stat. 34 Ed. 3. 1. it was convenient that the king should appoint one in the commission to have the custody of the rolls and records of the court, who is the *custos rotulorum*. Per Holt, Sho. 528.

And thereupon, the chancellor *virtute officii*, without other warrant, makes a commission or grant to him to be *custos rotulorum*, which was virtually the appointment of the king, for the commission was in the king's name. Per Holt, Sho. 529.

But all the records of the sessions of the peace are, in reputation of law, in the custody of all the justices; and a certiorari to remove any of them is directed to the justices generally. Per Holt, Sho. 528, 529.

And the king shall not make a person, not in the commission, *custos rotulorum*. Sho. 529.

(D 5.) Clerk of the peace.

By the st. 37 H. 8. 1. reciting, that the *custos rotulorum* used to appoint the clerk of the peace, &c. the *custos rotulorum* shall in every shire appoint such able person, instructed in the law, as shall be fit for the office, during such time as he continues *custos rotulorum*, so he demean himself justly, &c. to exercise by him, or his deputy learned in the law, and admitted as such by the *custos rotulorum*.

And by common equity, the *custos rotulorum*, having the custody of the records, ought to appoint the clerk with whom they shall be entrusted. Per Holt, Sho. 530.

By the st. 1 W. & M. 21. s. 5. the *custos rotulorum* shall appoint a clerk of the peace, able and residing in the same county, to execute the

the office by himself, or sufficient deputy, and to receive the fees, &c. as long as he shall well demean himself in the said office.

And therefore, a *custos rotulorum* having made a clerk of the peace since this statute, he has the office for life *quamdiu se bene gesserit*. R. and afterwards affirmed in Parl. 1 Sho. 427. 506. 516. 536. (Vide Sho. 556.) Ca. Parl. 166, 4. 4 Mod. 167.

And the *custos rotulorum* cannot make him for years, or *durante bene placito*, or for the continuance of his office. Per Holt, Sho. 535.

He may be made without deed; for the *custos rotulorum* has but a nomination. R. Sal. 467.

But by the st. 1 W. & M. 21. s. 6. if a clerk of the peace exhibit himself in his office, and a charge in writing of his non-exhibition to the justices at the general quarter sessions, and due proof openly in the quarter sessions, they may charge him; and the *custos rotulorum* may appoint or refuse to do so before next quarter sessions, the justices at general quarter sessions may do so.

And if the *custos rotulorum* sell, or take bond, &c. for any reward, &c. directly or indirectly to himself, or any other, for his appointing such clerk of the peace, both shall forfeit double the value of the sum given, and are disabled to hold their offices: and the clerk of the peace shall in open sessions swear that he hath not, nor will give any such reward, &c.

And therefore, where he extorts in his fees, or commits other misdemeanor in his office, articles may be exhibited against him before the justices at the quarter sessions, and upon proof of them in a summary way, he shall be suspended or discharged. Mod. Ca. 192.

And the forfeiture shall not be purged, by surrender of his office to the *custos rotulorum*, and taking a new grant. Mod. Ca. 193.

And if he be suspended or discharged by the justices, the *custos rotulorum* cannot make a grant to the same person. Per Holt, Mod. Ca. 193.

If he be charged before the justices at quarter-sessions, and the matter is adjourned to another sessions, he may be there convicted, though the same justices were not then present. Mod. Ca. 192.

So, if a clerk of the peace refuse the delivery of the rolls to the *custos rotulorum*, he may be indicted, and, after conviction, removed, and shall not be restored by mandamus. Per three J. Holt cont. 4 Mod. 32.

But without articles, or complaint in writing, he cannot be removed. R. Sho. 282.

And the facts, alleged by the articles, must be charged with the same certainty as in an indictment. R. Mod. Ca. 192.

And if the conviction be, for causes not charged with certainty, or not chargeable against him as a misdemeanor in his office, it may be removed by certiorari, and quashed in B. R. Mod. Ca. 192.

Yet, after a conviction quashed, he may be charged *de nova*. Per Holt, Mod. Ca. 193.

[When clerk of the peace is removed by quarter sessions, by 1 W. & M. c. 21. it is not by conviction, but by order, and the evidence need not be set out. Str. 996.



## (D 6.) Sheriff.

By the commission the sheriff shall attend at the sessions; and so it is commanded him by the precept made to summon the sessions. (Vide Lamb. 377. l. 4. c. 2.)

## (D 7.) Coroners, stewards, constables, bailiffs.

By the precept for summoning the sessions, it is commanded to the sheriff, *quod scire faciat omnibus coronatoribus, seneschallis, constabulariis, sub-constabulariis, et ballivis, quod sint tunc ibi, &c.* (Vide Lamb. 377. l. 4. c. 2.)

And if they do not appear, the justices of peace may amerce them. (Vide Lamb. 391. l. 4. c. 3.)

## (D 8.) Jurors.

By the precept it is commanded to the sheriff, *quod venire faciat tan 24 probos et legales homines de quolibet hundredo, quam 24 milites et alios probos et legales homines de corpore comitatús, &c.* (Vide Lamb. 377. l. 4. c. 2.)

By the st. 3 H. 8. 12. pannels returned for the body of the county at open sessions, &c. may be reformed by the justices of peace, by adding to or taking from the pannel; and the sheriff shall return the pannel so reformed, on pain of 20*l.*, a moiety to the king, a moiety to the prosecutor.

By the st. 11 H. 4. 9. indictments shall be by inquests returned by the sheriff, &c. without nomination of the party or any person, of which none shall be outlawed, or fled to sanctuary for treason or felony.

## (D 9.) Proceedings there.

At the sessions, offences shall be prosecuted by presentment, information, or indictment.

If a statute gives a penalty, to be recovered before justices of peace, without saying in what manner, it must be by bill. Per Holt, Sal 606.

[Where quarter sessions have not original jurisdiction, consent of parties cannot give it to them. 2 B. M. 745.]

[The sessions of a city have jurisdiction to hear and determine indictments on 5 Eliz. c. 4. 1 B. M. 251.]

[If on an indictment for trespass the *nec non ad diversas felonias transgressionibus, &c. audiend. et terminand. assign.* be omitted, it does not appear that they have any jurisdiction, and the indictment will be quashed. Str. 442.]

[They have a right of judging, upon appeal, with the same latitude of discretion as the two justices had. 1 B. M. 245.]

[They need give no reason in their orders, and it shall be presumed they acted on proper grounds; if they express their whole reasons, and if they are bad, their order is bad; but though the reasons set forth are bad, yet if the court is not obliged to judge them their whole reasons, it will presume they had others, and good ones, and their order is good. Ibid.]

[In all orders of sessions, the commencement must be shewn; but there is no necessity of setting out all the particular adjournments. Andr. 101.]

[An

[An order made at an adjourned sessions must shew that the sessions commenced within the time prescribed by the act. Str. 831.]

[So, on an indictment; which, for want of it, shall be quashed. Or, judgment on it arrested after verdict. Str. 865.]

[The sessions, on an appeal, must make a direct and final judgment themselves, and cannot refer it to the judges of assize. B. R. H. 79.]

[But they may adjourn the determination by a proper adjournment. Ibid.]

[But if the order of sessions only refers the matter to the judges of assize, who decline intermeddling, and the sessions afterwards make an order, it is void, as not being a proper adjournment. B. R. H. 79.]

[On indictment, where they proceed as a court of record, at common law, they must make regular continuances; but semb. on orders, it is not necessary. Ibid.]

[In orders, "whereas a presentment has been made to us, whereby it appears to us," is sufficient. Andr. 101.]

[Have original jurisdiction to discharge apprentices; but the order must set forth that the master appeared or was summoned. Str. 143.]

[Cannot set aside assignment of an apprentice bound out by the justices. Str. 48.]

If justices at sessions issue a warrant for taking any one, it must be shewn that the sessions continued by adjournment till the taking. R. 2 Lev. 229.

[A complaint in writing, preferred by the master, and verified by the oath of another, is sufficient to give magistrates jurisdiction under stat. 20 Geo. 2. c. 19. s. 4. 12 East, 248.]

[The remedy afforded by stat. 6 Geo. 3. c. 25. s. 1. is cumulative to, and not in lieu of that given by stat. 20 Geo. 2. c. 19. s. 4. 16 East, 19.]

[If justices of peace adjourn their proceedings to a day subsequent to the repeal of an act of parliament, under which they derive their authority, their jurisdiction will cease. 3 Burr. 1456.]

[Where a statute authorised the justices of peace "at the first or second general quarter sessions, or general session, to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors. Held, that the discharge must be at an original sessions, not at the adjournment of one convened before the act. 8 T. R. 424.]

[A statute after making the proprietors of certain navigation shares a corporation with certain funds, directed them to keep an account of their receipts and disbursements, which should every year be examined, stated, corrected, and allowed by the bishop of X., and the county justices of X., at their first general quarter sessions after a certain day, at which time they were to direct a distribution of the surplus profits, if any. The sessions in any year have no authority to revise or correct any errors in the accounts, upon which a balance was struck, and allowed at the sessions in any preceding year. 8 T. R. 286.]

[If the sessions find the fact of fraud generally, the court are bound by the finding. 4 T. R. 473.]

[The quarter sessions may proceed by information on 5 Eliz. c. 4. s. 39. Cowp. 369.]

[The stat. 47 Geo. 3. sess. 2. c. 66. enacts that offenders against its provisions shall be committed until the next court of oyer and terminer,

great sessions, or gaol delivery; not saying "general quarter sessions." Yet the quarter sessions nevertheless have jurisdiction over the offence, since it is a misdemeanor, and he may be indicted, though he were never apprehended or committed at all. 4 M. & S. 71.]

#### (D 10.) Presentment.

As to presentment, vide Indictment, (B).

#### (D 11.) Information.

As to information, vide title Information.

#### (D 12.) Indictment.

Justices of peace may take indictments of all things within their commission, or within the statutes, of which they can inquire. Vide ante, (B, A).—Vide title Indictment.

But indictments of things out of their cognizance they ought to reject. Vide ante, (B 1.)

By the st. 1 Ed. 4. 2. justices of peace shall proceed on indictments and presentments taken at the sheriff's turn, and delivered over to them.

But not upon an indictment taken before a coroner, justices of oyer and terminer, or others, except themselves or other justices of peace, or in the sheriff's turn.

#### (D 13.) Traverse.

A traverse before justices of peace shall not be tried the same day, as it may before justices in eyre, or gaol-delivery. R. Jon. 379. R. Cro. Car. 438. 448. Cont. 2 Cro. 404. (Vide 2 Inst. 568.—Vide Indictment, (L).)

Justices of peace cannot try it the same day, unless by consent. R. 1 Sid. 99. 334.

But justices of oyer and terminer, as well as of gaol-delivery, may try it the same day, without assent. R. 1 Sid. 335. 2 Inst. 568. 4 Inst. 164.]

So, justices of peace in capital cases, where the offender is in custody. Semb. per Cur.; but the reporter makes a quære. 1 Sid. 335. Acc. 2 Inst. 568. 4 Inst. 164.

#### (D 14.) Arraignment.

Justices of peace may arraign felons. (Vide Dalt. 653. c. 185. Lamb. 541, 542. l. 4. c. 14.) Vide Indictment (M).

And issue a *venire facias* returnable at the same session. (Vide Lamb. 543. l. 4. c. 14.—Vide also Dalt. 645. c. 185. Semb. cont. as to justices of peace, but acc. as to justices of gaol-delivery.)

And grant their clergy. Lamb. 543. l. 4. c. 14.

By the st. 34 H. 8. 14. justices of peace may write to the clerk of the crown in B. R. to certify an attainder, outlawry, or conviction; which he shall do without delay, on pain of 40s.

But they cannot deliver the gaol by proclamation, as justices of gaol-delivery. Lamb. 542. l. 4. c. 14.

Nor take an appeal. Lamb. 542. l. 4. c. 14.

*Not, tward a veture facias matrones*, if a woman be entelnt. (Vide Lamb. 543. E. 4. c. 14. Dub.)

(D 13.) Judgment, execution, &c.

If a man be convicted before justices of peace, for a trespass, riot, &c. where no certain penalty is inflicted by statute, he shall be fined at the discretion of the justices. Vide Indictment, (N).

But by Mag. Ch. 9 H. 4. 14. *liber homo amercietur, nisi secundum modum delicti illius, salvo contentamento*, &c.

And by the st. 1 W. & M. 1. sess. 2. no excessive fines shall be imposed, nor unusual punishments inflicted.

If a man be convicted before justices of peace for an offence, upon which a certain penalty is inflicted, the justices must pursue the statutes in their judgments; and cannot alter or mitigate it upon confession.

And if treble damages, &c. are given to the party, the justices of peace may assess them. Adm. Cro. Car. 448.

But they ought first to inquire by a jury of the damages, and then give treble the damages found. R. Cro. Car. 448, 9.

If the defendant be present, he shall be imprisoned till payment of the fine. 2 Cro. 404.

If he be absent, a *capias pro fine* shall issue; and so to an outlawry.

By the st. 51 H. 3. de Seac. all justices, commissioners, and others, shall deliver into the exchequer, at Michaelmas, all estreats of fines and amerciements taxed before them; which seems to extend to justices of peace.

But by the st. 14 R. 2. 11. justices of peace shall make duplicates of their estreats, and deliver one part to the sheriff to levy the money, &c.

If a fine be imposed without cause, B. R. upon a certiorari may discharge it. R. 1 Vent. 336.

If it be excessive, B. R. may mitigate it. D. 1 Vent. 336.

By the st. 34 H. 8. 14. the clerk of the peace shall certify into B. R. all attainders, outlawries, and convictions before justices of peace, within forty days after; or, if not in term, in twenty days of the next term, on pain of 40s.

By the st. 21 H. 8. 11. justices of tior for stolen goods, if the felon be evidence, or procurement of the owl

[Where a statute gives a special aul pulative disposal of property, the a follow precisely the provisions of the

[A judgment of the sessions may continuance. 1 M. & S. 442.]

[If the sessions make an order, f order omit to mention facts which record of the indictment may be re facts exist, and so to support the to a party prosecuted, without stati had; upon a certiorari, removing

will direct a certiorari to bring up the indictment, and see whether it states that fact. 4 M. & S. 208.]

[An order of sessions may be good for part, and void for the remainder. 6 T. R. 147.]

[Where one judgment is entered at the sessions for another, the K. B. cannot interfere, unless the mistake is apparent on the record. 1 M. & S. 442.]

[The court of K. B. will not examine into any thing but what appears on the face of the order of sessions. 4 T. R. 12.]

[Upon the removal of an order of sessions, the court of K. B. merely act upon the case as it appears upon the face of it, and will not hear affidavits touching matters which passed at the sessions. Thus, upon the removal of an order of sessions, allowing overseers' accounts, the court will determine its sufficiency as it appears upon the face of it, and will not hear affidavits shewing that the charges allowed are unreasonable; for first, the sessions are a court having jurisdiction to decide whether they are or are not reasonable; secondly, the time of the court would be absorbed in taking the accounts, and so the greatest inconvenience be the consequence. 2 M. & S. 321.]

[An application to K. B. to revise their judgment on an order of the sessions, unless for a clerical mistake, comes too late in the term subsequent to that in which it was given. 2 East, 222.]

[If the sessions confirm the act of a committee nominated by them, it becomes their own. 5 T. R. 279.]

(D 16.) Within what time actions may be brought against justices of the peace for misconduct in their office.

By the st. 24 Geo. 2. c. 44. it is enacted, "that no writ shall be sued out against, nor any copy of any process at the suit of a subject, shall be served on any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice of peace."]

[By s. 6. no action shall be brought against any constable, headborough, or other officer acting in obedience to justices' warrant, till demand made of the copy of the warrant, and refusal thereof, &c.]

[An action of replevin to recover damages is within the meaning of this statute. Willes, 668. 2 Bl. 1330. contra. 7 T. R. 274.]

[Where an officer, professing to act under a magistrate's warrant, is, in point of fact and not in law, by subsequent abuse, a trespasser *ab initio*, that is, sets out with an unjustifiable act, himself only, and not the magistrate likewise, is liable to the party grieved. 2 M. & S. 259.]

[An action will not lie against justices of peace for refusing to license an alehouse. 3 Wils. 121.]

[Whether a magistrate is entitled to notice under st. 24 Geo. 2. c. 44. depends upon whether he intended to act in that character; which it must



must be presumed he did, where the subject matter is within his jurisdiction. 2 H. B. 114.]

[A magistrate is entitled to notice of action, though he act by himself instead of jointly with another. 9 East, 364.]

[Notice of action to a magistrate under stat. 24 Geo. 2. c. 44. must express as well the nature of the writ or process intended to be sued out, as the cause of action. 7 T. R. 631.]

[Where notice of action is given to a magistrate under 24 Geo. 2. c. 44., it is sufficient, in indorsing the attorney's name, to put the initial only of his christian name. 2 Marshall, 377. 7 Taunt. 63.]

[Where two writs are sued out against a magistrate entitled to notice, the one in continuation of the other, and the second only is in time, the plaintiff must prove that the first was returned. 14 East, 491.]

[With reference to stat. 24 Geo. 2. c. 44. s. 8., a justice is answerable for such part of an imprisonment under his warrant as was within six calendar months of the commencement of the action, though the first commitment was beyond that time. 12 East, 67.]

[In an action against a magistrate, the defendant, after issue joined, may move to withdraw the general issue, pay money into court, and plead *de novo*. 2 Marshall, 356. 7 Taunt. 33.]

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## JUSTICIARY.

Vide SCOTLAND, (D 11.)

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## JUSTICES.

Vide COUNTRY, (C 5.)—QUOD PERMITTAT, (D 1.)

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## JUSTIFIABLE HOMICIDE.

Vide JUSTICES, (M 20.)

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## JUSTIFICATION.

Vide IMPRISONMENT, (H 8, 9.)—PLEADER, (E 15.—F 19.—G 4.—O 6.—2 L 3, &c.—3 M 15, &c.—3 O 11, &c.)

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## KEEPER.

Lord keeper. Vide CHANCERY, (B 1.)

KIN.

**KIN.**

Vide ADMINISTRATION, (H). — BARON AND FEME, (B 4. — C 2.) —  
DISCENT, (C 1, &c.)

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**KING.**

Vide ROY.

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**KINGDOM.**

Vide CHANCERY, (4 B). — PREROGATIVE, (D 34, 35.) — ROY, (H 1, 2)

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**KING'S BENCH.**

Vide COURTS, (B 1, &c.) — PLEADER, (C 3, &c. — 3 B 3.)

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**KNIGHT.**

Vide DIGNITY, (B 7.) — HOMAGE, (G 4.) — PARLIAMENT, (G 5.)

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**KNIGHT'S SERVICE.**

Vide CHIVALRY. — GUARDIAN, (A — H, 1, &c.) — HOMAGE, (G 1, &c.)

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**LABOURERS.**

Vide CHIMIN, (C 2, 3.) — JUSTICES OF PEACE, (B 50, &c.)

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**LACHES.**

Vide BARON AND FEME (L — M). — ENFANT, (D 4.)

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**LANCASTER.**

Vide FRANCHISES, (D 3.)

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**LANDS.**

By what words they pass. Vide DEVISE, (N 2, 3.) — FAIT, (E 4.) —  
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**Centenated lands.** Vide **PREROGATIVE**, (D 65.)

**Derelict lands.** Vide **PREROGATIVE**, (D 61, 62.)

**Trespass to lands.** Vide **TRESPASS**, (A 2.)

**Trust of land.** Vide **CHANCERY**, (4 W 1, &c.)

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## [LAND-TAX.]

[A person possessed of a freehold office, may act as a commissioner of the land-tax, under the qualification of his office. 3 Burr. 1287.]

[An adjudication of the commissioners of land-tax, confirmed on appeal, is conclusive in a collateral proceeding. 7 T. R. 367.]

[An election under 25 Geo. 3. c. 4. to the office of clerk to the commissioners of the land-tax, in their department, for the rates and duties on windows, houses, and lights, of one candidate, made at a meeting held for a different purpose, and without notice of the intended election being given to the friends of the other, is void on the ground of surprise. 1 T. R. 146.]

[Lands purchased before the act which made the land-tax perpetual, by a college, under a private statute, which provided, that the college should pay all taxes which the premises then were or should thereafter be subject to, are not exempt from the tax. 3 B. & P. 635.]

[Additions to the limits of a college made before the act which made the land-tax perpetual, though after the first land tax act, are exempt from that tax. 3 B. & P. 635.]

[A house within the limits of an hospital, yielding no profit, but occupied by an officer attached to the charity, as incident to his office, is within the exemption in the land-tax act. 1 H. B. 68.]

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## LAPSE.

**Lapse of a church.** Vide **ESGLISE**, (H 11, &c.)

**Lapse of a legacy.** Vide **CHANCERY**, (3 Y 18, 14.)

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## LARCENY.

Vide **JUSTICES**, (O 4, &c.—Y 9, 10.)

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## LATIN.

Vide **FALSE LATIN**.

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## LAW.

Vide **LEY**.

## LEASE.

## LEASE.

Vide **BARON AND FEME**, (G 5.) — **COPYHOLD**, (K 3.) — **LEASE**, (B 3.) — **ESTATES**, (B 32.—G 1, &c.) — **PLEADER**, (3 O 14.) — **POIAL**, (B 1, &c.)

## [LEATHER.]

[A condemnation by a majority of the triers assembled under st. 1 Jac. 1. c. 22. (q. v.) is binding. 1 B. & P. 229.]

[Searchers of leather are not justified, under st. 2 Jac. 1. c. 22. in seizing leather which, in point of fact, is well and thoroughly dried within the meaning of the act, although, in their own judgment, it may not be so. 6 T. R. 443.]

[The right of seizure vested in searchers of leather by st. 1 Jac. 1. c. 22. s. 40. applies not against a purchaser, though for re-sale, unless of a trade mentioned in the act, but only against the original maker. 3 East, 334. 2 N. R. 389.]

[The penalties inflicted by st. 1 Jac. 1. c. 22. (continued by subsequent statutes) are not repealed by st. 9 Ann. c. 11., the penalties by the latter are accumulative only. 4 T. R. 109.]

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(O) Amercia-



**(O) Amerciament.**

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**(A) Leet ; sheriff's tourn.**

The leet is so called of the Saxon word *gelethian*, *convenire*. 4 Inst. 261.

And it is named, the view of frankpledge, because all residents within the leet were divided in decennies, viz. corps of ten families, and each of the decennie was pledge for the other, *quod stare legi*, &c. whence the chief of the principal family was named *capitalis plegius*, the others, *franci plegii*; and the court where they appeared, *visus franci plegii*. 6 Co. 77. b. 2 Inst. 73.

The sheriff's leet, or the tourn, (out of which all other leets are derived,) is the most antient court. 1 Rol. 541. l. 5. 10. 2 Inst. 72.

The tourn and leet have the same style and jurisdiction. 2 Inst. 71, 72. 4 Inst. 260. Cont. 18 H. 6. 13. b.

The tourn is a court of record held before the sheriff. 4 Inst. 260. And the sheriff himself is the judge.

And shall have all fines and amerciaments there.

By the st. M. Ch. 9 H. 3. 35. the sheriff shall have his tourn only *bis in anno & in loco consueto*, viz. *semel post Paschæ, & iterum post festum S. Mich. et visus franc. pleg. fiat ad festum S. Mich.* which is meant of a view at the tourn. 2 Inst. 72.

By the st. 31 Ed. 3. 15. *semel infra mensem post Paschæ, & iterum infra mensem post festum S. Mich.*, otherwise the sheriff shall lose his tourn for the time.

The sheriff may hold his tourn at any place within the county where he pleases.

The jurisdiction of the tourn is the same with the jurisdiction of the leet. *Quod vide post*, (L 1, &c.)

But

But the tourn by M. Ch. 9 H. 3. 17. shall not hold pleas of the crown.

So, it shall have a view of frankpledge only *semel in anno*, after Easter. [Michaelmas in the statute.] 2 Inst. 72.

So, the tourn cannot inquire of a matter within the precinct of another leet, though it be not presented there. 4 Inst. 261.

(B) Leet derived from the tourn.

The leet is a court of record derived out of the sheriff's tourn. 4 Inst. 261. 2 Inst. 71.

And shall be held before the steward; for he is the judge of the court. 4 Inst. 261. R. 6 Co. 12. 1 Rol. 541. l. 14. 2 Inst. 143.

So, there may be a court by prescription in the nature of a leet. Semb. 1 Leo. 217.

A leet may be claimed by charter, or the king's grant.

Or, by prescription, which supposes a grant; for it shall be intended that the king granted to the lord of the manor to have a view of the pledges and tenants resident within his manor. Co. L. 114. b. 2 Inst. 71.

So, it may be claimed as appurtenant to a manor, hundred, &c. 2 Leo. 74. Per And. 1 Leo. 218.

And if it belongs to an hundred, by a grant of lands in a vill parcel of the hundred, with all leets *præmissis spectari. & pertinen.*, the grantee shall not have a leet within such vill. R. Mo. 427.

So, if it belongs to a manor, and the king purchases two parts of the manor, the leet remains to the third part. 1 Bendl. pl. 30. 1 And. 26.

So, if the king grant a leet to the lord of a manor, who afterwards enfeoffs another of the manor without mentioning the leet, he retains it. Dy. 30. b.

But a man shall not have a leet in his manor within the leet of another seignior. 1 Rol. 541. l. 10.

Yet, there may be a superior leet, at which the residents in an inferior leet ought to be attendant. R. 2 Cro. 583. Dab. Cro. Car. 75. Het. 21.

Or, by custom, the reeve and four residents ought to attend, and no others. 2 Cro. 583.

And at the superior leet, a nuisance in a vill, where the inferior leet is, may be presented, if it be not presented in the inferior. R. 2 Cro. 551.

But that must be specially pleaded. R. 2 Cro. 551.

(C) At what time it shall be held.

The leet shall be held at the time assigned by charter. Adm. 2 Sand. 291. 2 Inst. 72.

Or, by prescription, it may be held at a certain day *semel*, or *bis in anno*. 2 Inst. 72. or *sæpius*. R. 2 Leo. 28. Cro. El. 125.

Or, upon a reasonable summons. 2 Inst. 72.

Or, it may be prescribed to be held *semel in anno*, upon which the lord may hold it when he pleases. Per three J. 2 Leo. 74.

So, if the king grant it to hold *semel in anno*, without ascertaining the time. Per two J. 2 Leo. 75.

But if the charter or prescription does not direct otherwise, by the equity of the st. M.Ch. 35. it shall be held within a month after Easter and a month after Michaelmas. Adm. 2 Sand. 290.

And it shall be within a lunar month. 2 Cro. 167. Vide Ann (B).

If the leet does not appear to have been held at the lawful time, an indictment or presentment there will be void. St. P. C. 84. b.

If it be alleged *infra mensem*, viz. 12th Nov. it is void, for the 12th Nov. appears to be more than a month after Michaelmas. R. 2 Sand. 290. 1 Vent. 107.

If the viz. be rejected, then no day appears, and it might have been upon a Sunday, which is not *dies juridicus*. 2 Sand. 291.

So, *infra mensem* P. or Mich. is uncertain; for it might be before as well as after. D. Cro. Car. 275. Jon. 300.

### (D) At what place.

The leet may be held at any place within the seignior, where the lord pleases. Kit. 44. b.

### (E) Who ought to do suit there.

After the leet summoned by a reasonable garnishment, and the style of the court entered, and three proclamations made (of which vide Copyhold, (R 7, &c.), the suitors and resiants within the leet shall be called. Kit. 6.) Vide Copyhold, (K 13, &c.)

All resiants within the leet of the age of twelve years (except ecclesiastical persons, women, and barons of the realm) ought to do suit in the leet, within which they are conversant, in person. 2 Inst. 99. 121. Vide Copyhold, (K 16.)

And after the age of twelve years, shall be sworn there to the king. Co. Lit. 68. b. Vide Allegiance, (B 1.)

Though he resides upon lands which belonged to an abbey which was exempt, and there be a grant of the privileges of the abbey. R. 2 Rol. 56.

If a suitor does not appear at the leet, he shall be amerced, and not distrained. 2 Inst. 118. Vide Copyhold, (K 17.)

So, the king cannot grant to another that he shall not do suit. 2 Rol. 56.

So, one cannot do suit by attorney; for the st. Mert. 20 H. 3. 10. does not extend to suit real. 2 Inst. 99.

If a man's house be within two leets, he must appear where his bed is. 2 Inst. 122.

If he has a family in two leets, he must appear where his person is commorant. Ibid.

A servant is resiant where his master is. Kit. 83. b.

[No man can be of two leets. Dougl. 537.]

### (F) Inquest

**(F) Inquest in a leet.**

After the suitors called, and the essoigns entered, the jury ought to be impannelled and sworn. Kit. 7.

An inquest in a tourn or leet to make an indictment, or presentment, ought to be twelve at least. 2 Inst. 387.

Vide post, (G 1, 2.)

**(G 1.) Presentment in the leet.**

By the st. W. 21. 13 Ed. 1. 13. no indictment or presentment in a tourn, or leet, shall be but by twelve at least. 2 Inst. 387. Kit. 7. 44. b.

If there are not twelve present in the leet, a stranger may be sworn upon the inquest. Kit. 7. 44, 45. b.

And the steward may compel a stranger travelling within the leet to be sworn. 1 Rol. 542. l. 10.

So, the steward may compel the inquest in a leet to be sworn; for the st. of Marl. 52 H. 3. 22. does not extend to it. 2 Inst. 143.

If the jury refuse to present defaults of which they are informed, the steward may fine them. Kit. 41. b.

[The jury cannot present things subsequent to their swearing. Semb. Andr. 47.]

By the st. W. 2. 13. the jurors ought to put their seal to the presentment in a tourn.

[Inquisitions for offences where the party cannot be apprehended, need not be sealed; for W. 2. c. 13. relates only to such as are a foundation for imprisonment. Nor need they be indented; for 1 Ed. 3. stat. 2. c. 17. relates not to presentments which were to be proceeded on in the leet, but to such as were to be delivered over to the justices. 3 B. M. 1859.]

There may be a presentment for a nuisance, &c. within the leet, without notice given to the offender of the presentment; for all residents shall be supposed present. 2 Rol. 3.

**(G 2.) When traversable, or not.**

A presentment in a tourn, or leet, by twelve of a matter within their jurisdiction is not traversable. Kit. 42. 44. b. Kel. 66. b.

[But may be removed by certiorari into the court of B. R. and is traversable there. Cowp. 458.]

As, if it be for blood spilt. Dy. 13. b. Kit. 42. b.

For refusal to be sworn. Kit. 42. b.

For a nuisance. Dub. 3 Mod. 138.

But a presentment of a matter out of their cognisance will be traversable; as, of a freehold, &c. Dy. 13. b. Kel. 66. b. Kit. 42. b.

Or, the life of a man. Kel. 66. b.

So, a presentment there by a less number than twelve is traversable. Kit. 42. 44. b.

So, if a presentment by twelve be false, the party at the day of presentment shall have a writ of false presentment. Kit. 42. b.

If a matter there presentable is omitted to be presented, it may be presented in B. R. or Eyre. Kit. 42. b.

Or, upon a commission by writ for such purpose, and not otherwise, in the tourn. 4 Inst. 261. Kit. 42. b.

By the st. 1 Ed. 4. 2. presentments and indictments in the tourn must be transmitted to the justices of peace to proceed thereon, under the penalty of 100l. 2 Inst. 388. R. Jon. 301.

### (H) Common fine.

A common fine *pro certo letæ* is usually paid at Michalmas, and collected by the tything man. Kit. 13. a.

Such fine may have a lawful commencement, viz. for the charge of the lord in obtaining a grant of the leet, and an allowance in Eyre. R. 6 Co. 77. b. 2 Inst. 71.

And therefore, it shall be enquired, whether it be collected. Kit. 13. a.

If it be not paid, or collected, a bill in equity lies to enforce payment. Dub. 2 Ver. 278.

### (I) The profits of the lord.

So, the leet may inquire of things which belong to the lord; as, treasure-trove. St. 18 Ed. 2.

Wreck, waifs, or estrays. Kit. 12, 13.

Whether a person outlawed, put in exigent, or who flies, being indicted, had goods. Kit. 12. b. 13. a.

Whether land be aliened in mortmain without licence. Kit. 23. b.

Whether a scabbed or infected horse be put upon the waste. Kit. 12. b.

So, of customs or services withheld by whom, and at what time. St. 18 Ed. 2. Kit. 10. b.

Vide post, (L 1, &c.)

### (K) Instruments of correction.

By the st. 51 H. 3. st. 6. every liberty ought to have a pillory of convenient strength. Vide Tumbrel.

And therefore, the lord of a leet ought to have pillory, tumbrel, and other instruments of correction, for offences which may be punished within the leet. Kit. 13. a. Cro. El. 698. Mo. 573.

So, he ought to have stocks, upon pain of forfeiting 5l. Kit. 13. a.

And the neglect is inquirable in the leet. Kit. 13. a. Vide Cart. 29.

And for that his liberty may be seized. Fl. 1. 2. c. 12. s. 19. Agd. Mo. 574. Cro. El. 698. R. Mo. 607.

But a penalty cannot be assessed at the leet upon a vill for not finding them; for it belongs to the lord, not to the vill, without a special prescription. R. Mo. 607. Semb. cont. Kit. 13. a. R. Cro. El. 698. Vide Cart. 29.

(L) The



(L) The jurisdiction of the leet.

(L 1.) In felony.

By the common law, the leet might inquire and determine of all felonies, except homicide. 10 H. 6, 7. 2 Inst. 32. St. 18 Ed. 2.

So, they might inquire of murder, or homicide. Cont. 41 Ass. 30. Acc. Kit. 9. a. 22. b. Fl. 2. c. 52.

So, they might inquire of petit treason; as, a felony. Kit. 9. a.

Or, of high treason, if it was a felony before; as, coinage, &c. Kit. 9. a.

So, they may inquire of a felony made by statute, where the same statute gives an inquiry to the leet.

But by the st. M. Ch. 17. *vicecom, &c. non teneant placita coronæ.*

And a felony by statute is not inquirable in the leet, without express words in the same statute. 2 Inst. 181. Kit. 9. a. 22. b.

And now no felony is determinable there; for by the st. W. 2. 13. an indictment for felony there shall be by twelve, who shall put their seals to it. Sta. P. C. 84. b.

And by the st. 1 Ed. 3. 17. shall be taken by indenture, whereof one part shall remain with the jurors, the other with the steward, and by him shall be delivered to the justices of assise at the next gaol delivery for the same county. St. P. C. 85. a. 2 Inst. 388. Kit. 8. b. 10. a.

[The jurisdiction of a leet jury, like that of a grand jury, is confined to things happening before their swearing, or during their sitting; therefore, a custom to swear jurors at one court leet to inquire and return their presentments at the next court is bad. 2 East, 52.]

(L 2.) In cases of misdemeanor.—As escape, &c.

By the st. 18 Ed. 2. the leet may inquire of an escape out of prison and every escape of felons.

Be it voluntary or negligent. Vide Escape, (A 1, 2.)

So, of those who go on messages for thieves. St. 18 Ed. 2.

Of fugitive villeins, if they have not remained in antient demesne for a year and a day. St. 18 Ed. 2.

If women, or nuns, are carried away. Fl. 2. c. 52.

Or, the rape of them be not presented before the coroner. St. 18 Ed. 2.

If hue and cry be not pursued. St. 18 Ed. 2. 2 Inst. 172.

Or, levied without cause. Fl. 1. 2. c. 52.

If persons outlawed return without the king's licence. St. 18 Ed. 2.

Or, a person who has abjured. Fl. 2. c. 52.

(L 3.) Persons of bad fame.

So, by the st. 18 Ed. 2. the leet may inquire of haunters of taverns if they have not wherewithal to live.

So, of haunters of alehouses. Kit. 11. a.

So, by the st. 18 Ed. 2. of those who travel by night, and sleep in the day.

Of vagabonds and hazarders. Kit. 11. a. Fl. 2. c. 52.

So, by the st. 18 Ed. 2. of those who take doves by engines in winter.

Of malefactors in parks or warrens. Fl. 2. c. 52.

Of barretors. Kit. 11. a.

Of those who receive poor men for their tenants to be chargeable to the vill. 1 Rol. 542. l. 2.

Of usurers, sorcerers, apostates. Fl. 2. c. 52.

Of eves-droppers, who stand under walls or windows by night or by day, to hear tales, and carry them to make debate between their neighbours. Kit. 11. a.

Of scolds or bawlers. Ibid.

So, there may be an indictment for that at the quarter sessions. Mod. Ca. 178. 213.

And when convicted, the proper punishment is by the cackstole. Per Holt, Mod. Ca. 11. 213.

But she must be a common scold; for that is the nuisance. Per Holt, Mod. Ca. 213.

So, the indictment must say, *communis vexatrix*; for *communis rix* is error. R. Mod. Ca. 239.

Or, *communis calumniatrix*; for it will be reversed upon error for this. R. Mod. Ca. 11.

#### (L 4.) Adultery.

Antiently the leet might inquire of adultery and fornication, which now belong to the spiritual court. 3 Inst. 206.

And therefore, an indictment does not now lie for adultery. Per Holt, Sal. 552. [Vide supra Indictment, (D.)]

But now they may inquire of those who maintain bawdry in their houses. Kit. 11. a.

And a person who keeps a bawdy-house may be indicted. R. 1 Sal. 382. 384.

So, a lodger, who accommodates lewd persons with his house or room, for acts of bawdry. R. 1 Sal. 382.

So, the husband and wife jointly. R. 1 Sal. 384.

So, an indictment lies for an assault with intent to ravish a woman. Sal. 552.

But it is not indictable, *quod in lupanario scortationem committere procuravit*. R. 1 Sal. 382.

Or, *quod est communis lena*. 1 Sal. 382.

Or, for soliciting the chastity of another. Ibid.

#### (L 5.) Breach of the peace.

So, the leet may inquire of all assaults or affrays. St. 18 Ed. 2. 8 Rol. 541. l. 46.

Of blood spilt, or any open breach of the peace. St. 18 Ed. 2. Kit. 11. a. 23. a.

If any wound, maim, or imprison another within the leet. Fl. 2. c. 52.

If a stranger make an affray, and it be not presented by the decenniers. Kit. 23. a.

If a man break a pound, and rescue a distress. Kit. 11. a.

Or, rescue a man arrested. Ibid.

#### (L 6.) Deceit.

(L 6.) Deceit.—In weight or measure.—What weights shall be used throughout the realm.—Troy.

By the st. M. Ch. 9 H. 3. 25. *una mensura, unum pondus fit per totum regnum.* So, by the st. 27 Ed. 3. st. 2. c. 10. 14 Ed. 3. 12. Vide Justices of Peace, (B 90.)

By the st. 25 Ed. 3. st. 5. c. 9. auncel weight (in which there was a deceit by guiding the balance with the hand) is taken away. 4 Inst. 273. Vide the st. 27 Ed. 3. st. 2. c. 10. 8 H. 6. 5.

And therefore, there are only two species of weights allowed within the realm; troy and averdupois. 4 Inst. 273.

By troy weight are weighed pearls, precious stones, gold, silver, bread, corn, &c. Ibid.

So, electuaries, spices, confections, by the St. Comp. Pond.

By the st. 31 Ed. 1. Comp. Mens. thirty-two grains of wheat dry in the midst of the ear (or twenty-four grains of barley or artificial grains, 4 Inst. 273.) make one pennyweight, of which twenty make an ounce, whereof twelve make a pound troy.

So, twenty four blanks make a droit, twenty-four droits a minute; twenty minutes a grain. 4 Inst. 273.

So, twelve grains of fine gold make a caret, twenty-four carets make an ounce, twelve ounces make a pound of gold. Ibid.

[The jury of a leet have not power to enter houses to examine weights and measures. Semb. Andr. 47. though the usual practice is so to do.]

(L 7.) Averdupois.

Averdupois, though introduced by custom, is allowed by the St. Comp. Pond. Vide Justices of Peace, (B 90.)

So called because it gives full weight. 4 Inst. 273.

Troy weight is 20s. sterling to the pound, averdupois is computed 25s. sterling, or rather 24s. 4d. for it contains only two ounces twelve pennyweights troy above a pound troy. Dalt. ch. 112. sect. 13.

Twenty-one grains  $\frac{7}{8}$  make a pennyweight, twenty pennyweights make an ounce, sixteen ounces make a pound averdupois. 4 Inst. 273.

Seven pounds make a gallon, fourteen make a peck, fifty-six a bushel Dalt. ch. 112. s. 14.

By averdupois are weighed all physical drugs, wax, pitch, tar, iron, steel, lead, hemp, flax, flesh, butter, cheese, and all commodities subject of waste. 4 Inst. 273.

What measures.

Vide Justices of Peace, (B 91, 92, 93.)

Wine licence.

Vide Justices of Peace, (B 100.)

Assise of wine.

Vide Justices of Peace, (B. 98.)

(L 8.) *Assisa panis et cervisiæ.*

By the st. 18 Ed. 2. it is declared that the leet may inquire of the assise of bread, or ale broken. Vide Justices of Peace, (B 94. 96.)

3 H 4

Or

Or, of false measure in a bushel, gallon, yard, or ell. Kit. 11. b.

Or, of false balances, or weights. Ibid.

Or, of those who buy by a great and sell by a small measure. Ibid.

So, of those who, being tiplers, sell by measures not sealed. Ibid.

The assise of bread is broke, when bread is ~~not made~~ according to the size or quantity limited by some ordinance. Vide Lit. s. 234.

By the st. 51 H. 3 *ass. pan. et cerv.*, when wheat is 32d. per quarter, wastel bread of a farthing shall weigh 6l. 16s., simple bread less by 2s., cocket bread more by 2s., if of worse corn more by 4s.

[The offence of selling a loaf of bread short of weight, is not within the jurisdiction of the leet. 3 Burr. 1359.]

### (L 9.) Deceit in prices.

By the st. 23 Ed. 3. 6. butchers, fishmongers, regrators, hostlers, brewers, bakers, poulterers, and all other sellers of victuals shall sell at reasonable prices, having regard to the price in places adjoining: and any convicted in selling in other manner shall pay double to the party damnified; or, in his default, to him that will sue for the same. Vide Justices of Peace, (B 89. 95. 99.)

And mayors, &c. of city, borough, &c. shall inquire of offenders, &c. or convict of neglect shall pay treble to the party damnified, and yet answer to the king.

By the st. 25 H. 8. 2. if cheese, butter, capons, &c. and other victual be enhanced, &c. the lord chancellor, treasurer, president, privy seal, steward, chamberlain, and other lords of the council, treasurer and comptroller of the household, chancellor of the dutchy of Lancaster, justices of B. R. and C. B., chancellor, chamberlains, under treasurer and barons of the exchequer, or seven of them (*quorum unus* chancellor, treasurer, president, or privy seal), may set reasonable prices on the said victuals, and all persons having or keeping any such victuals to sell shall sell the same at such prices, on a penalty in the proclamation which notifies such prices.

But justice Berkley was impeached for saying that corn was victuals within the statute. 2 Rush. 606.

The leet may inquire of those who sell for unreasonable and excessive prices, having regard to the common prices in near places. Kit. 11. b.

As, of butchers, brewers, fishmongers, poulterers, cooks, vintners, and all others. Ibid.

Innkeepers who sell corn and beans at excessive prices, and take more than a halfpenny a bushel above the market price, and nothing for litter. Kit. 11, 12.

If an innkeeper do not bake his horse-bread according to the price of grain. Kit. 12. a.

If a miller take an excessive toll, which ought to be only the twentieth, or twenty-fourth grain according to the strength of the water. Ibid.

Vide Justices of Peace, (B 89. 95. 99.)

### (L 10.) In quality.—As to victuallers.

By the st. 51 H. 3. of pillory and tumbrel, a jury shall inquire if any butcher sell contagious flesh or that died of the murrain. Vide Justices of Peace, (B 88.)

Or,

Or, if cooks seeth unwholesome flesh or fish.

And therefore, as a nuisance, or as contained within the st. *assise panis et cervisie*, the leet may inquire if any sell bread or ale unwholesome. 4 Inst. 262. Kit. 11. b.

If a butcher, fishmonger, or other victualler sell corrupt victual. 4 Inst. 261. Kit. 11. b.

If corrupt malt or hops are used. 4 Inst. 263.

Or, corrupt drugs, or spices. Semb. 4 Inst. 264.

If a miller change grain, which he had to grind. Kit. 12. a.

If artificers use any deceit. Ibid.

Or, use two offices; of a tanner and shoemaker, or butcher, &c. Fl. 2. c. 52.

But the leet has not jurisdiction, if a tanner utter leather not sufficiently tanned. R. 1 R. 3. 1. a.

### (L. 11.) In office.

The leet may inquire of a constable, aleconner, bailiff, or other officer, who neglects his duty.

As, if a constable does not do watch and ward. Fl. 2. c. 52.

### (L. 12.) Common nuisance.—What shall be.

So, a common nuisance may be inquired of at the leet. Co. L. 56. 1 Rol. 541. l. 45. Kit. 10. b. 23. a.

If it be *ad commune nocumentum*, of all the king's liege subjects; for if the presentment does not say *ad commune nocumentum*, it is bad. R. 2 Cro. 382.

Or, if it be, *ad nocumentum ligeorum prope inhabitantium*. R. 1 Rol. 406.

Or, *diversorum ligeorum*. R. Cro. El. 148.

As, if a ditch be made cross the highway. Co. L. 56. a.

Or, if a ditch in an highway be not cleansed. 1 Rol. 541. l. 50. Kit. 23.

And they may amerce for it in the leet; though a forfeiture for it is given to the surveyor by the st. 18 El. 10. R. Ray. 250.

So, if a gate be put up in an highway, though not locked; for it hinders the passage. R. Cro. Car. 184. 2 Rol. 137. l. 50.

If a laystall be made in an highway. Kit. 11. a.

Or, carrion thrown out there. Ibid.

If a way or path be stopped or diverted. St. 18 Ed. 2.

Or, there be an encroachment upon it. Kit. 11. a.

Or, billets or logs be laid *sparsim*, and continue there. R. 2 Rol. 137. l. 25. 35.

So, of a bridge broken. Kit. 23. a.

Or, water stopped, or diverted from its course. St. 18 Ed. 2.

Of bounds thrown down, or taken away. Ibid.

Of purpresture done in land, wood, or water, by the st. 18 Ed. 2.

Of blocks, stocks, ditches, or hedges levied, made, or filled up, to annoyance: by the st. 18 Ed. 2. Kit. 10. b.

Of walls, houses, pales, or hedges set up, or thrown down, to annoyance. Ibid.

If



If an house near the highway continues ruinous, to annoyance. R. 1 Sal. 357.

Though the occupier be only tenant at will. Ibid.

Of common breakers of hedges. Kit. 11. a.

Introducing inmates of poor families into an house. R. 2 Rol. 139. l. 5.

Corrupting water by whytawing, lime, or flax lying in the water. Kit. 11. b.

If a person who has no warren, stores his land with conies, it is a common nuisance. Mo. 453.

[Semble, that an act to be indictable as a nuisance, need not have produced actual injury. It is sufficient, if in its nature and circumstances it is capable of producing it. 4 M. & S. 73.]

[Semble, a stoppage in the streets for the purpose of unloading wag-gons at an inn or warehouse, may, by its frequency become a nuisance. 2 Smith, 424. 6 East, 427.]

[Unlawfully, injuriously, and with full knowledge of the fact, to expose in a public highway, a person infected with a contagious disease, such as the small-pox, is a comon nuisance and indictable as such. 4 M. & S 73.]

### (L 13.) What not.—Vide Action upon the Case for a Nuisance.

But if any (besides the parson or lord) build a dovecote, it will not be a nuisance inquirable by the leet; for if it be lawful for the lord or parson, it cannot be a nuisance in another. R. 2 Cro. 302. 491. 2 Rol. 138. l. 36.—Cont. Mo. 238. 5 Co. 104. Mo. 421. Acc. 2 Rol. 4. 30.

So, if a man unload billets, &c. in a street or highway; for necessity requires it. 2 Rol. 137. l. 30. 2 Rol. 32.

Or, erect scaffolds, &c. for repairing a building. 2 Rol. 145. l. 10.

So, a private nuisance is not inquirable in the leet; as, if one sur-charge a common. R. 1 Rol. 541. l. 40.

If he stop a watering place for the inhabitants of B. Co. L. 56. a.

If he stop up his lights. R. 9 Co. 58. a.

If he suffer his gate to be open to the annoyance of others. R. Cro. El. 414. Mo. 356.

Vide Action upon the Case for a Nuisance.

### [(L 13. b.) Judgment upon conviction for a nuisance; and appeal.]

[Upon a conviction for a nuisance, the judgment is to be adapted to the nature of the offence alleged; if there be no allegation of the continuance up to the time of taking the inquisition, judgment that it may be abated is unnecessary; if a continuance be alleged, prostration should be awarded. 7 T. R. 467. 8 T. R. 142.]

[Upon conviction for a nuisance, of which a continuance was alleged, judgment of prostration will not be given by the court of K. B., if they be satisfied that the nuisance has been already effectually abated. 12 East, 164.]

[Where an act empowers commissioners to abate nuisances, on neg-  
lect

glect by the owner after notice in writing, and gives an appeal to the quarter sessions "against any matter or thing to be done by the commissioners in pursuance of the act," an appeal lies against such notice. 8 East, 41.]

(L 14.) Jurisdiction by several statutes.

Also, by the words of several statutes, the leet may inquire of the following offences :

As, by the st. 14 (or 14 and 15) H. 8. 10. of those who trace hares in the snow, who shall forfeit 6s. 8d. to the lord of the leet. Vide Justices of Peace, (B 9.)

By the st. 24 H. 8. 10. every occupier of land within a leet, presented for not endeavouring to destroy choughs, crows, and rooks upon his land, shall be amerced at the discretion of the steward, and two presenters (named by the others) according to the offence, to the use of the lord, to be levied by distress as other amerciaments. And the steward ought to give this act in charge.

*Nota :* This part of the act was repealed by the st. 8 El. 15. and the repeal continued by several other acts which are all expired, whereby this clause seems now in force.

By the st 32 H. 8. 13. if any put a stone-horse above two years old, and not fifteen hands high, on a common wast, &c. within the shires and territories of Norfolk, Suffolk, Cambridge, &c. or not being fourteen hands, on like grounds in any other shire, it shall be forfeited to the finder, who may carry a constable to fetch the horse to pound, and measure him before three honest men. And the constable or three men refusing, &c. forfeit 40s. And owners shall yearly in fifteen days after Michaelmas drive the forests, commons, &c. on pain of 40s., which offences may be presented in the leet, and such presentment shall be certified to the next general sessions of the county in forty days, on pain of 40s. by the steward.

By the same st. if any put any scabbed horse on a common, &c. he forfeits 10s. to the lord ; of which the leet may inquire. Vide Justices of Peace, (B 48.)

By the st. 33 H. 8. 6. none shall keep or use an hand-gun not a yard long in the stock and barrel, or hag-but not three quarters of a yard long, on pain of 10l.

None, not having 100l. per annum, shall shoot with, keep or carry bent or charged any cross-bow, hand-gun, or hag-but, unless to shoot at a butt or bank of earth in a place convenient, on pain of 10l.

None shall shoot within a quarter of a mile of city, borough, or market unless at a butt or bank.

No servant shall shoot at a deer or fowl by command of his master, but may carry a gun for his master, or to be mended, on pain of 10l. a moiety to the king, half the other moiety to the lord of the leet, and half to the informer.

By the st. 38 H. 8. 9. every one, for every male in his house, of or above seven and under seventeen years of age, shall provide a bow and two arrows : and every one, above seventeen and under sixty, shall provide himself a bow and four arrows, on pain of 6s. 8d. for each offence, except a spiritual person, or judge.

None

None under twenty-four shall shoot, unless at rovers, on pain of 4*d.* every shoot, and none above shall shoot at a mark of 220 yards or under with any prick-shaft on pain of 6*s.* 8*d.* None under seventeen shall use a yew bow, who or whose parents have not lands or tenements to the value of 10*l.* per annum, or be not worth 40 marks in goods, on pain of 6*s.* 8*d.* Every town shall provide butts on pain of 20*s.* for every three months' default.

By the same st. none shall keep a common house, or alley, for bowls, coys, tennis, dice, cards, or other unlawful game, invented or to be invented, on pain of 40*s.* for every day, without a placard [all such placards made void by st. 2 & 3 Ph. & M. 9.] expressing what game, and by whom to be played, at the obtaining of which he shall find surety not to use it contrary to the form thereof. Vide Justices of Peace, (B 42.)

None shall haunt, or play at, such houses, or games, on pain of 6*s.* 8*d.* for every time.

And no artificer, handicraftsman, husbandman, labourer, apprentice, journeyman, mariner, fisherman, waterman, or servant, shall play at any unlawful game, unless at Christmas in the master's house, or by licence of the master, with such as resort to his house, on pain of 20*s.* every time. A moiety of the forfeitures to the lord of the leet, a moiety to the informer. And justices, bailiffs, constables, &c. shall search once a month at least, on pain of 40*s.* if need be, after such houses, and games, and the keepers, or haunters of them may imprison, till they find surety by recognizance not to keep or haunt such games.

By the st. 33 H. 8. 17. none shall water hemp or flax in a river, stream, or common pond, where cattle drink, on pain of 20*s.* in a court of record, leet, &c. a moiety to the king, a moiety to the informer.

By the st. 2 & 3 Ed. 6. 15. butchers, brewers, bakers, poulterers, cooks, or fruiterers, conspiring not to sell but at certain prices; and artificers or labourers, conspiring not to work but at certain prices, or at certain hours or times, or not to finish what others have begun, forfeit 10*l.* for the first offence, or on non-payment in six days, twenty days' imprisonment: 20*l.* for the second, or on non-payment in six days, pillory; 40*l.* for the third, or on non-payment in six days, pillory and one year. Vide Justices of Peace, (B 89).

By the st. 7 Ed. 6. 5. none shall retail wine but in a city, borough, port, corporate, or market-town, on pain of 10*l.* per diem. Nor, in a city, or town corporate, unless empowered by the head officer and most part of the common council, aldermen, burgesses, or commonalty there, by writing under the common seal, on pain of 5*l.*—But now, by the st. 12 Car. 2. 25. the patentees of granting wine licences may empower, &c. as it seems. Vide Justices of Peace, (B 100.)

By the st. 2 & 3 Ph. & M. 8. the steward of a leet may fine, or amerce, at his discretion, offences presented to be committed within the leet against that statute for repair of the highway; and in their default, the quarter sessions.

And by the st. 18 El. 10. the leet has jurisdiction of offences against that act for the repair of the highways.

By the st. 1 El. 17. the leet may inquire within a year, of those who take the fry or spawn of fishes, or pikes under ten, salmon sixteen, trouts eight, barbel twelve inches, or take fish (except by angling) in another

another way than with a net or tramell of two inches and half mesh, except smelts, loches, minnies, gudgeons, and eels, who shall lose 20s. to the lord of the leet. And if the steward does not give this in charge, he shall lose 40s. And if the jury voluntarily conceal the offence and do not present it, the steward shall impanel another jury to inquire of the concealment, and if it be found, each juror shall lose 20s. to the lord of the leet. Vide Justices of Peace, (B 44.)

[The water-bailiff cannot seize unlawful nets before conviction. 3 B. M. 1769.]

By the st. 23 El. 10. the leet shall inquire, if any in the night take a pheasant, or partridge, or hawk, or hunt with a spaniel, over eared corn, who shall forfeit 20s. for each pheasant, 10s. for a partridge, 40s. for hunting or hawking, a moiety to the lord, a moiety to the informer, or, if he refuse it, to poor men of the parish, and shall find surety before a justice of peace not to offend within two years; and if he does not pay within ten days, he shall be imprisoned for a month, without bail. Vide Justices of Peace, (B 45, 46.)

By the st. 31 El. 7. the leet shall inquire if any erect a cottage for habitation, without four acres of land, his freehold or inheritance, annexed to it, who shall forfeit to the king 10l., or continuing such cottage shall forfeit 40s. per mensem, unless it be within a borough, or town, or within a mile of a mine, quarry, &c. for working there, or within a mile of the sea or navigable river for a sailor, or such who by occupation makes, furnishes, or victuals any ship, or cottage by a parker, or warrener, or before erected by a common herdsman, shepherd, or impotent poor, or by order of assises or quarter sessions: or, if any place or suffer an inmate or more families than one in any cottage, who shall forfeit 10s. per month to the lord of the leet, to be levied, after presentment, by distress, or recovered by action of debt. Vide Justices of Peace, (B 84, 85.)

## (M) Officers in a leet.

### (M 1.) Steward.

*Provideat sibi dominus de seneschallo discreto, &c. cujus officium est curias tenere, &c.* Fleta, l. 2. c. 72. Vide Copyhold, (C 5.—R 3. 5, &c.)

In a court leet the steward is judge. 6 Co. 12. 4 Inst. 261.

And he is a judge of record. 10 H. 6, 7. a. Kit. 41. R. 8 Co. 41. Griesley.

The steward of a leet may be retained by deed, or by parol. Co. L. 61. b. R. 4 Co. 30. a. Dy. 248. Kel. 158. b.

And shall have debt for his salary, but not annuity, though retained without deed. Dy. 248.

He may make a precept to the bailiff to distrain, by parol. Kit. 41. a.

And may fine. Kit. 41. R. 8 Co. 41.

A steward might have been punished in the star-chamber for a misdemeanor. Kit. 42. a.

### (M 2.) Bailiff.

## (M 2.) Bailiff.

*Bailivus cujuscunque manerii debet esse in verbo verax. in opere diligens, &c.* Fl. l. 2. c. 73.

And shall be sworn in the leet to do his office. Kit. 45, 46.

## (M 3.) Reeve.

The reeve is called from the Saxon word *gerefa*, *præpositus*. Co. L. 61. b.

*Dom: no vel seneschallo debet præsentari, cui injungatur officium, &c.* Fl. l. 2. c. 76.

And shall be sworn to do his office in the leet. Kit. 46. a.

And his oath contains, that he will execute all attachments and process to him directed by the lord, or his steward, and present all pound-breaches, waifs, and estrays, &c. Kit. 46. a. Co. L. 234. b.

## (M 4.) Ale-conner.

An ale-conner shall be sworn in the leet, to see that bread be weighed according to the assise, and that ale be wholesome, and sold at due prices, and to present all defaults of brewers and bakers. Kit. 46. b. [Vide 1 Wils. 248.]

## (M 5.) Constable.—Chief constable.

A constable is an officer chosen for the maintenance of the king's peace within his precinct.

And by the common law, there was a chief constable as well as a petit constable. 1 Sal. 176. 881. [Vide 2 Ld. Raym. 1192.]

By the st. Wint. 18 Ed. 1. st. 2. c. 6. in every hundred and franchise, two constables shall be chosen to make the view of armour, [repealed as to armour, by 21 Jac. 28.] who shall present to the justices such defaults as they see about armour, suits of towns, highways, lodging strangers; in upland towns for whom they will not answer, and defaults in not following hue and cry. (Vide 4 Inst. 267.)

And therefore, their duty by that statute consists in those five points. Ibid.

But their authority was only enlarged by that statute. 1 Sal. 881. Cont. 4 Inst. 267. where it is said, that they have no authority but what was given by that or subsequent statutes.

[The naughty acts, under the word constable, comprehend a high constable. 3 B. M. 1259.]

[He may make a deputy to do ministerial acts, and such is billeting soldiers; for not every act which requires judgment is a judicial act, but such as is done *pendente lite*, of some sort or other. Ibid.]

The high constable shall, regularly, be chosen by the justices of peace at sessions. 1 Bul. 174.

Or, by prescription, he may be chosen by the leet, as well as the petit constable.

So, the sessions may remove, if necessary. 1 Bul. 174. Sal. 150.

So, if such constable present another at the end of his year according to usage, and the court refuse him, B. R. may issue a mandamus for his discharge, and the swearing of the other; and if there be a cause for the refusal, it must be returned. R. 1 Rol. 536. l. 5.

And



And if, during his office, he be elected overseer in another parish, he shall be discharged by B. R. 2 Jon. 46.

(M 6.) Petit constable.—How chosen.

The petit constable is an officer at common law. 4 Inst. 265. 267.

And his election belongs to the leet. 4 Inst. 265. R. 1 Rol. 541.

1. 25. Sal. 502. Sav. 94.

And properly to the homage there. 2 Jon. 212. 1 Sal. 175.

And the leet may prescribe to elect one of the residents constable. 8 Co. 38. a.

[But a prescription must be laid for choosing a constable in a particular manner. 1 Ld. Raym. 94.]

If the constable elected be present, he shall be sworn there. 1 Sal. 175.

So, a corporation may prescribe to choose a constable, but has no right to do it of common right. R. Sal. 502. Comb. 416.

And an indictment for refusing to be sworn when chosen by a corporation, must shew the power to elect by custom, or prescription. Semb. Skin. 669. Comb. 416.

[The quarter sessions cannot discharge constables appointed at the leet. Str. 798.]

And therefore, if a constable chosen by the leet be discharged at the sessions, and another sworn, a writ shall issue out of B. R. to the justices to discharge the party chosen by them, and to swear him chosen in the leet. R. 1 Rol. 585. 1. 45. 541. 1. 15. 1 Bul. 174. [Not a writ but a rule of court.]

But a borsholder, headborough, or borough-head, tythingman, trithingman, or the chief pledge, has the same authority in many cases as the petit constable.

And by the st. 13 & 14 Car. 2. 12. in case the constable, &c. dies or goes out of the parish, two justices of the peace may make and swear a new constable, tythingman, &c. till the lord holds a leet, or the next quarter sessions, who shall approve the officer so made and sworn, or appoint another, as they think fit.

[If the sessions discharge old constables, and appoint new ones, on a suggestion that the old ones had served a year, they must make an adjudication of their having served the year. Str. 1050. B. R. H. 282.]

[The sessions cannot appoint constables for a year, or till others are chosen, but only till the lord holds a court. Ibid.]

So, a constable chosen at the leet may be sworn by the sessions, or any justice of peace. 1 Mod. 13. 2 Jon. 212.

So, if the homage choose a constable, but the steward refuses him, and swears another, the quarter sessions may examine the matter, and swear him who was chosen by the homage. R. 2 Jon. 212.

So, if a constable chosen at the leet be absent, the justices of peace, as conservators of the peace by the common law, may swear him. 1 Sal. 175. Skin. 635.

And the constable ought to have notice of his election. Skin. 635.

Yet the sessions since the st. 13 & 14 Car. 2. cannot make a constable where there never was any. Semb. 1 Mod. 13.

Yet

Yet it was said per Holt, that a constable and a vill are correlative, and the justices of peace may make them in any vill, but not in an hamlet. 1 Sal. 176.

So, the sessions cannot imprison for refusing to be sworn, but he must be indicted. R. Cro. Car. 567.

[To every county, and therefore to every town erected into a county, the office of high constable is incident; because no disuser or non-user of the office can destroy the right of reviving it, or electing to it for the first time. 6 T. R. 228.]

[The appointment of constables is incident to a court leet. Doug. 537.]

(M 7.) Who shall be a constable.—He may make a deputy.

The constable elected ought to be *homo idoneus*; viz. honest, and of competent knowledge, sustance, and ability of body. 8 Co. 41. b. Vide Officer, (D 1.)

If he be *idoneus*, he may be chosen, though he be a master of arts. Semb. 1 Rol. 533. l. 45. 541. l. 15.

Though he be tenant to a parliament-man. 1 Mod. 13.

Or, a physician. R. 1 Mod. 22. Dub. 1 Sid. 431.—S. C. 2 Keb. 578.

Though he be a watchman at the custom-house, and allege a custom that such shall not be; for the custom is void. R. 1 Sid. 272.

Or, a captain of the king's guard. R. 1 Lev. 233.

But an alderman of London shall not be chosen constable, where he lives in the country; though by the custom the constable is to be chosen of any of the inhabitants within the manor. R. Cro. Car. 585. Joa. 462. [Doug. 538.]

Nor, an attorney; but he shall have a writ of privilege. R. Cro. Car. 389. D. Cro. Car. 535. [Doug. 538.]

Nor, the servant of a member of parliament. 1 Mod. 13.

Nor, a counsellor or barrister at law. 2 Keb. 578.

Nor, by the st. 1 W. & M. 18. a teacher in a congregation allowed by the same act.

Nor, by the st. 6 (or 6 & 7) W. 3. 4. an apothecary in London or seven miles distance, if free and approved by the company, or in the country, if he hath been seven years apprentice, while he continues to use the trade.

Nor, by charter, 2 Jac. a surgeon. 2 Keb. 578.

So, if the constable be not *idoneus*, he may be discharged by the leet, or a writ out of B. R. 8 Co. 42. a. 1 Bul. 174. [By rule of court.]

So, if a constable be chosen for a year, and at the end of the year he presents another to the leet to be sworn, and the steward will not swear him, a writ shall issue out of B. R. to the steward to swear him; and if he be not *idoneus*, it may be returned for cause. R. 1 Rol. 536. l. 5.

So, if a tithingman by the custom ought to serve only for one year, and the homage continues him for another year, there may be a writ from B. R. for his discharge, and to elect another. R. 1 Rol. 536. l. 10.

And by the st. 13 & 14 Car. 2. 12. if a constable continue above a year

year in his office, the justices at the quarter sessions may discharge him, and place another fit person in his room, till the lord hold his court.

[A naturalized foreigner is not eligible to the office of constable. 5 Burr. 2787.]

[The crown has the privilege of exempting individuals from serving the office of constable, headborough, and the like, provided there are a sufficient number of persons left to serve the office; which fact will be presumed until the contrary be shewn. 1 T. R. 679.]

[One who is a resiant within a private leet, within the hundred, is not therefore exempt from serving the office of constable, is good. Cowp. 13. Lofft. 420.]

[A certificate, under 10 & 11 W. 3. c. 23. of conviction of a burglar, in the parish of Manchester, which consists of several townships having separate parish officers, held, upon demurrer, to exempt a person from serving the office of constable for the separate township of Manchester, although the manor of Manchester, at the leet for which such constable is chosen, is not co-extensive with the parish of Manchester. 3 Smith, 181. 7 East, 174.]

[A constable of a manor, which includes a parish, is not exempt from the office of constable, by having a statutable certificate of exemption from all ward offices. 2 Burr. 1182.]

[The office of constable may be served by deputy. 1 T. R. 679.]

(M 8.) The duty of a constable.—To take an oath.

A constable elected, must take an oath, if it be required, to execute his office.

And such oath may be administered by the steward of the leet. Kit. 47. a. 1 Sal. 175.

Or, by any justice of peace, 2 Jon. 212.—as conservator of the peace, 1 Sal. 175. Vide ante, (M 6.)

Or, if he be chosen by two justices, or the quarter sessions, pursuant to the st. 13 & 14 Car. 2. 12. by the justices or sessions.

[If a constable chosen at the leet is afterwards sworn in before a single justice of the peace, it is a good swearing. Str. 1149.]

And if the constable refuse the oath, being present, the steward may fine him for his contempt. R. 8 Co. 38. 41. 1 Sal. 175. 5 Mod. 96. 130. Sav. 94. [1 Ld. Raym. 70.]

If he be absent, he may be presented by the homage at the next court, and amerced. 1 Sal. 175. 5 Mod. 130.

So, he may be indicted for refusal. 5 Mod. 96. Dub. F. g. 192. Vide post, (M 11.)

But the indictment must shew he was well elected and by whom. R. 5 Mod. 96.

So, the sessions cannot fine him for refusing to be sworn. 5 Mod. 96.

(M 9.) To keep the peace.

A constable by his oath swears that the peace shall be duly kept according to his power. Kit. 47. a.

That he will arrest all whom he sees making riots, debates, or affrays. Ibid.

That he will endeavour, upon complaint, to take felons, barretors, and riotous persons. Ibid.

And that the statutes against beggars, vagrants, rogues, and idle persons shall be observed. Ibid.

A constable by the common law is a conservator of the peace within his precinct. Kit. 47. b.

And therefore, if the peace be broke in his view, he may take the wrong-doers and bring them to a justice of peace. H. P. C. 135.

So, if it be in the night, &c. he may imprison them in the stocks, or other custody for a reasonable time, till he can bring them before a justice.

Or, till they find surety. H. 136. Per Poph. 13.

So, he may make proclamation that the affrayers depart.

And if an affrayer flies, he may pursue him into another county or franchise. H. 92.

If he flies to an house, he may break open the house to take him. H. 136.

Or, if the affray be made in an house. H. 135.

If an assault be upon the constable himself, he may take him or return the blow. H. 92. 136.

So, upon complaint of a felony committed, he may take up any of bad fame, suspected. 17 Ed. 4. 5. H. 92. Vide Imprisonment, (H 4.)

He may arrest him that gives the stroke, though the party be not dead. H. 92.

So, upon complaint, he may take him that threatens death. See Lamb. Const. sect. 13. at the end.

And upon a felony he may break open an house to take a man. H. 93.

So, he may arrest for prevention of a felony. H. 136. Brownl. 198. Poph. 13.

So, he may arrest night-walkers, who go abroad in the night and sleep in the day. R. 13 H. 7. 10. b.

And persons who frequent houses of bawdry, or keep suspicious company. Ibid.

Or, by the custom of London, he may carry to the counter a person found with a woman in adultery; for it is a breach of the peace. 1 H. b. 6.

So, he may detain in the stocks him who leaves an infant of two months old in a church. R. Mo. 284. Cro. El. 287. Poph. 12.

So, by his office, he may bring before a justice of peace a person whom he finds drunk, tippling, cursing, &c. contrary to the statute.

Or, selling wares, using unlawful sports, or travelling upon a Sunday contrary to statute.

But a constable cannot imprison, or put in the stocks, without bringing the person before a justice of peace. R. Sav. 98.

Nor, for longer time than till he can conveniently bring him before a justice. H. 92.

So, he cannot imprison, without a warrant, for an affray not made in his view. H. 136. [Vide 2 Ld. Raym. 1301.]

Nor, for an assault, or contumelious language to him, going upon his duty. R. Sav. 98.

So, he cannot take a recognizance for the peace. Kit. 48. b. Dalt. 3.

Nor, an obligation for security of the peace. Cont. Kit. 48. a. b.

(M 10.) To execute process.—Pursue without cry.—Present affrays, &c.—Provide watch and hue and cry, &c.

So, a constable swears to execute all process or precepts to him by the justices of peace. Kit. 47.

If a statute gives jurisdiction to justices of peace, the constable, though not named by the statute, must execute all process and warrants of the justices thereupon to him directed. R. 1 Sal. 381. [1 Burn, 394.]

If the warrant be to him only, he may execute it out of the precinct of his vill, though he need not do it. 1 Sal. 176. [Ld. R. 546.]

Otherwise, if a warrant be directed generally, to all constables, bailiffs, &c. for then the constable cannot go out of his precinct. 1 Sal. 176. [Ld. R. 545.]

[Unless in London. 2 Ld. Raym. 1299.]

So, if a constable sees an affray, and would arrest the affrayers, who fly into another county, he may pursue and take them there. 13 Ed. 4. 8. b.

After a warrant executed, the constable ought to certify what he has done; otherwise the defendant cannot be discharged. R. 1 Sal. 381.

But he need not return the warrant; for it may be necessary for his defence. 1 Sal. 381.

If any make resistance with force, &c. he is sworn to make outcry, and pursue them till taken. Lamb. Const. sect. 14.

And if any upon a felony fly, the constable may seize and safely keep his goods, for which he must answer, and therefore ought to inventory them.

He is also sworn, that he will present bloodsheds, outcries, affrays and rescous within his office. Kit. 47. Dalt. ch. 174. at the end.

But he is not obliged to make presentment but of an offence within his conusance, though it be proved to him by witnesses. 1 Vent. 336.

He is also sworn, that he will endeavour that the st. Winton for watch, and hue and cry, be observed. Kit. 47.

A constable is charged to see that the watch be observed according to the st. Winton, 13 Ed. 1. 4. Lamb. Const. sect. 13.

And that hue and cry be pursued from town to town against felons, according to the st. 13 Ed. 1. 1. Lamb. Const. sect. 13. For he ought to raise the town by night or day, and warn the next constable. H. P. C. 90.

He shall bring suspicious persons, delivered to him by the watch, before a justice. Dalt. ch. 104. sect. 3.

If an inhabitant in his turn refuse to watch, the constable may put him in the stocks. R. 3 Leo. 208. Per Wray, Gawdy cont. Cro. El. 204.

So, he may be indicted for the refusal. Comb. 243.

But the constable cannot make a passenger to serve upon the watch, but must aver that he was an inhabitant. R. 3 Leo. 208. R. Cro. El. 204.



Nor, an inhabitant of a town at his pleasure, but in his turn. 3 Lea. 208.

So, an indictment against a woman for not watching is bad, unless it says that she did not procure another to watch for her. Comb. 243.

[It is the duty of a constable to present a highway within his district for non-repair. 3 M. & S. 465.]

(M 11.) Penalty for neglect, [and refusal of office.]

If a constable neglects his duty, he may be indicted: as, if he does not execute a warrant, or process to him directed. 2 Rol. 78. R. 1 Sal. 381. 5 Mod. 96. Vide ante, (M 8.)

[An indictment for not serving the office of constable under an appointment by a corporation, without shewing a right in the corporation to appoint by grant or prescription, is bad. Dougl. 534.]

[(M 12.) Other matters.]

[A compliance by the constable with the demand of a perusal and copy of the warrant, at any time before action brought, though after the six days have expired, is sufficient to entitle him to the protection of the statute 24 Geo. 2. c. 44. s. 6. (q. v.) 5 East, 445. 2 Smith, 5.]

[A constable seizing goods under a warrant to seize "stolen goods in such an house," but which turn out not to have been stolen, is protected by the st. 24 Geo. 2. c. 44. 2 B. & P. 158.]

[A constable acting under the verbal directions of a magistrate, is not protected by the st. 24 Geo. 2. c. 44. 2 B. & P. 158.]

[Constables are only within the st. 24 Geo. 2. c. 44. s. 6. when in obedience to the justices' warrant. Hence, where goods were seized under a warrant of distress granted by a magistrate for Kent, directed to the constables of the lower half hundred of C. and G. in Kent: held, that the defendants, constables, &c. sued in trespass, were not entitled to the benefit of the statute, it appearing that the warrant was executed within the jurisdiction of the Cinque Ports, and not in the county of Kent. 5 East, 233. 1 Smith, 402.]

[Semb, that if two constables are appointed for a certain district, and the usage is, that one shall confine himself to one portion, the other to the residue, still each is answerable for a neglect of duty which happened in the other's portion. 3 M. & S. 471.]

(N) Fine in a leet.

(N 1.) When a fine may be imposed.

Every court may impose a fine for a contempt within view of the court: as, all the courts of record in Westminster-hall. 11 Co. 44. a.

So, the leet may impose a fine, pursuant to a bye-law there, for harbouring of inmates. Per Hale, Hard. 471.

So, for an offence within the view of the steward. 2 Rol. 3, 4.

So, the court of admiralty may impose a fine for contempt in their view, though it be not a court of record. 1 Vent. 1.

So, the court of mayor and aldermen in London, if an alderman refuses to attend the court. Semb. Pal. 533. 539.

But,

But, generally, a court, not of record, cannot impose a fine: as, a county court, hundred, or court-baron. 11 Co. 43. b.

So, a court, in equity by English bill, cannot fine for not answering the bill.

Nor, for not performing a decree. 4 Inst. 84.

So, ecclesiastical courts before the ordinary, archdeacon, &c. or their commissaries; for they proceed according to the canon or civil law. 11 Co. 44. a. 4 Inst. 324.

Nor, the high commission. 4 Inst. 324, &c.

So, a constable, though he may imprison upon an affray, cannot fine. 11 Co. 44. a.

So, the pope never fined or imprisoned, but proceeded only by ecclesiastical censures. 4 Inst. 324.

So, no ordinary or ecclesiastical judge in an ecclesiastical cause, unless authorized by act of parliament. Ibid.

Though the king by letters patent grants a power to fine. Ibid.

### (N 2.) Proclamation upon pain.

So, where a court may fine, it may make proclamation, upon pain: as, proclamation for silence, upon pain. 1 Rol. 219. l. 12.

Or, command that an officer shall do his duty, upon pain, and if he do not he shall lose his office. 1 Rol. 219. l. 15. Per Cotsmore, 7 H. 6. 12. b.

### (N 3.) For what cause.

A fine may be imposed for any neglect of his duty to the court by any officer: as, if an officer in a leet refuse to do upon command that which belongs to his office. 8 Co. 38. b. 1 Rol. 218. l. 40. 542. l. 12.

If a bailiff refuse to make a return of the pannel. 1 Rol. 219. l. 15. 542. l. 12.

If a constable, being elected, refuse the office. R. 8 Co. 38. 41.

Or, to make a presentment. 8 Co. 38. b.

So, if a juror refuse to be sworn he may be fined. 1 Rol. 219. l. 18.

Or, if he depart without giving his verdict. 8 Co. 38. b.

Or, the inquest refuse to present defaults of which they are informed. Kit. 41. b.

Or, a man refuse to be sworn to give evidence to the grand inquest, in a case of high treason. 1 Sal. 278.

Or, the jury, being sworn to present articles of the leet, refuse to do it, each may be fined for such concealment and contempt. R. Dy. 211. b.

So, for a contempt in view of the court: as, if a man makes a disturbance in court. R. 8. Co. 38. b.

If the steward desire him to be uncovered, and he says, that he does not regard what he can do. R. Ray. 68.

If he says openly to the steward in court, you lie; for it is a contempt. R. Mo. 470. Cro. El. 581.

If a man refuse to be sworn to give a verdict, or will not give a verdict when sworn. Semb. 1 Leo. 217.

But for a thing not in his view, the steward cannot fine; as, for not doing suit. R. Cro. El. 241.

Nor, for words which do not import a contempt; as, if he say to the steward in the town-hall, that the mayor has more right there than the steward himself. R. 2 Jon. 229.

(N 4.) In what manner.—Must be assessed severally.

A fine ought to be imposed upon every offender severally. Dy. 211. b.

Though many join in the same offence; for the offence of one is not the offence of the others: as, if the twelve chief pledges refuse to present *pro certo letæ*, they cannot be fined together. R. 11 Co. 42. b.

But where there is an uncertainty, as to the offenders, they may be fined generally together; as, a fine may be imposed upon the whole town, hundred, or county, &c.; as, for the escape of a murderer. 11 Co. 43. b.

(N 5.) Must be reasonable.

So, a fine ought to be reasonable. 4 Inst. 261.

By the st. 1 W. & M. 2. sess. 2. excessive fines ought not to be imposed.

And therefore, if a fine in a court leet be unreasonable, it may be avoided by plea, and judgment of the court; for the judges are to determine the reasonableness of the fine. R. 11 Co. 44.

So, if a fine be excessive, or without cause, it shall be discharged upon a certiorari to remove it to B. R. 1 Vent. 336.

So, upon a distress for such a fine, trespass lies. R. 2 Jon. 229.

So, upon a certiorari, &c. the cause of the fine, the words, or contempt for which it was imposed, ought to be shown in particular. R. 1 Vent. 336.

If 6*l.* be assessed for a fine for not presenting a *certum letæ*, it will be excessive. Semb. 11 Co. 44.

But a fine of 40*s.* for a contempt in court is not excessive. Ray. 68.

Nor, 5*l.* for refusing to be constable. 8 Co. 38.

Nor, 40*l.* for refusing to impanel a jury. Kit. 41. b.

How a fine shall be collected and answered to the king, vide in Prerogative, (D 51, &c.)

## (O) Amerciament.

(O 1.) When it may be imposed. In a leet.

So, for an offence in the leet, not done in the presence of the steward or in contempt of the court, a man may be amerced.

[When an offence is presented by the jury, the punishment is by amerciament, not fine, though it be a contempt. Andr. 47. Vide 1 Wils. 248. *et seq.*]

As, for not doing suit. Cro. El. 241. Mo. 89. Kit. 43. a.

Or, not paying *certum letæ*. 13 H. 4. 9.

For a nuisance done. Kit. 43. a.

But there shall not be an amerciament in the leet for a trespass done to the lord himself; for he shall not be judge in his own cause. 1 Rol. 211. l. 25. 12 H. 4. 8. b. 6 T. R. 511.

Nor,

Nor, for non-payment of a rent to him, for which he may distrain. 1 Rol. 211. l. 10.

Nor, for a neglect in keeping a tumbrel, or stocks; for the lord of the leet ought to do it. R. Mo. 573. Cro. El. 698.

Nor, for leaying his gates open to the nuisance of the inhabitants; for it does not appear to the leet. R. Mo. 358.

Nor, for digging coney-burrows in the lord's waste. R. Ray. 160.

Nor, for encroaching upon the waste, and building a cottage there. R. 1 Sand. 135.

Nor, for any private nuisance, or thing, to the damage of the lord or any other. 1 Sand. 135.

(O 2.) How affeered.

An amerciament ought to be imposed with mercy; and therefore it is called *misericordia*. Co. L. 126. b. 8 Co. 41. F. N. B. 75. E. H.

By the st. M. Ch. 9 H. 3. 14. *nullus liber homo amercietur nisi secundum modum delicti, salvo contenemento, mercator salvo merchandiza, villanus salvo wainagio, ecclesiastica persona secundum laicum tenementum, &c.*

And therefore shall be proportioned according to the offence to the lord, and not the damage to the tenant. F. N. B. 75. E.

The arms of a soldier are his contenement, and the books of a scholar, &c. 2 Inst. 28.

But the amerciament of a duke shall be 10*l.*, of an earl or bishop 5*l.* Ibid.

And if he be amerced as a baron, when he does not hold by barony, it may be pleaded in discharge. Mad. 367.

By the st. M. Ch. 14. *misericordia non ponatur, nisi per sacramenta proborum & legalium hominum de vicineto.*

And therefore, when it is fixed by the court, it must be affeered and moderated by others. F. N. B. 75. G. R. 1 Rol. 542. l. 20. Hob. 129. R. 3 Lev. 206.

In a court-baron, by the tenants of the same court upon oath. F. N. B. 76. D.

If it be assessed without affeement, the party shall have a writ upon M. Ch. 14. and thereon an alias, pluries, and attachment. Ibid.

Or, if it be outrageous, a writ *de moderata misericordia*. F. N. B. 75. A. Noy, 20.

And it ought to be assessed at a sum certain. R. 1 Rol. 542. l. 20.

Or, reduced to a certainty by affeement. 3 Mod. 138.

And assessed upon each severally. F. N. B. 75. G.

[A general amerciament is good, if it is afterwards reduced to a certainty by affeement. Andr. 47.]

Or, by custom, it may be a sum certain, without affeement. Semb. 2 Mod. Ca. 299.

But an affeement by the steward is void. 8 Co. 41.

Or, by four of the jury. D. Cro. Car. 275.

Or, by the whole jury; for it ought to be affeered by officers chosen by the steward, and sworn for that purpose. 3 Lev. 206. But now it may be affeered by the jury. Semb. Sho. 62.

[Amerciament of a freeholder must be affeered by freeholders of the manor. 2 Wils. 20.]

Yet, if the jury assess the amerciament, it is sufficient, without other affeement. 8 Co. 40. b. Semb. cont. Jon. 301.

If an issue be, whether A. and B. were affeerors, it shall be tried by the record, not by the country. Cro. El. 860.

By the equity of the st. W. 1. 3. Ed. 1. 18. the clerk of the warrants estreats the amerciaments in C. B. and delivers them to the clerk of assise to be affeered by the coroners, and they are afterwards re-delivered to the clerk of the warrants, who with the justices of C. B. delivers the roll to the exchequer.

So, the amerciament in B. R. or before justices of assise. F. N. B. 76.

If the plaintiff be nonsuited, when a verdict is ready to be delivered, the amerciament shall be assessed by the jury. R. 8 Co. 39. b.

An amerciament upon a sheriff, gaoler, or other minister of justice, shall be assessed by the justices of the court, and the entry shall be, *ideo in misericordiâ et affertur per just.*, for it is out of M. Ch. or the st. W. 1. 18. 8 Co. 40.

(O 3.) When upon a town, county, &c.

So, a town, hundred, or county, may be amerced for murder or manslaughter committed there. Mad. 374. 377.

So, for other misdemeanors. Mad. 378.

As, for not making hue and cry. Mad. 386.

Permitting the escape of a felon. Mad. 387. Adm. 1 Leo. 107. 3 Leo. 207.

Concealment of homicide. Mad. 389.

But if a felony be done in the night-time, and the felon escape, a town in the county shall not be amerced for it. (Vide 1 Leo. 107. 3 Leo. 207.)

So, if a felon give a mortal wound in the day-time of which the party dies in the night; for till death it is no felony. Semb. 3 Leo. 207.

But the king's demesnes were discharged of so much of the amerciament as was charged upon them. Mad. 374.

So, lands in the possession of the queen. Ibid.

So, the barons of the exchequer, for themselves and their tenants. Mad. 375.

And ecclesiastical persons, for an ecclesiastical fee. Ibid.

So, the lands of him who has the king's grant for his discharge. Mad. 374.

So, an amerciament must be reasonable, otherwise the lord shall not have an action for it. Semb. Carth. 184.

(O 4.) In actions.—When a plaintiff or demandant, defendant or tenant, &c. shall not be amerced.

In all actions real or personal, if the writ abates by the act of God, and not by the default of the party, the demandant, or plaintiff, shall not be amerced; as, if it abate by the death of the demandant or plaintiff. Co. L. 127.

So,



So, where several join in a suit, which fails for the default of one only, the others who were not in default shall not be amerced; as, if one plaintiff be nonsuited, (in a case where the nonsuit of one will be the nonsuit of both,) he who appears shall not be amerced. 8 Co. 61. a. 1 Rol. 213. l. 49.

So, in judicial process, if the writ abates, or the plaintiff be nonsuited, or barred, the plaintiff shall not be amerced; because the suit is founded upon a record. 8 Co. 61. a. 1 Rol. 214. l. 4. 16.

As, in a *quid juris clamat*.

In a *scire facias*, &c. 11 H. 4. 7. a.

So, if the plaintiff discontinue he shall not be amerced; for it is the act of the court. 8 Co. 61. a. 1 Rol. 225. l. 1.

Nor, if the court be ousted of jurisdiction. 8 Co. 61. b.

So, if the plaintiff recover upon all the causes of action contained in the declaration, he shall not be amerced, though he recover less than was demanded, as, if the plaintiff declare *ad dampnum* 40*l.* and recover only 20*l.* Cro. El. 257.

If there be trover for 500 load of goods, &c. and he recovers but for 100 load.

So, in an action against several, if he recover against each for part. R. 1 Rol. 217. l. 45.

Or, against husband and wife, if the husband be acquitted; for he must be joined for conformity. 8 Co. 61. a. 1 Rol. 217. l. 40.

So, in an action for words, if it be found for the plaintiff as to all the material words, though it be against him for words not material. R. 1 Rol. 217. l. 12. Qu. Dy. 75. a.

In wast for cutting down twenty trees, if it be found for the plaintiff only for two. Per Berkley; but the other J. dub. Cro. Car. 453.

In ejectment for a manor, and it be found for the plaintiff for the manor, but not as to the services. R. 1 Sid. 232.

So, if the plaintiff join issue to part, and demur to the other part, and the demurrer be adjudged for him, whereupon he enters a *nolle prosequi* as to the issue. R. 1 Rol. 217. l. 5. R. 2 Mod. Ca. 198.

So, if the defendant, or tenant in all actions real or personal, which do not charge force or deceit, comes at the first day, and renders the thing demanded, he shall not be amerced. R. 5 Co. 49. b. 8 Co. 61. b. 1 Rol. 212. l. 20. 27. 51.

So, if he comes at the first day, and makes defence by attorney, and pleads *non sum informatus*; for that is the same as to the plaintiff, as if he had confessed the action. R. 1 Rol. 213. l. 1. 17.

So, the king, or queen, shall never be amerced. 8 Co. 61. b.

Nor, an infant generally; for the entry shall be, *sed nihil de misericordia quia infans*. Dy. 338. b. Adm. Cro. Car. 410. R. 1 Rol. 214. l. 50.

And if an amerciament be entered against an infant, he shall be pardoned of course, and the entry shall be, *ideo in misericordia, sed pardonatur quia infans*. 8 Co. 61. b. 1 Rol. 214. l. 41.

Though the infant be a defendant with others in ejectment, trespass, &c. R. 2 Cro. 274.

**(O 5.) When a plaintiff or demandant shall be amerced.**

But in all actions real or personal, if there be a default in the plaintiff, or demandant, he shall be fined, or amerced.

And therefore, in all writs of entry, *præcipe quod reddat*, *permittat*, or *faciat*, if the writ abates for matter of form, or the demandant be nonsuited or barred, he shall be amerced. 8 Co. 60. b.

So, in all personal actions, which charge with force and deceit, and which do not, if the writ abates for matter or form, or the plaintiff be nonsuited or barred, he shall be amerced *pro falso clamore*. 8 Co. 61. a.

So, if he enter a *retraxit*, he shall only be amerced, though he be in contempt of the court. 8 Co. 60. a.

So, in all actions real or personal, if the demandant or plaintiff be barred for part of his demand, though he recovers for other part, he shall be amerced. Dy. 89. a. 8 Co. 61. a. R. Mo. 692. R. Cro. El. 699. Vide ante, (O 4.)

Or, if there be several tenants or defendants, and he be barred as to one, or as to part against one, though he recovers against the others. R. 1 Rol. 216. l. 10. 2 Cro. 630.

As, in covenant for several covenants broken, if he recover upon one, and be barred as to the residue. R. 1 Rol. 216. l. 35.

In *assumpsit* upon several promises, and he recover only upon one.

Or *assumpsit* for several things, if he recover only for one, and be barred for the other, though the *assumpsit* was entire. 1 Rol. 216. l. 40.

In wast in *domibus et gardinis*, if he recover only for wast in *domibus*. Cro. Car. 453. 1 Rol. 217. l. 17.

**(O 6.) When a tenant, or defendant.**

So, in all actions real or personal, if the plaintiff recover, the tenant or defendant shall be amerced, or fined; unless where he comes the first day in actions which do not charge force or deceit.

In all writs of *præcipe*, 8 Co. 60. b., he shall only be amerced.

So, in an assise for rent, where the disseisin was only by denial. 1 Rol. 223. l. 25.

In an attain, where the defendant was only tenant by receipt. 8 Co. 60. a.

So, in all personal actions, which do not charge with force or deceit, the defendant shall only be amerced; as, in account. 8 Co. 61. a. R. Cro. El. 107.

In *assumpsit*. 1 Rol. 223. l. 1.

In an action upon the case. 1 Rol. 222. l. 40.

Though it be upon the custom of the realm; as, against a carrier, hostler, &c. R. 2 Cro. 224.

Though it be an action upon the case for a deceit. 8 Co. 59. b.

In trover. R. Sav. 37.

In an action upon a statute for non-feasance; as, upon the st. of Wint. or the st. 2 Ed. 6. for not setting out tithes. Vide post, (O 8.)

So, in an action for *scandalum magnatum*. Semb. 1 Lev. 148.

So, the defendant shall be only amerced, if he deny the deed of another; or if, *relictâ verificatione*, he confess the action after denial of his own deed. Vide post, (O 8.)

**(O 7.) When**

(O 7.) When there shall be a *capiatur*:—Against the plaintiff.

In an appeal for felony or mayhem, if the writ abates by the default of the plaintiff, or he be nonsuited or barred, the plaintiff shall be fined, and the entry of the judgment shall be by *capiatur*. 8 Co. 60. a.

So, in an attain. Ibid.

So, in a recaption; unless it be brought in a county-court, which not being a court of record, there can be no fine. 8 Co. 60. b.

So, where the plaintiff appears to be vexatious; as, if he sue in C. B. and also in London, or other court, for the same cause. 8 Co. 60. a.

So, in trespass, if the verdict be against the plaintiff. 1 Rol. 225. l. 20.

(O 8.) Against the defendant.

So, in all actions *vi et armis*, or which charge the defendant with force or deceit, if there be judgment against him, he shall be fined. Dy. 89. a. 8 Co. 59. b.

As, in trespass for an assault and battery, &c. Cro. El. 84. 1 Rol. 222. l. 26.

In rescous, though it be in the nature of an action upon the case. 1 Rol. 222. l. 30. Hob. 180.

In assise, if the disseisin be found to have been by force. 8 Co. 59. b.

In a writ of deceit upon a recovery by default in a real action, if non-summons be found. Ibid.

In an attain, if the defendant was a party to the first record. 8 Co. 60. a.

So, in all cases, where the defendant is fined, the judgment ought to be, *quod capiatur*: as, in an indictment, &c. R. 1 Rol. 225. l. 25. Cro. Car. 340. Jon. 407.

Or, if he be present, he shall be committed, and then no *capiatur* is necessary; and if the *ideo in misericordia* be also entered, it is surplusage. R. Cro. Car. 340.

So, if the defendant deny his own deed, and it be found against him, he shall be fined. Dy. 67. b. 8 Co. 60. a. Dy. 245. b. 1 Rol. 219. l. 46. 224. l. 15. 33 H. 6. 54. b. 2 Sand. 192.

Or, if he plead a false deed made to himself. 8 Co. 60. a. 1 Rol. 219. l. 45. 224. l. 17. 2 Cro. 225.

Otherwise, if he plead a false deed to another, or deny the deed of another. 8 Co. 60. a. 1 Rol. 224. l. 37.

Or, deny his own deed, or plead a false deed to himself, if, *relicta verificatione*, he confesses the action. R. 33 H. 6. 54. b. D. cont. Dy. 67. 8 Co. 60. a. Per two J. acc. Gawdy cont. 2 Cro. 64. R. acc. 1 Rol. 224. l. 42. 2 Cro. 420. Dub. per Twisden; sed Sand. semb. acc. 2 Sand. 191. Dub. Ray. 195. 202.

So, in replevin, if the defendant claims property, and it is found against him in a *proprietas probanda*. 8 Co. 60. a.

So, in all actions where the defendant is charged for a contempt against the king's writ: as, in a *quare incumbavit*, *quare non admisit*, prohibition, &c. Ibid.

So,

So, in all actions upon statutes, where the defendant is not sued for a duty : as, in ravishment of ward. 8 Co. 60. b. 2 Cro. 631.

In debt upon the st. of Marl. 52 H. 3. 1., or the st. 1 & 2 Ph. & M. 12., for carrying a distress out of the county. R. 1 Rol. 222. l. 42. 45. Qu. Dy. 177. b.

In debt upon the st. against usury. R. 1 Rol. 223. l. 5.

Otherwise, in an action upon a statute for non-feasance; as, upon the st. of Wint. against the hundred. R. 2 Cro. 348.

Or, in debt upon the st. 2 (or 2 & 3) Ed. 6. 13. for not setting out his tythes. 1 Rol. 223. l. 10. R. Sho. 81.

So now, by the st. 5 & 6 W. & M. 12. in trespass, ejectment, assault, or false imprisonment, no fine or *capiatur pro fine* shall be charged, but the plaintiff in satisfaction of it shall pay 6s. 8d. on the judgment, which shall be allowed him in costs.

And therefore, if a *capiatur* be now awarded in such a case, it will be error. R. 5 Mod. 285.

And since the statute no fine or *capiatur* is entered in B. R. 1 Sal. 54.

In C. B. the entry is *nihil de fine quia remittitur per statutum*. Ibid.

#### (O 9.) When several amerciaments are allowed.

The plaintiff may be amerced several times. 1 Rol. 218. l. 10. 15. 8 Co. 61. a.

But the defendant shall be amerced only once. 8 Co. 61. a. R. 5 Co. 58. b.

Though he plead several pleas. 5 Co. 58. b.

Or, confess for part, and plead to issue to the other part, which is also against him. Ibid.

Yet, if the defendant pleads several pleas, and both are against him, there may be an amerciament against him upon one, and a *capiatur* upon the other. R. 1 Rol. 213. l. 13.

So, in an account upon a judgment *quod computet*, the defendant shall be amerced, and again afterwards, if he be found in arrear upon a final judgment against him. 1 Rol. 218. l. 10.

So, if a defendant or tenant confess a judgment for part, and plead to another part, upon which judgment is afterwards against him, there may be a several amerciament upon each judgment. R. 1 Sal. 253.

For both the judgments are final and independent. 1 Sal. 54. 5 Mod. 65. 67. Skin. 593.

So, if there are several defaults by the same defendant, there may be several amerciaments against him. 2 Leo. 4. 185.

So, if there are several defendants who plead severally, they may be severally amerced. 5 Co. 58. b.

#### (O 10.) Remedy for an amerciament.—By distress.—When and how it shall be affeered.

If an amerciament in a leet be affeered, the lord may distrain for it of common right, without prescription. R. 2 Cro. 382. 8 Co. 41. Kit. 43. Vide ante, (O 2.)—Vide Distress, (A 1. 3.—B 3.)

A dis-

A distress for an amerciament may be in any place within the precinct of the manor. Semb. Noy, 20.

So, it may be upon any goods of the offender. (Vide Noy, 20.)—Vide Distress, (B 3.)

So, if an amerciament be upon a vill, the distress may be for the whole, upon any in the vill, if he was an inhabitant there at the time of the amerciament. R. Cro. El. 698.

But a distress cannot be taken for an amerciament in a place out of the jurisdiction.

Nor can the goods of a stranger be taken, though they be upon the land of the offender. Semb. Noy, 20.

So, the bailiff cannot distrain for it *ex officio*, but he must have the steward's precept. Per Poph. Gawdy cont. Cro. El. 698. Mo. 574. R. 3 Mod. 138.

And if he justifies in trespass, he must shew the precept. R. 3 Mod. 138.

Otherwise, in replevin. Adm. 3 Mod. 138.

So, if the defendant justifies by distress for an amerciament upon a vill, he must allege that no one else has paid it. R. Cro. El. 698. Mo. 574.

### (O 11.) By debt.

So, debt lies for an amerciament affeered. R. 2 Cro. 382. Adm. 2 Cro. 582. Kit. 43. b. Vide 1 Wils. 248. *et seq.*

[And debt on amerciament may be joined with debt on a *mutuatus*. 1 Wils. 252, 3.]

[Amerciament of a freeholder must be proved to be affeered by freeholders of the manor, or debt will not lie for it. 2 Wils. 20.]

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## LEGACY.

Vide ADMINISTRATION, (C 3. 5, &c.) — CHANCERY, (3 A 3, &c. — 3 G 3, &c.—3 Y 1, &c.)—PROHIBITION, (G 17.)

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## LEGATE.

Vide POPERY, (A 2.)

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## LEGATEE.

Vide CHANCERY, (3 G. 3, &c. 7. — 3 Y 18, 19.)

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## LEPROSY.

(A) Leprosy. p. 862.

(B) How restrained. p. 862.

(A) Leprosy.



## (A) Leprosy.

There are many sorts of leprosy. F. N. B. 234. G.

(B) *Ipso restrained.*

If a man, who is a visible leper, will intrude himself into a church, or the company of his neighbours, to their nuisance, or disturbance, a writ shall be directed to the mayor, bailiff, &c. of the town to enquire whether he be a leper, &c. *tunc honestiori modo, quo poterit, a communicatione hominum amovere.* &c. F. N. B. 234. D.

And if he will not execute the writ, they shall have an *alias*, *pluries*, and attachment. F. N. B. 234. F.

But if he does not appear to be a leper by the visible putrefaction of his flesh, and the smell of his ulcers, he shall not be removed. *Semb.* F. N. B. 234. G.

Or, if he be a visible leper, or if he keeps himself within his house. F. N. B. 234. G.

## LETTERS.

Letter of attorney. Vide ATTORNEY, (C 1, &c. 5, &c.)

Letters patent. Vide PATENT.

Letter to a peer. Vide CHANCERY, (D 2.)

[The st. 9 Ann. c. 10. s. 40., imposing a penalty on persons opening, detaining, or delaying letters, &c. only extends to those employed by the post office. 5 T. R. 101.]

## LEVARI FACIAS.

Vide COUNTY, (C 10. 13.)—EXECUTION, (C 3.)—PROCESS, (E 4.)—  
STATUTE STAPLE, (D 3.)

## LEVEL.

Vide SEWERS.

## LEVITICAL DEGREES.

Vide BARON AND FEME, (B 4.)

## LEVYING WAR.

Vide JUSTICES, (K 4.)

LEY.

## LEY.

- (A) What laws are allowed in England. p. 863.
- (B) The original and grounds of the common law. p. 864.
- (C) What realms are governed by the laws of England. p. 864.
- (D) Professors of the law.
- (D 1.) Apprentices. p. 865.
- (D 2.) Serjeants of the law.—How created. p. 865.
- (D 3.) What privileges belong to them. p. 866.

## (A) What laws are allowed in England.

Divers laws are used and allowed within the kingdom of England; which are all part of the laws of the realm. Co. L. 11. b.

The law of the realm is, *scripta, vel non scripta*.

As to the law in writing, or statute law, and the laws and usages of parliament, vide Parliament, (G 1, &c.—H 1, &c.)

The law, not in writing, comprehends the common law, strictly so called, and the particular laws allowed in peculiar courts in peculiar cases.

As to the canon and civil law allowed in the ecclesiastical courts, in the admiralty, and the court of chivalry, vide Admiralty.—Canons.—Courts, (E 1, &c.)

The common law, strictly so called, regulates the proceedings in the usual courts of justice; and if it be applied to criminal cases is called the crown law. *De qua vide* Justices, and Justices of Peace.—Vide Action, (D 1.)

If it be applied to the affairs of the king, it is termed the prerogative law. *De qua vide* Prerogative.

If to matters within the forest, &c. it is termed *lex forestæ*. *De qua vide* Chase.

If to trade or commerce, it is called *lex mercatoria*. *De qua vide* Merchant, (D).

If to customs of particular places, the name varies according to the places: as, in Ireland, they are termed the laws of Ireland. Of which vide Ireland.

In Scotland, the laws of Scotland. Of which vide Scotland.

In Jersey, Guernsey, Man, &c. the laws of Jersey, Guernsey, or Man, &c. Vide Navigation, (F 2, 3, 4, 5.)

In the plantations, the laws of the plantations. Vide Navigation, (G 1, &c.)

As to laws in Wales, vide Wales.

[The courts in England do not take notice of foreign revenue laws. Dougl. 251.]

[So,

[So, it is a general principle that the penal laws of one country cannot be taken notice of in another. By Buller, J. 3 T. R. 739. Cowp. 341.]

### (B) The original and grounds of the common law.

The foundations of the common law are, 1. the law of nature or reason; 2. the divine law; 3. general customs; 4. divers principles, or maxims; 5. several particular customs. D. & St. dial. 1. ch. 4. at the end.

And it was called the common law, because of the code of laws collected by Edward the Confessor out of the laws before used in the several provinces during the heptarchy, was common to the whole realm. 1 Ch. R. Arg. 60.

[Common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country. By Lord Kenyon, Ch. J. 3 T. R. 261.]

### (C) What realms are governed by the laws of England.

The common law is the inheritance of all the subjects of the realm.

And therefore, in the plantations, or elsewhere, where colonies of English are settled, they are to be governed by the law of England. Ca. Parl. 31. Vide Navigation, (G 3.)

If the king makes a conquest of an infidel kingdom, the antient laws are abrogated *ex instanti*, and it ought to be governed by such laws as the king appoints. 7 Co. 17. b. Calvin. Ca. Parl. 31.

So, if the laws of England are once established in another realm, which the king obtains by conquest, they cannot afterwards be altered, except by parliament. 7 Co. 17. b. Calvin.

So, if a foreign territory, not inhabited, be obtained by the crown of England, all laws in England bind there. R. Sal. 411.

But if a conquest be made of a christian kingdom, the antient laws remain there, till they are altered. 7 Co. 17. b. Calvin. R. 4 Mod. 225.

So, if a christian kingdom descend to the king, the antient laws cannot be altered, but by parliament. 7 Co. 17. b. Calvin.

So, if an infidel kingdom be gained by conquest, though the laws there are abolished, yet the laws of England are not of force till it be so declared. R. Sal. 411.

And till the laws of England are declared to be of force there, such infidel kingdom, gained by conquest, shall be governed by their antient laws, which are not contrary to the law of God, (for those do not seem to be absolutely abolished till other laws are introduced,) or by the rules of natural equity. Sal. 412.

(D) *pro-*

## (D) Professors of the law.

## (D 1.) Apprentices.

The professors of the law, till 2 H. 3. were usually of the clergy. Doug. O. J. 21. or rather till the year 1164, temp. H. 2. when by the canon *in sinodo Turonensi sub Alex. 3. papa*, it was ordered, *quod post votum religionis nullus ad physicam vel leges mundanas legendas permittatur exire*. Seld. Diss. ad Fl. 519.

By the st. W. 1. 29. *si ul serjeant, counter, ou auter face ul maner de disceit, ou de collusion en la court le roy, ou consent de faire la, en disceit de la court, pur engin. le court, ou la partie, et de ceo soit atteint, lors puis eit la prisonment dun an et un jour, et ne soit oye en la court le roy a counter pur nulluy. Et si soit auter que counter, per mesme le maner eit la prison dun an et dun jour a tout le meins. Et si le trespass demande greinder paine soit a volonte le roi.*

And this extends to a serjeant, and also to an apprentice of the law. 11 Ed. 4. 2 Inst. 214.

And if an apprentice refuse to be counsel for any, when assigned by the court, he may be excluded from the bar. 11 Ed. 4. 3.

[An appeal lies from the inns of court, in matters relative to calls to the bar, to the twelve judges at Serjeants' Inn. Dougl. 353.]

[A bare retainer does not authorize the counsel to withdraw the record at *nisi prius*. 3 Taunt. 225.]

[The acts of the senior counsel, at the trial, are conclusive. 3 Taunt. 531.]

## (D 2.) Serjeants of the law.—How created.

The serjeants of the law are commanded by the king's writ to take this state and degree; for by the chief justice of C. B. by the assent of all the justices, the names of the most worthy in the study of the law, are presented to the chancellor, who by the king's writ assigns a day to them to take *statum & gradum servientis ad legem sub pœna*, &c. Fort. c. 50.

If they do it not at the day of the return of the writ, they shall be at the king's mercy. 2 Rol. 167. l. 10.

And *ex rigore*, they cannot take it afterwards. 2 Rol. 167. l. 17.

If their creation be void, as in the time of the usurpation, they may be required *de novo* to take the same state and degree. 1 Sid. 3.

If the writ be returnable *immediatè*, whereupon the serjeant appears before the chancellor in the vacation, and is sworn, it is not legal. R. Cro. Car. 2 Jon. 63.

After the writs to the serjeants, they appear before the justices of one of the benches, and make their counts, &c. and being robed with coifs, &c. go to Westminster attended by the marshal, warden, benchers, and others of their respective societies, and there make counts, &c. *de novo*, and afterwards return to Serjeants' Inn, and make a feast there. Cro. Car. 4. Jon. 63.

The serjeants have precedence according to their antienty in admittance.

If a man created a serjeant was before speaker of the house of commons, he shall take place according to his admittance, and shall not have precedence of the other serjeants. R. per Poph. and the greater

part of the judges and barons ; the lord keeper, four judges and twelve privy counsellors cont. 2 Cro. 2.

(D 3.) What privileges belong to them?

A serjeant of the law has privilege for himself and his clerks, that they shall not be sued but in the courts of Westminster-hall. A.

And therefore, if they are sued in the Marshalsea, &c. an inhibition shall go out of C. B. to surcease. R. Cro. Car. 84.

But the privilege does not extend to a court in Westminster-hall, and therefore he may be sued in B. R., for he may practise there. R. 2 Lev. 129.

[A serjeant sued in B. R. may plead his privilege, that he ought to be sued in C. B.; but if he has long retired from the bar, it shall not be allowed. 2 Wils. 232.]

So, the privilege does not extend to a prohibition. Dub. 1 Sid. 65.

So, a serjeant shall have privilege to sue by attachment of privilege, and not by writ.

Though he sues as heir. Per Englefd. Fitz. cont. Dy. 24. a.

But he shall be sued by original writ, and not by bill. Semb. 11 Ed. 4. 2. b.

And if he be sued by bill, he may plead his privilege. 11 Ed. 4. 2. b.

[A serjeant cannot prevent the venue being changed, unless he sues by writ of privilege. Barnes, 484.]

So, a serjeant at law shall serve upon a jury, for necessity, where a peer is party to the action, and there is no other knight who has a freehold in the county. 2 Mod. 182.

If he does not serve as counsel when assigned by the court, he may be excluded from the bar. 11 Ed. 4. 3.

Though assigned by the chief justice of B. R. Ibid.

But a serjeant may be discharged by the king's writ, of his title and degree. Dudg. 140.

So, the acceptance of the office of a judge, commissioner of the great seal, &c. discharges him from the office of king's serjeant. R. 3 Lev. 351.

But the office of a judge, or baron, does not discharge him from the degree of a serjeant. Ibid.

Nor, the office of commissioner of the great seal. R. Ibid.

Nor, a patent to be a peer of the realm.

Act of law. Vide CONDITION, (L 13.)

Authority of law. Vide IMPRISONMENT, (H 4, &c.)

Enactings of laws. Vide PARLIAMENT, (G 10, &c.)—(R 3, &c.)—  
PREROGATIVE, (D 1.)

## LEY GAGER.

Vide WAGER OF LAW.

**LIBEL.**



## LIBEL.

## (A) Libel; what shall be.

(A 1.) In defamation of the government. p. 867.

(A 2.) Of a magistrate. p. 868.

(A 3.) Of a private person. p. 868.

## (B) Publication.

(B 1.) What shall be. p. 869.

(B 2.) What not. p. 870.

## (C) Libeller.

(C 1.) Who is not. p. 871.

(C 2.) If done in a course of justice. p. 871.

(C 3.) How punished.—By the common law. p. 872.

(C 4.) By statute. p. 875.

(C 5.) What remedy is provided. p. 875.

## (A) Libel; what shall be.

A libel (*libellus famosus*) is a contumely, or reproach, published to the defamation of the government, of a magistrate, or of a private person.

And it may be in writing. 5 Co. 125. b. Vide infra.

[But it is not a breach of the peace; and therefore a member of parliament writing a seditious libel, is entitled to his privilege from being arrested for the same. 2 Wils. 159.]

As, if a man publishes a rhyme, epigram, or other writing made to the defamation of another, &c. 5 Co. 125. b.

Writes a letter, and sends it to another. R. 12 Co. 35. Vide post, (B 1.)

Or, it may be without writing. [Vide Sal. 418.]

As, if he makes a picture in an ignominious manner, or any ignominious sign to the reproach of another. 5 Co. 125. b.

If he makes the sign of a gallows, &c. upon the door of any one. Ibid.

[If a mayor send a licence to keep a public house, to a peer. Str. 422.]

[The jury are the judges of what is or is not a libel. 32 G. 3. c. 60.]

## (A 1.) In defamation of the government.

So, if he makes the king's arms, with a text that insinuates calumny, in a church. Sav. 49.

If he writes, preachers run to the queen, as though they were to be directed by her to tarry for reformation. R. Sal. 49.

[If A. publish an advertisement that money had been collected at a meeting for the relief of the widows, &c. of those who, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops. Cowp. 673.]

## (A 2.) Of a magistrate.

So, a libel against a magistrate tends to the scandal of the government. 5 Co. 125. a.

It will be a libel, if A. delivers a writing to a parson to be published in a church, which says, bewail the sodomy and wickedness in this city which go unpunished by the magistrate, though it does not say, that the magistrates knew it. R. 1 Sid. 219.

If one writes to a privy counsellor, that the chief justice, &c. will do nothing by the command of the king. 3 Inst. 174.

So, a libel on one who was formerly a judge, which charges him with perjury, &c. in his office, when he was a judge. R. Cro. Car. 175. 1 Sid. 271.

So, words of a justice of peace, which affect him in his office, are indictable, though they are not actionable: as, A. is a buffle-headed fellow, doth not understand law, and hath not done B. justice. R. 3 Mod. 139. Comb. 65. Vide post, (C 1.)

So, though he might have an action for the same words. R. Carth. 15.

So, words of a judge, which reflect upon him. 1 Sid. 271. Cro. Car. 504.

[These seem not to be libels.]

## (A 3.) Of a private person.

So, a libel against a private person deserves severe punishment; for it incites the whole family to revenge, and by consequence tends to quarrels, and the breach of the peace. 5 Co. 125. a. R. per three J. 1 Sid. 270. 1 Lev. 139.

As, if one writes to a woman to whom B. is suitor, that B. has the pox, and is not worth a groat. R. 1 Sid. 271.

To his debtor, that if he had honesty, civility, or humanity, he would not deal so, but would go to hell and be damned for cheating. R. Ray. 201.

[If one publish an advertisement of a tradesman, that though he pretends so and so, yet all gentlemen should be cautious, for he dares not engage with any artist in town; it is a libel, and actionable. Str. 898.]

[Any thing that tends to make a man ridiculous, or to hinder men from associating with him, is a libel; as, that he stinks of brimstone, and is an old stinking, old nasty, old itchy, old toad. 2 Wils. 403. 2 B. M. 980.]

So, it will be a libel, though wrote in French or other foreign language. 3 Inst. 174.

If it be a translation of a declaration in prohibition, &c. distributed with intent to disparage. 2 Mod. 119.

If he publishes in writing, though in words not actionable. F. g. 121. 253.

Though it be true; for it tends to private quarrels and revenge. R. 5 Co. 125. b.

Though the person against whom be of ill fame. 5 Co. 125. b.

Though

Though the magistrate or private person, upon whom the libel is made, was then dead. R. 5 Co. 125. a. [4 T. R. 126.]

So, making a libel, is punishable, though it be not published. R. 5 Mod. 167.

And he who procures another to make a libel, will be a contriver. R. Mo. 813.

If A. dictates to B. who writes a libel, both are makers. R. 5 Mod. 167.

So, he who approves it, when wrote. Ibid.

[An action will lie for publishing in writing any thing which tends to render another ridiculous. 2 Wils. 403.]

[An expression which, when verbal, is not defamatory, may become so when reduced to writing. 4 Taunt. 355.]

[If the meaning is clear to the jury, misdating of facts, or omission of letters in words, will not make it less a libel. Lofft. 778.]

[Even admitting that it is not actionable to republish in writing the verbal slander of another as such; yet, quære, whether it can be justified where the re-publisher knew that the original charge was unfounded, and that the author of it was convinced that he had been mistaken. 2 East, 426.]

[It seems that, to print of another that he is a swindler, is actionable; at all events it is, where the defendant uses it in a criminal sense. 1 T. R. 748.]

[To write of another that he is a villain, is actionable. 1 B. & P. 331.]

[The printer of a libel, who sends it forth to the world, is guilty of a publication. 4 T. R. 418.]

[That the publisher is ignorant of the contents, goes for nothing. Lofft. 544. It may, indeed, on circumstances, be a mitigation, but it cannot justify the action. Lofft. 762, 763.]

## (B) Publication.

### (B 1.) What shall be.

A libel may be published by speaking, singing, or delivery. 5 Co. 125. b.

As, if a libel be maliciously repeated in the presence of others. 5 Co. 125. b.

As, if after hearing or reading, he reads it. R. 9 Co. 59. b.

Or, relates the effect of it. 12 Co. 35. Mo. 813.

Or, speaks it by way of question, did not you hear that A. did so, &c.? R. 12 Co. 134.

So, if a libel be maliciously sung in the presence of others. 5 Co. 125. b.

So, if he sends a servant for a paper, who mistakes, and then he fetches a paper which is read, and is a libel, he will be the publisher. Semb. 5 Mod. 167.

So, if a libel, or a copy be delivered to another. 5 Co. 125. b. Mo. 813.

Or, the copy of a letter written by himself to the scandal of another, be dispersed. R. 12 Co. 35.

So, if any letter that contains a libel is sent sealed to another. 12 Co. 35.

Or, sent to the party himself against whom it is made. R. 12 Co. 35. R. Hob. 62. 215. Poph. 139. [Quære, only applicable to the case of an indictment, and insufficient to support an action. Vide the Cases.]

If he lends the libel to another to be copied. R. Mo. 813.

So, he who procures the publishing, as well as he who publishes, is a publisher. Ibid.

As, if the servant of A. who has a shop for the sale of pamphlets, tells a libel in the shop for the benefit of A., though A. was not privity to the contents, or sale. R. F. g. 47.

So, if a man writes a copy of a libel, it will be evidence of a publication. Sal. 418.

Or, if he has in his custody a libel publicly known. Ibid.

But the having a copy of a libel not published in his custody, is not evidence of a publication. Ibid.

[Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher. 4 T. R. 126.]

[The publication must be stated in the declaration; but it may be collected from the whole of it, and requires no technical form of words. 2 Bl. 1037.]

[Upon an information for printing and publishing a seditious libel, the jury found the defendant guilty of printing and publishing only; for which reason a *venire de novo* was awarded. 5 Burr. 2661.]

[A publication reflecting on the memory of one deceased, not from a fair and honest motive of exciting detestation for his vices, but wantonly to vilify his memory, and thereby stir up his relatives to a breach of the peace, is a libel. But an indictment against the publisher must aver, that he published it with that intention. 4 T. R. 126.]

[A libel on king William and queen Mary, especially as instrumental of the revolution, is punishable now. Lofft. 178.]

[Evidence by a party indicted for a libel, that others had previously published it with impunity, is inadmissible. 5 T. R. 436.]

[A member of parliament cannot publish a libellous speech made by him in parliament, though for the purpose of correcting a mis-statement of it. 1 M. & S. 273.]

[Judicial proceedings cannot be published, where the publication would be likely to produce consequences pernicious to the morals of the community. 1 M. & S. 281.]

### (B 2.) What not.

But if a man finds a libel and burns it, or delivers it to a magistrate when it concerns a private person, it will not be a publication. R. 5 Co. 125. b.

So, if it concerns a magistrate, he ought to deliver it to the magistrate, to have inquiry made for the author. Ibid.

And if he did not, he might have been punished in the star-chamber.

But though he does not, but keeps it to himself without any publication, he is not now punishable for the libel. Per Cur. 1 Vent. 31.

So, it will not be a publication of a libel, if he takes a copy of it, if he never publishes the copy. Semb. cont. Sal. 418.

If he reads, or hears a libel read, not knowing that it was a libel. R. 9 Co. 59. b. Mo. 813.

Though he laughs upon hearing it. 9 Co. 59. Mo. 813.

Though he takes a copy, or reads it by command of his father, or master. R. Mo. 813.

So, if a man delivers by mistake a paper out of his study, it is not a publication, though it be a libel. R. 5 Mod. 167.

### (C) Libeller.

#### (C 1.) Who is not.

But a man is not punishable for a libel, if he does not contrive it, nor procure the composition or contrivance of it. R. 9 Co. 59. b. Lamb.

Or, does not publish it, knowing that it was a libel. 9 Co. 59. b.

[But it is not competent for a defendant to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. 5 T. R. 436.]

[If defendant has owned himself author of a book, errors of the press and some small variations excepted, it is sufficient to entitle the prosecutor to have the book read, and the defendant shall be put to shew that the variations were material. Str. 416.]

So, words to the diminution of a magistrate, do not make a libel, if they do not impeach him in his office: [nor, unless in writing. Vide Sal. 417, 418.] and therefore, a man is not indictable, if he says justices of peace have nothing to do with the excise. 1 Vent. 10. Vide ante, (A 2.)

Or, the justices of peace don't understand the laws of excise, and many parliament men don't understand them, if they read them, though they are causes for binding to good behaviour. R. 1 Vent. 16.

[These words, "the Rev. John Robinson, and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," published by posting a paper on which these were written, purporting to be a regulation of a particular society, held not to be a libel. 1 Price, 11.]

#### (C 2.) If done in a course of justice.

So, it will not be a libel if a man charges another with a crime in a course of justice; as, by an appeal for murder, robbery, rape, or other felony. 2 Inst. 228.

Or, by indictment for such crime.

Though the charge be false. 2 Inst. 228.

So, if he writes a falsity of another for the instruction of his counsel, attorney, &c. in a course of justice. Ibid.

Or, speaks it in evidence to a jury. Ibid.

Or, uses such words in any manner in a course of justice. Ibid.

Or,



Or, says upon examination, that his bill, &c. is true. R. 2 And. 28. Mo. 705, 6.

[It is no libel to assign on the books of a quakers' meeting their reasons for expelling a member. 1 Bl. 386.]

But if a man charge another with felony or other crime, in the chancery, star-chamber, &c. or other court that has not jurisdiction of such offence, it will be a libel; for it is not in the course of justice. 2 Inst. 228. 2 And. 28. Mo. 143.

Though the bill was exhibited by a solicitor in his name, and in his absence, if he does not disclaim it, when he has notice of it. Semb. Poph. 152, 3.

So, if he charges with a crime of which the court has cognisance, if it be *ex mera malitiâ*, without colour, and not with intent to proceed against the defendant. R. 12 Co. 103. But it was agreed that this was not punishable by law, but only by fine and costs in the star-chamber. Mo. 820.

So, if a paper against a petition to parliament be published containing foreign aspersions and slanders. R. Hard. 470.

[A copy of a report of a committee of the house of commons, though reflecting on an individual, is no libel, and the court refused to grant a criminal information against the publisher. 8 T. R. 293.]

[The publication of a judicial proceeding, though reflecting on a man's character, is lawful. 8 T. R. 293. 1 B. & P. 525.]

[Although the publisher of judicial proceedings is not bound to detail them *verbatim et literatim*, yet he must be careful that his account varies not substantially from the original, and that the impression which it is calculated to excite in the reader's mind, of the party concerned, be not less favourable than that which he would have received had he been present at the original proceeding. 7 East, 492.]

[A court-martial in giving judgment may express their opinion as to the motives for the prosecution. 2 N. R. 341.]

[An order to a governor abroad to dismiss an officer, does not, therefore, authorize his publishing the grounds of dismissal. 3 Taunt. 456.]

### (C 3.) How punished.—By the common law.

By the common law, every libeller shall be indicted, and if thereupon convicted, shall be fined and imprisoned according to the nature of the offence. 5 Co. 125. 3 Inst. 174. Cro. Car. 175. 504.

[On the trial of an indictment for a libel, the only questions for the consideration of the jury are, the fact of publishing, and the truth of the innuendos. Whether the matter be or be not a libel is a question of law for the consideration of the court. 3 T. R. 428. Vide st. 32 Geo. 3, c. 60. contra.]

Or, may be put in the pillory. 5 Co. 125. b.

So, he might have been punished by bill, or *ore tenus* upon confession in the star-chamber. 5 Co. 125.

[A libeller may be fined, and bound to his good behaviour, on his confession in court. Fort. 201.]

So, now an information may be exhibited against a libeller.

[And

[And it need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. 7 T. R. 4.]

[If the libel be true, the court will not grant an information. Str. 498.]

[And it is a general rule, that in order to obtain an information for a private libel, charging a specific offence, the party libelled must deny the charge upon oath. Doug. 284.]

[Unless where the party libelled is abroad at a great distance, or the subject of the charge is general imputation, or an accusation of criminal language held in parliament. Doug. 387.]

[When a defendant is brought up for judgment, his acts subsequent to the trial may be considered, either by way of aggravating or of mitigating the punishment, even though they be separate and distinct offences, for which he may be afterwards punished. 3 T. R. 428.]

[But in such cases the court will take care not to inflict a greater punishment than the principal charge itself will warrant. 3 T. R. 428.]

And in such information the prosecutor may give in Latin the sense and import of the libel; and in such case it is sufficient, if the substance of the libel be recited, though not the words. Sal. 661.

Or, the prosecutor may recite the words of the libel; as, if he say, *quæ sequitur in his Anglicanis verbis*; and then a variance in any word, defeats the prosecution. R. Sal. 661.

Or, if he say, *cujus tenor sequitur*. Sal. 661. 417.

Or, *quæ continet inter alia juxta tenorem sequentem*; for he need not set forth the whole paper; and if that which is omitted vary the sense of the other part, the defendant shall be found not guilty. R. Sal. 417.

Or, *juxta tenorem & ad effectum sequentem*, though *ad effectum* by itself would have been bad. Ibid.

But the charge must be certain; and therefore *scripsit aut scribi causavit*, is bad. 2 Mod. Ca. 329.

[All circumstances necessary to constitute the crime must be set out. Cowp. 683.]

[Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced on the record are unnecessary. Ibid.]

[But where it does not in itself contain the crime without extrinsic aid, such extrinsic matter must be put upon the record by averments. Id. 684.]

[On an information for writing and publishing a libel "of and concerning" the king's government and the employment of his troops, (setting forth the libel verbatim,) "of and concerning" are a sufficient introduction of the matter contained in the libel; and a sufficient averment that it was written "of and concerning" the king's government and the employment of his troops. Cowp. 682.]

So, if a libel be to the defamation of another, an action upon the case lies, as well as an indictment. R. Skin. 123, 4.

[In an action for a libel, it must be laid to be of and concerning the plaintiff. Str. 934.]

[If the charge in a libel be general; as, that the person libelled is a swindler; to an action for such a libel, the defendant, if he meant to justify,

justify, must state the particular instances of fraud; a justification generally in the words of the libel are not sufficient. 1 T. R. 748.]

[The words *vi et armis* are only necessary in indictments where the crime charged is actually a breach of the peace; not, therefore, in an indictment for a libel. 7 T. R. 4.]

[Since a libel, though true, is criminal, an indictment for a libel need not aver that it is false. 7 T. R. 4.]

[In an action or indictment for a libel, it must appear without the addition of the innuendoes, that there is a complete cause of action in the one case, and a complete crime in the other. Now there is neither, unless it appears that the libel was published concerning the particular person or subject matter in question. Merely to allege that the defendant, intending to injure the plaintiff, said, "J. S. is perjured," is not sufficient; for the innuendo that he meant him, cannot be called in aid; *non constat* that there is not another J. S. Hence the use of the words "of and concerning." 4 M. & S. 164.]

[An indictment for a libel alleged that the defendant, intending to vilify J. S., &c. published the following libel: "Sloe Juice" (meaning the said J. S.), &c. The judgment was arrested, for want of the words "of or concerning," or their equivalents; since, from the indictment, abstracted from the innuendoes, there was nothing to shew that Sloe Juice meant J. S. 4 M. & S. 164.]

[Upon an information against the defendant for a libel, for that he, &c. wickedly, maliciously, and seditiously did write and publish, &c. a certain false, scandalous, and seditious libel, of and concerning his majesty's government, and the employment of his troops, according to the tenor and effect following (setting out the libel verbatim); the words "of and concerning," are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written of and concerning the king's government, and employment of his troops. Cowp. 672.]

[A libel written in Dublin and received in London from an unknown hand, with the Dublin post-mark, was published in Middlesex, in the form of letters, which contained internal evidence of a request by the writer to the publisher to publish them in Middlesex. Held, upon probable evidence of the loss of the envelopes, and probable evidence of their being received by the post, that this was a publication by the writer, living in Dublin, by his agent in Middlesex, and sufficient evidence of publication, both to authorize the reading of the libel, and to go to the jury upon an indictment charging the publication in Middlesex, the handwriting being proved. 3 Smith, 94. 7 East, 65.]

[On the trial of an indictment for a libel, to which not guilty has been pleaded, the only questions for the jury were,—1. Whether the defendant published? and, 2. Whether the innuendoes are correct delineations of his meaning? The question whether the writing be a libel, was a question of law for the court. 3 T. R. 428.]

[After conviction in an indictment for a libel, the court will not, at the instance of the defendant, order the prosecutor to deposit the libellous papers with the officer of the court. 2 East, 361.]

(C4.) By

(C 4.) By statute.

Who are within the st. W. 1. and 2 R. 2. 5. vide *Scandalum Magnatum* in Action upon the Case for Defamation, (B 1, &c.)

So, by the st. W. 1. 34. none shall be so hardy as to tell or publish false news, whereby discord or slander may arise between the king and his people, or the great men of his realm: and he who does so shall be detained in prison till he find in court him from whom the speech moved.

So, by the st. 2 R. 2. 5. none shall be so hardy to devise, speak, or tell any false news, lies, &c. of prelates, lords, &c. whereby discord or slander may arise within the realm (viz. between lords, or the lords and commons), on the pain inflicted by the said st. W. 1. 34. And this is confirmed by the st. 12 R. 2. 11.

And by the preamble of the st. 2 R. 2. 5. it is recited, that devisors were of false news and horrible lies of prelates, dukes, earls, barons; and other nobles, and of the chancellor, treasurer, privy seal, steward, justices of one bench or other, and of other great officers, &c.

Before those statutes, false rumours produced great mischiefs to the peace of the kingdom. 2 Inst. 226.

And for prevention of them, remedy was provided by those statutes, where any false news or rumours are invented or contrived. 2 Inst. 227.

So, against them who do not contrive, but disperse and relate such false news. Ibid.

Though they name their author for the relation. R. 12 Co. 134.

Within the st. W. 1. 34. are all contrivers or dispersers of false rumours of the king himself. 2 Inst. 228.

And by the st. 2 R. 2. (though that does not extend to the king), as well as by the st. W. 1., contrivers or relators of false news concerning the great men or officers of the realm shall be punished. 2 Inst. 227. 12 Co. 133.

So, any rumours are within the statute, whereby discord and slander may arise between the king and his nobles, or between the king and his people. 2 Inst. 227. 12 Co. 133.

(C 5.) What remedy is provided.

For false news of any great man, named by the st. 2 R. 2. 5. an action for *scandalum magnatum* lies. Vide Action upon the Case for Defamation, (B 1, &c.)

So, the party might have proceeded against him who spoke scandalous words against any such great man by bill in the star-chamber, whereupon he should be fined and imprisoned, or have corporal punishment. R. 12 Co. 134.

Or, the attorney-general might have proceeded in the star-chamber by bill, or *ore tenus* upon confession. R. 12 Co. 134.

So, the commission to justices of oyer and terminer, &c. gives authority to inquire *de illicitis verborum propalationibus*. 12 Co. 134. 2 Inst. 228.

Or, there may be a special commission for it. 2 Inst. 229.

And therefore, a contriver and reporter of false news, &c. may be punished by indictment.

A con-

A contriver or inventor, being convicted upon an indictment, had no express punishment against him by statute, but shall be left to the punishment due by the common law, viz. fine and imprisonment. 2 Inst. 228.

So, a relator shall be punished by fine and imprisonment; for the statute says that he shall be taken and detained, which implies that he shall be also fined. Ibid.

And this by the express words of the st. 12 R. 2. 11. which enacts, that if any imprisoned, &c. cannot find him from whom the speech moved, he shall be punished by the advice of the council.

So, by the st. W. 1. and 2 R. 2. 5. a man convicted for spreading false rumours, &c. may be imprisoned till he finds his author. 2 Inst. 229.

But where the indictment is general, for speaking of scandalous words, without reference to any author, the judgment shall not be, that he be imprisoned till he produce his author, though he heard the words before his speaking them. R. 12 Co. 134.

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## LIBERATE.

Vide STATUTE STAPLE, (D 6.)

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## LIBERTATE PROBANDA.

Vide VILLENAGE, (C 3.)

THE END OF THE FOURTH VOLUME.







